Texas Business Today

Fall 2007/Winter 2008

Ron Lehman, Commissioner Representing Employers

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Workforce Round Up From Around the State

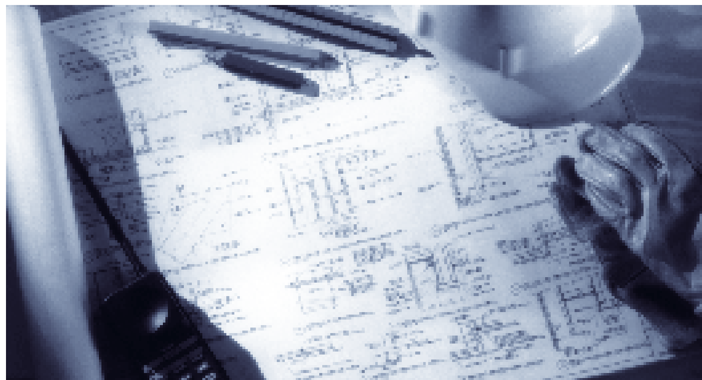
Gulf Coast Manufacturers Receive $1.6 Million Grant to Train Workers

The Gulf Coast workforce will benefit from a recent $1.6 million Skills Development Fund grant presented to 12 manufacturing companies. The grant will upgrade the skills of 1,533 workers in high-demand, high-wage industries.

Partnering companies that will receive grant funding include Shumate Industries in Conroe, Hughes Christensen in the Woodlands, Stewart & Stevenson in Houston and Halliburton Energy Services Group, among others.

The North Harris Montgomery Community College District (NHMCC) will offer training in more than 36 courses to new and existing advanced manufacturing workers. The training ranges from applied math and blueprint reading to welding and supervision.

"This grant has been a great example of the kind of economic prosperity that can be achieved through public and private partnerships," NHMCC Director of District Workforce Grants Administrator Evelyn Ofong said. "These companies understand the benefit of the grant to keep our companies globally competitive, and our workforce trained for the jobs of today and tomorrow."



Salaries for the employees will range from $10 to $59 per hour.

For additional information about the Skills Development Fund and how to apply for a grