

Texas Business Today

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Ron Lehman, Commissioner Representing Employers

In This Issue:

An Introduction to the Fair and Accurate Credit Reporting Act (FACTA):

What Business Owners Must Know Now.

Higher Education Reform Takes Center Stage.

The Unemployment Claim and Appeal Process in a Nutshell.

National Conference to Focus on the Impact of Unemployment Insurance.

The Truth About Required Workplace Posters.

Why Do Employers Lose Unemployment Cases?

TEXAS
WORKFORCE SOLUTIONS

An Introduction to the Fair and Accurate Credit Reporting Act (FACTA): What Business Owners Must Know Now

It often seems that there isn't a week that goes by that we don't learn that hackers have managed to breach corporate, government, or university databases in a major way. Entities ranging from ChoicePoint to the Department of Veteran's Affairs to the University of California, Los Angeles and the University of Texas School of Business have all been recent victims. The individuals whose personal information was compromised all share a common fear: that identity thieves will use their data, including phone numbers, social security numbers, driver's licenses, or birth dates, to take out loans, open new credit card accounts, access bank accounts, or obtain long distance calling accounts or cell phones in their name.

There is very good reason to be concerned. According to the national Identity Theft Resource Center, of the approximately 44 million Americans who have been the victims of identity theft at some point, each spent an average of 600 hours and \$1,495 getting their finances straightened out. And, that doesn't include attorney's fees.

The High Cost of Identity Theft to Business

While that's plenty to worry about, the cost of identity theft to business is even greater. Because a number of consumer protection laws help to limit the financial liability for the victims of identity theft, businesses wind up bearing the brunt of costs for account balances, goods, or services lost to identity thieves. In 2004, identity theft cost financial institutions and businesses an estimated \$52.6 billion, according to the 2005 Javelin Identity Fraud Survey Report, published by Javelin Strategy & Research and the Better Business Bureau. There are also indirect costs to businesses such as lost productivity and allowing employees who are victims extra time off to resolve the identity theft.

In an effort to help fight what has become the fastest-growing crime in the U.S. - identity theft - Congress added new sections to the federal Fair Credit Reporting Act (FCRA) when it passed FACTA - The Fair and Accurate Credit Transactions Act of 2003. Privacy, limits on information sharing, new consumer rights to disclosure and accuracy are all addressed.

However, these new provisions also create serious new responsibilities - and potential liabilities - for businesses nationwide. Simply put, if data aiding an identity theft originates from a security breach at your company, you could be sued, fined, or become a defendant in a class-action lawsuit by affected employees whose personal information has somehow gotten out. In this brave new world, not only do you have to worry about safeguarding your own personal information from identity thieves, you've got to worry about what could happen if another's personal information is stolen from your company and results in identity theft.

Ready or not, it's time to get familiar with FACTA, and develop a reasonable plan to reduce and mitigate potential risks as much as possible. For many small businesses, this could be as simple as having a sturdy, dependable shredder - and routinely using it - to far more sophisticated security measures for larger organizations that maintain extensive computer databases.

An Overview of FACTA

- FACTA was signed by President Bush on December 4, 2003.
- The provisions of the law have been phased in over the past few years, and all are now in effect.
- Every consumer can get one free copy of their credit report each year at www.annualcreditreport.com or by calling 877-322-8228.

Introduction to FACTA	2
From the Dais	5
Business Briefs	6
Higher Education Reform Takes Center Stage	7
The Unemployment Claim and Appeal Process in a Nutshell	8
National Conference to Focus on the Impact of Unemployment Insurance	12
The Truth About Required Workplace Posters	13
Why Do Employers Lose Unemployment Cases?	13

- Businesses must leave off all but the final five digits of a credit card number on electrically printed store receipts as of December 1, 2006.
- Employers must destroy all information obtained from a consumer credit report before discarding it.
- Consumers who suspect that they are the victims of identity theft only need to notify one of the three credit reporting services (Experian, TransUnion, or Equifax) to initiate a nationwide fraud alert.
- Mortgage lenders must provide the credit score they use to determine a loan's interest rate, regardless of whether the loan is approved or denied.
- FACTA is enforced by the Federal Trade Commission (FTC).

Initially, legal analysts believed that FACTA applied only to the banking and financial-related industries. However, because it is basically impossible to be an employer in the 21st Century without collecting, disseminating, maintaining and destroying personal information, the current consensus is that if you have even one worker – a yard man, a nanny – and you obtain their personal information to pay Social Security taxes, you must not only safeguard that information while it is in your possession, you must “destroy” the information before you throw it away. The law requires the “shredding or burning” of all paper and the “smashing and wiping” of all computer discs containing personal information “derived from a consumer report” before they are thrown away.

Who Does FACTA Affect?

This law applies to any business, regardless of size, that collects personal information or consumer reports about customers or employees to make decisions within their business (including names, credit card numbers, birthdates, home addresses and more). Covered entities include:

- Employers – including individuals
- Insurers
- Lenders
- Mortgage brokers
- Landlords
- Automobile dealers
- Attorneys
- Debt collectors
- Private investigators
- Tax preparers
- Financial Advisors and Credit Counseling Services
- Investment or financial advisory services, including instruction on individual financial management and tax planning

Reasonable Measures of Destruction

According to the Federal Trade Commission, reasonable measures include:

- Burning, shredding, or pulverizing documents so they become impossible to put back together or read.
- Erasing media files or electronic files that contain any consumer reports so that they cannot be reconstructed or recovered.
- After reviewing company practices to ensure that they are reasonably designed to protect personal information, some are also hiring outside sources that specialize in destroying personal records. There are currently about 2,000 companies in North America that provide records destruction services; approximately half of them do it as their primary business.

Penalties

If personal information isn't destroyed and it gets out, FACTA provides penalties including:

- Civil liability. An employee could be entitled to recover actual damages sustained if their identity is stolen from an employer. Or, an employer could be liable for statutory damages for up to \$1,000 per employee.
- Class action lawsuits. If large numbers of employees are impacted, they may be able to bring class action suits and obtain punitive damages from employers.
- Federal fines. The federal government could fine a covered business up to \$2,500 for each violation.

Now What? It's Time to Develop a Plan!

The Federal Trade Commission (FTC) has created a new Division of Privacy and Identity Protection to focus on aggressive enforcement of identity theft cases. In order to comply with FACTA, Betsy Broder, the Assistant Director of that FTC division, was quoted in the March 2006 American Bar Association Journal saying that means businesses need to have a written plan describing how customer data will be safeguarded and a staff member or company officer designated to be responsible for implementing that plan. Broder went on to say, “We're not looking for a perfect system. But we need to see that you've taken responsible steps to protect your customers' information.”

Many large companies will entrust such planning and execution to a chief technical officer or a chief privacy officer. However, Broder says she understands that small businesses cannot be expected to hire a full-time privacy specialist, but added that all businesses must be able to show that they have a security plan in place. In other words, effort counts.

According to the FTC, a “reasonable” plan to safeguard personal information includes:

- Designating an employee (or employees) to coordinate and be responsible for the security program.
- Identifying “material internal and external” risks to the security of these personal data (with such a risk assessment including employee training on the detection, prevention, and response to attacks or other system failures).
- Designing and implementing reasonable safeguards to control the risks identified in the risk assessment.
- Continually evaluating and adjusting the security plan in light of the results of ongoing monitoring and testing of the program, material changes to business arrangements, or to the company’s operations, or “any other” circumstances that could have a material impact on the effectiveness of the security plan.
- Creating a mitigation plan. Even with the FTC’s focus on “reasonable” security measures and “appropriate” risk levels, there is still the real possibility that security breaches may occur, regardless of what precautions are taken. This mitigation plan should kick in when there is a privacy or security breach and there is a need to “repair it” immediately in the eyes of customers, government regulators, and management.

Remember: perfection is not the goal here; the standard is one of “reasonableness.” A sensible and effective program will go a long way towards reducing the risk of federal government enforcement, even if the security policy should fail in a particular situation and a security breach results.

Some Steps to Take Right Now

Even if you are a very small employer, there are some proactive measures you can take immediately, in both your personal and business lives.

- Burn or shred, with a confetti or cross-cut shredder, any financial papers, mail, or credit reports that contain personal information. **NEVER RECYCLE SUCH DOCUMENTS!**
- Call 1-888-5OPTOUT and request credit card companies to stop sending pre-approved credit card applications to your home or business. These are ticking identity theft time bombs.
- Also ask your credit card company to stop delivering so-called “convenience checks” to your home and business. These, too, are time bombs.
- Invest in a durable cross- or confetti-cut shredder. Simple strip-cut shredders are no longer sufficient. Look for strength – can the shredder cut through credit cards, data CDs, diskettes, and staples?

- Many shredders have to be turned off to cool down after shredding just a few pages. While that may be sufficient for most consumers, if you plan to destroy a great deal of business paperwork, a more durable model is in order. And, the more pages you can shred at once, the less time you’ll waste destroying unwanted credit card applications and other documents containing personal information.
- Because it’s impossible to tell what’s real and what’s fake online, delete any e-mail that asks for personal information and instruct your employees to do the same.
- Hang up on telemarketers, especially those who seem to be digging for personal information – yours or your employees. Instruct your employees to do likewise.
- Limit the number of credit cards you hold, both business and personal. Religiously review your financial statements monthly and instruct your employees to do the same. The sooner you discover an incident of identity theft, the better.

Conclusion

The law of identity theft has changed dramatically in the past year, and many believe these changes will continue and expand. Undoubtedly, security risks will remain because of the huge volume of personal data that is collected, disclosed, and used on a daily basis in the United States. The most important steps you can take right now include an awareness of the increasing legal obligation arising from identity theft risks, and establishing reasonable security practices to protect the personal information in your possession.

For additional information, visit the FTC’s website at www.ftc.gov or call toll-free 1-877-FTC-HELP (1-877-382-4357). You may also visit www.texasworkforce.org, click on “Businesses and Employers,” and under “Publications,” you’ll see Back Issues of Texas Business Today. Visit the Fall 2005 issue to see “*Identity Theft in the Workplace: What You Must Know.*” 🗝️



From the Dais – Winter/Spring 2007

Dear Texas Employers,

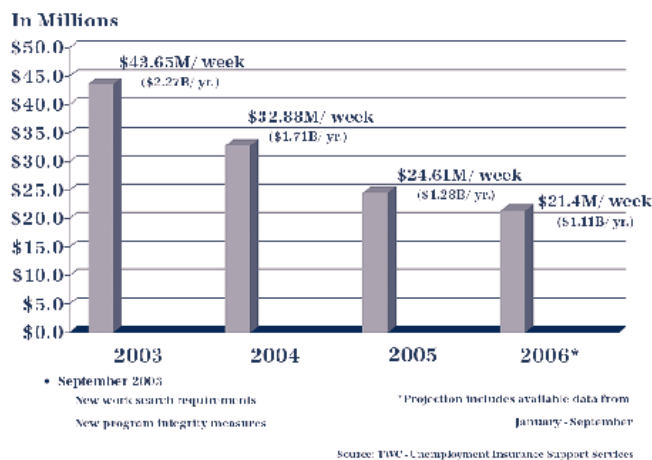
Here's some great news: as 2007, begins, not only will some 360,000 Texas employers receive a tax credit on their state unemployment insurance taxes this year, most will also see lower overall state unemployment tax rates. Thanks to strong economic conditions in the state, the Unemployment Insurance Trust Fund has a \$320 million surplus. All experience rated employers will be eligible to receive the benefit of the surplus tax credit.

Texas unemployment insurance tax rates are down more than two-tenths of a percentage point, on average, and initial claims for unemployment benefits have dropped by more than 24% in the last 12 months.

Sixty-seven percent of Texas' 400,000 employers will pay the minimum tax rate of 0.29% on the first \$9,000 of each employee's wages in 2007. This low rate is at least in part the result of the proactive measures the Texas Workforce Commission (TWC) undertook in 2003 to issue bonds to sustain the Unemployment Insurance Trust Fund. And, the average state unemployment tax rate of 1.3% for 2007 is down from 1.51% in 2006, while the average experience tax rate of 1.13% for 2007 is down from 1.37% in 2007.

Here's more good news: the bar chart below shows the steady decline in the dollar amount of Unemployment Insurance (UI) benefits that have been paid out in Texas each week since 2003. In fact, UI benefit payments have dropped by 50% - from \$43.65 million per week in 2003 to \$21.99 million per week through June 2006. A combination of an improved economy and stricter new work search requirements for claimants has dramatically reduced the amount of Unemployment Insurance benefits paid, thereby saving Texas employers money.

UI Benefits Paid



How Your State Unemployment Insurance Taxes Are Calculated

The “experience tax rate” – the actual tax you will pay - is established by the Legislature and is the sum of the general tax rate, the replenishment tax rate, and the obligation assessment tax rate for 2007. The components of the 2007 tax rate are:

- The obligation assessment rate - to collect the amount needed to repay the bond obligations due in 2007. It is experience-rated, based on an employer's 2006 tax rate.
- The general tax rate - based on claims against an employer's 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, those employers will pay a general tax.
- The replenishment tax rate - charged to all employers to cover all unemployment claims not charged to a specific employer (for example, cases that involve chargeback protection to an individual employer's account because of an employee's separation due to medical reasons). This tax tends to rise following economic slowdowns when businesses close and unemployment claims rise.
- The employment training assessment - charged to all employers who are eligible for a computed tax rate to finance the Skills Development Fund and the Texas Enterprise Fund. The Skills Development Fund provides new and current workers with customized assessment and training in response to the needs of Texas businesses. In 2005, the Texas Legislature changed the way the Skills Development Fund is financed. This program is now funded by a flat rate assessment on all employers, called the Employment Training Assessment, and is a component of the unemployment tax rate.

TWC is dedicated to finding ways to lower the financial impact of unemployment on the employers of this state. The agency has instituted initiatives to ensure program integrity and to increase fraud detection and prevention in all areas it administers. Through the use of increased work-search verifications, improved automated processes, and database cross matches with other agencies, TWC has also seen a reduction in UI overpayments since January 2004. We will continue our efforts to keep taxes as low as possible and mitigate the effects on Texas employers.

Thank you for being a Texas employer, and it is an honor to represent you here at the TWC. I look forward to cheering your successes in 2007. 🇹🇽

Sincerely,

Ron Lehman
 Commissioner Representing Employers

Business Briefs – Winter 2007

Electronic State Unemployment Tax Filing Initiative Begins

In an effort to provide better service to employers, the Texas Workforce Commission's (TWC) electronic state unemployment tax filing initiative kicked off in January 2007. Employers are encouraged to begin filing state unemployment taxes electronically by using one of TWC's free online tools (Employer Tax Information Online or QuickFile), or by using approved magnetic media. For more information about these filing methods, please visit the following Web sites:

Employer Tax Information Online:

<http://www.twc.state.tx.us/ui/tax/emtaxinfo.html>

QuickFile:

<http://www.twc.state.tx.us/ui/tax/quickfile.html>

Magnetic Media:

<http://www.twc.state.tx.us/ui/tax/emedial.html>

Heads up: If you have more than nine employees and you've been filing quarterly reports by paper, there's a new development you need to be aware of. Effective July 1, 2007, all employers who have to file a quarterly report on more than nine employees in any one calendar quarter must file the Employer's Quarterly Report (Form C-3) **electronically** instead of using paper forms. Affected employers will no longer receive a paper Employer's Quarterly Report except in cases of hardship.

If you are affected, your TWC Tax Representative listed on the bottom of a letter you should be receiving from the agency shortly stands ready to help you choose a filing method and use the agency's online tools.

Congress Extends Texans' Sales Tax Deduction

In one of its final moves before adjourning last year, Congress voted to allow Texans to keep a popular sales tax deduction on their 2006 annual federal income tax returns. This tax break allows Texas filers who itemize to deduct sales tax expenditures, and was supported by lawmakers from Texas and six other states that do not have state income taxes (which are deductible on federal returns), but do have state and local sales taxes.

The deduction was extended through 2007, with supporters saying it will keep \$1 Billion annually here in Texas communities.

In addition, this wide-ranging legislation allows taxpayers with incomes of \$65,000 or less (or \$130,000 for married couples filing a joint return) to deduct \$4,000 for higher education expenses. For those earning up to \$80,000 (or \$160,000 for couples filing a joint return), the higher education deduction is \$2,000.

The measure also extended through 2007 the welfare-to-work tax credit so that employers can get a maximum \$3,500 federal tax credit for the first year of employing an individual who has received public assistance.

For further information, visit www.irs.gov, or consult your tax professional.

Small Business Economic Trends: Small Firms Engage in Near-Record Hiring in November 2006

According to the December 2006 National Federal of Independent Business's Small Business Economic Trends, a national monthly survey of small business owners' opinions and plans, more than half - 55% - of the owners responding hired or tried to hire one or more employees in November. With the exception of the dot com boom in the late 1990's, this survey indicated the highest job-creation since the survey began in 1986. The respondents also indicated that 18% plan to create new jobs during the next three months, while only six percent plan reductions. The job-creation plans are positive in all industries.

Closer to home, Texas employers added 27,900 jobs in October 2006, the second largest gain of the year. The Texas economy grew by 213,200 jobs during 2006, and by November, Texas employers had added jobs for 25 consecutive months and 38 of the preceding 39 months. A total of 704,400 jobs have been added since July 2003. December's seasonally adjusted unemployment rate dropped to 4.5% from 4.7% in November, and down from 5.2% in December 2005. The unemployment rate is at its lowest point since March 2001. (NFIB Small Business Economic Trends December 2006, copyright of the NFIB Research Foundation. To see the entire survey, visit www.nfib.com).

The Employee Free Choice Act: It May Be Back

In early December 2006, organized labor leaders launched a campaign to reintroduce legislation that would make it easier for workers to form unions. According to AFL-CIO President John Sweeney, "Our top priority for the new Congress we've elected is to make the Employee Free Choice Act the law of the land."

Last introduced in April 2005, the measure would require employers to recognize a union after a majority of workers sign cards or petitions, allow for arbitration to settle first contract disputes, and impose stronger penalties on employers that violate labor laws.

Under current law, an employer is not legally required to recognize the union until the employees have voted for union representation in a National Labor Relations Board (NLRB) election. Today, an

employer can refuse to recognize the union and insist on an NLRB election even if 100% of the employees have signed authorizations.

Under the proposed Employees Free Choice Act, if a majority of employees sign authorizations to form a union, the choice to recognize the union would no longer be left up to the employer. The employees would be able to present the signed authorizations to the NLRB, and if the agency decides the authorizations were signed by a majority of workers, the employer would be legally required to recognize and bargain with the union.

Leading business organizations such as the U.S. Chamber of Commerce oppose the proposal, saying workers should be allowed to vote on union formation by secret ballot rather than signing a petition or card. According to Michael Eastman, a labor specialist at the chamber, voting by secret ballot allows employees to decide if they want union representation without the fear of being bullied into signing a card supporting a union. "In terms of the card check process, peer pressure comes into play," according to Eastman. "Everybody knows how you voted."

While labor activists believe they may be able to get the Employee Free Choice Act through Congress, they acknowledged that it might not be signed into law by the President.

5th Annual Applied Manufacturing Conference a Success

In mid-December 2006, the Texas Manufacturing Assistance Center held the 5th Annual Applied Manufacturing Conference in Arlington. The three-day event featured a variety of educational sessions designed to inform Texas manufacturers about the latest techniques, trends and issues in manufacturing. Calling attention to the strength of the manufacturing sector in Texas (second in the nation only to California), Pat Panchak, former editor-in-chief of IndustryWeek magazine pointed out that, "The Texas Manufacturing sector consistently leads the U.S. national average in manufacturing wages, output and employees." Her comments were confirmed by Fiona Sigalla, an economist with the Dallas Federal Reserve Bank, who stated that our strategic location in the middle of the United States makes Texas the largest trading partner in North America.

Ron Lehman, Commissioner Representing Employers at the Texas Workforce Commission, was honored at the event as a Manufacturing Mainspring Advocate winner for his efforts to sustain and grow a skilled manufacturing workforce in Texas. 

Higher Education Reform Takes Center Stage: Creating the Workforce of the Future

Here in Texas, we have created an environment where employers are free to grow, prosper, and create jobs. Employers such as yourselves are adding thousands of new jobs each month, and Site Selection Magazine recently named Texas as the state with the number one business climate in the nation for the second consecutive year.

However, to remain competitive in an increasingly global marketplace, we cannot be content to rest on our laurels. The future economic strength and power of Texas will be largely dependent on the educational attainment of our state's population. To that end, Governor Rick Perry has proposed a higher education incentive package which will significantly boost funding, academic standards and graduation rates at our institutions of higher education. This higher education package was crafted after receiving input from business leaders, educators, job creation experts, students, and parents over the past three years, and identifies critical business sectors Texans must address if we are to compete with other states and countries in graduating more students equipped to prosper in a technology-based economy.

The package complements other initiatives to provide a state economy that will be competitive in the global marketplace of goods and ideas. For the first time ever, significant resources would be made available to address the Texas Higher Education Coordinating Board's "Closing the Gaps" goal of increasing by 50% the number of degrees, certificates, and other identifiable student success measures from high quality programs by the year 2011. This package is also in sync with other education initiatives, such as the high school completion program, drop out prevention programs, and the Science, Technology, Engineering and Math Academies. The long-term goal is for Texas to have a seamless integrated education system that is world-renowned for graduates who can successfully compete in the arena of ideas, innovations, and products that lead to a more prosperous future.


The proposed higher education policies include:

- An innovative incentive-based performance funding system to prepare students for the 21st Century by specifically rewarding institutions for increasing the number of students who re-

ceive degrees in critical fields, such as electrical engineering, computer science, and nursing.

- Need-based and performance-driven increases in financial aid. The recommendation is to increase financial aid and programs by 60% - a \$362 million increase per year - including a new financial aid program, the Texas Technology Grant, which provides financial assistance to students studying engineering, engineering technology, and computer science.
- Creative alternative programs to address nursing shortages.
- 100% funding support of the higher education operating formula.

- Understandable and responsible funding patterns for distributing tax dollars to our schools.

We in Texas have enjoyed great success in our economic development endeavors over the past few years. Addressing the needs of higher education is a critical step toward ensuring that you will be able to find the qualified workers you need and that Texans of the future will have the innovative, creative, and challenging academic background that equips them to prosper for decades to come. If you would like to learn more, you may contact Sarah Floerke at Sarah.Floerke@governor.state.tx.us, or contact your legislators at www.capitol.state.tx.us. 

The Unemployment Claim And Appeal Process In A Nutshell

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 also added a number of new workforce development programs. However, TWC has retained the responsibility for the state unemployment compensation program. The agency is headed by a board consisting of three commissioners appointed by the Governor to staggered six-year terms. One board member represents labor, another represents employers, and the chairman represents the public at large. Although TWC administers several employment law statutes, much 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 Insurance System: The Basics

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.

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 which was appealed.

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.

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. 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, the court appeal period is between the 15th and 28th calendar days 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.

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, attendance, 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; 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. Resignations And Discharges: The Basics

The vast majority of TWC cases deal with work separation issues involving resignations, layoffs, and discharges, and there are some basic principles to keep in mind.

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.

IV. Focus: Telephone Appeal Procedures

- 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”. 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.

Many employers 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. Because employers automatically receive copies of the fact-finding statements of the claimant, more employers than ever before are learning to use claimants’ prior inconsistent statements against them 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; in a nutshell, you should call in prior to the start of the hearing and leave your phone number with the receptionist. The hearing officer will then call you and the claimant and any witnesses at other locations and hold a “teleconference”.

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 any witnesses ready to go. 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 system of justice, an accused has the right to face his 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, **YOU 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 or change their story at the hearing; 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: you can’t ask a piece of paper questions. 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 hit-

ting 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 tape-recorded. If a further appeal is necessary, it can sometimes help to order a copy of the tape 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 tape-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 tape of the hearing cannot be released to anyone but the claimant and employer.

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, 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.

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. 

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

National Conference to Focus on the Impact of Unemployment Insurance

What will the bottom line impact of the unemployment insurance system be in the future? Will the cost of federal and state unemployment insurance taxes be going up? What are the best practices to contain the costs of the system? How can business and government officials work together effectively to improve efficiency and fill employer needs for a skilled and motivated workforce?


The National Foundation for Unemployment and Workers' Compensation will cover these issues and more at its 26th Annual Unemployment Insurance Issues Conference at the Westin Stonebriar Resort, North Dallas in Frisco, Texas on May 30, 31 and June 1, 2007. You are invited to join state and national experts from the business community and federal, state and local officials to get the latest updates and take the opportunity to influence decision makers at this premier national conference specifically focused on unemployment issues affecting business.

“We are happy to have the national spotlight on Texas once again. This conference will provide employers

with access to the latest tax information and best practices from across the country and right here in Texas,” said Ron Lehman, the Commissioner Representing Employers at the Texas Workforce Commission.

UWC – Strategic Services on Unemployment and Workers' Compensation (UWC) serves as the voice of business on unemployment insurance issues at the federal level and provides support to business associations in evaluating and advocating unemployment insurance program policy at the state level.

“We welcome the opportunity to work closely with the Texas Workforce Commission to focus on issues that matter to employers as we evaluate changes in federal and state policy and respond to the bottom line impact on business,” said Doug Holmes, President of UWC.

More information on the conference, including registration specifics and hotel reservations, is available online at www.UWCstrategy.org/Conferences. 

The Truth About Required Workplace Posters

Employers are required to have certain work-related posters in the workplace which are “readily accessible” to employees. These posters should be in a location where employees would normally be expected to be each workday - near the time clock or the employee break room, for example. It is not necessary to place the posters at all of your worksites as long as the posters are located where the employees regularly see them, such as the main office where the time clock is located. The posters a business needs depends upon the type of business it is in, and the number of employees it has.

The list of posters an employer might be required to post include: Texas Workers Compensation Act (subscriber or non-subscriber), Texas Unemployment Compensation Act, Texas Payday Law, Fair Labor Standards Act (Minimum Wage, Overtime, and Child Labor), Uniformed Services Employment and Reemployment Rights Act, Employee Polygraph Act, Family and Medical Leave Act (FMLA), Migrant and Seasonal Agricultural Worker Protection Act (AWPA), Job Safety and Health Protection, Equal Employment Opportunity is the Law & Americans with Disabilities Act (ADA) (combined poster from the Equal Employment Opportunity Commission), and Age Discrimination in Employment Act (ADEA).

Employers with fewer than 50 employees do not need to post the FMLA poster because the Act only applies to those that employ 50 or more workers stationed within 75 miles of each other.

Employers with fewer than 20 employees are not required to post the ADEA poster as the Act applies only to those employers that employ 20 or more.

For those employers not in the agricultural business, it is not necessary to post the AWPA poster.

Employers with fewer than 15 employees do not need to post the EEOC combined poster as these Acts only apply to those that employ 15 workers or more.

All Posters Are Available Free of Charge!

It is not necessary to purchase these posters from private vendors as the posters are available at no charge from the agencies themselves directly or through other sources. There are several private companies that send out “Urgent Notices” telling Texas employers that they must immediately buy these posters from them or suffer dire financial consequences. You may disregard these letters and obtain the posters yourself - free of charge - if you choose.

The Texas Workforce Commission makes posters available free of charge at:

<http://www.twc.state.tx.us/ui/lablaw/posters.html>. The posters can be printed directly from this website. You may also call the agency’s poster department at 512-837-9559 or fax a request to 512-936-3205.

Another helpful website for posters is: <http://www.dol.gov/elaws/asp/posters/industry.asp>. This poster advisor site from the federal Department of Labor asks questions about your business, including type of industry and number of employees, and indicates which federal posters you should have. The phone number for this department is 1-866-487-9243. 🇺🇸

Why Do Employers Lose Unemployment Cases?

Here in the Employer Commissioner’s Office of the Texas Workforce Commission (TWC), we are often asked by employers why they lost an unemployment insurance (UI) claim involving a former employee. After speaking with them about the facts in their case, we are able to decipher the reasons and provide general information to help them win these cases in the future.

In an effort to further assist employers, we recently implemented a case study to determine the top reasons why employers lose these claims. After examining thousands of actual UI cases that have been on recent

dockets here at the TWC, we have determined the top six reasons why claims are lost. (Please see the pie chart accompanying this article). These categories are: Lack of evidence to establish misconduct, lack of firsthand testimony, late protest or appeal, insufficient warning given to the former employee, lay off due to lack of work, and inability by the claimant to perform work. We have also included an article entitled “The Unemployment Claim and Appeals Process in a Nutshell” on page 8 of this issue of Texas Business Today to provide a general overview of the UI system to help you navigate this sometimes tricky area of the law.

The Top Six Reasons Employers Lose UI Cases

1. Lack of evidence to establish misconduct. Under the Texas Unemployment Compensation Act (the Act), when an employee is released from work by the employer through discharge, layoff, forced retirement, reduction in force, job elimination, or mutual agreement, the employer must show that the employee was guilty of work-related misconduct. "Misconduct" is defined in Section 201.012 of the Act as, "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 safety of employees." If an employer does not show misconduct, the claimant likely will receive the benefits. The two best ways to establish misconduct are through documentation and witnesses with firsthand testimony about the events leading to the termination. Documentation can include the company policy or handbook, written warnings, video surveillance, and signed confessions. Twenty seven percent of UI cases that are lost by employers are due to a lack of this evidence. Employees are often fired upon suspicion, hearsay, or for other intangible reasons that cannot be substantiated. Documenting the misconduct can be as simple as giving a written "job in jeopardy" warning when a problem arises and then following through when the next incident occurs. Providing this evidence to the Texas Workforce Commission will substantially increase your odds of winning the claim.

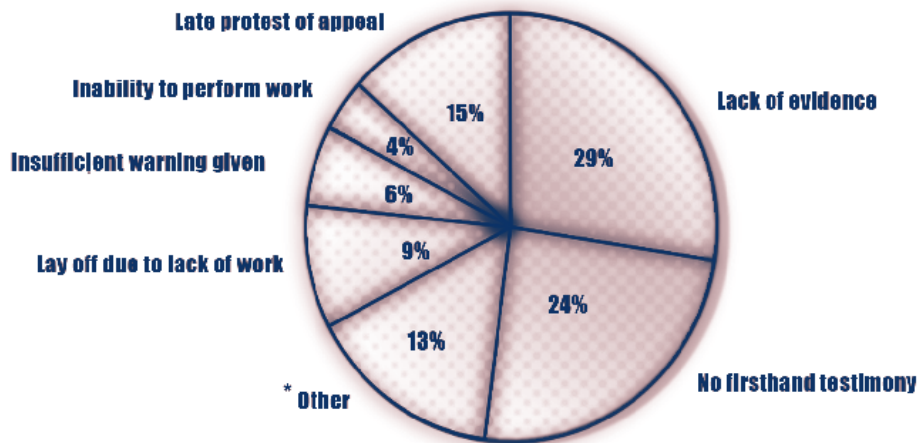
2. No firsthand testimony. TWC precedent cases dictate that a party's sworn denial of wrongdoing or misconduct carries more weight than hearsay evidence provided by the other party. Twenty three percent of UI cases that are lost by employers are lost because they did not provide witnesses with firsthand testimony when the claimant denied the allegations. Employers

should always ensure that the firsthand witnesses to the misconduct are interviewed by the TWC claims investigator, and are available to testify at any telephone appeals hearing. This includes any witness, employee or otherwise, that saw or heard the incident that caused the claimant to be discharged. This could be a co-worker who found the claimant sleeping in the break room, or a customer who was present when the claimant was shouting expletives in the workplace environment.

3. Late protest of appeal. Employers are mailed a "Notice of Application for Unemployment Insurance Benefits" once a claim is filed, and an employer has 14 days from the date it was mailed - not the date it was received - to file a protest. The failure to file a timely response could result in an adverse determination and deprive the employer of a chargeback ruling regarding the taxability of the claim. This protest can be filed by mail, phone, fax, or on-line. Once an adverse determination is issued, an employer has 14 days to file its appeal to the Appeal Tribunal and request a telephone hearing. Employers lose 14% of their UI cases due to late appeals, but paying careful attention to the deadlines can alleviate the problem. Don't put off the appeal until the deadline: business emergencies can crop up and memories fade. Obtain documentation such as a fax confirmation sheet or request a return receipt from the U.S. Post Office in case you need to prove that an appeal was timely filed.

4. Lay off due to lack of work. This can include a reduction in force, layoff, or mutual agreement to end the working relationship. In this situation, the claimant's separation from the work is not his or her fault, and therefore is not considered to be work-related misconduct. Sometimes these situations cannot be avoided by employers, and you may have to bite the bullet. Employers lose 10% of UI cases for this reason.


Reasons Employers Lose Unemployment Claims



* Delay in discharge, reduction in pay, change in hiring agreement, and ignoring policies

5. Insufficient warning given. Many employees are discharged after repeatedly violating an employer's policies, but without ever receiving a formal warning. Written "job in jeopardy" warnings are the best way to document an employee's work-related misconduct, and this paper trail of evidence could be the winning factor in your UI case; it could also help reduce this category down from its current six percent.

6. Inability to perform the work. According to Commission precedent cases, an employee's inability to do the work is not considered misconduct. Employers lose four percent of their UI cases for this reason. If an employee is never able to satisfactorily meet an employer's standards, and is let go for that reason, the employee likely will qualify for UI benefits. On the other hand, if an employee demonstrates the ability to perform the work, but their work later deteriorates, this will likely be considered misconduct.

There are other reasons employers lose UI cases, including allowing too much time to pass after an incident of misconduct before the discharge, reducing pay by 20% or more, making a substantial change to the hiring agreement, and ignoring (or not having) employee policies. By paying careful attention to the details, employers will increase their chances of winning more UI claims. To learn more, the Appeals Policy and Precedent Manual demonstrates all of the above mentioned situations and many more. The Web link is www.twc.state.tx.us/ui/appl_manual.html, or simply go to the agency's home page at www.texasworkforce.org, and type in "Appeals Policy and Precedent Manual" in the search box. 

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

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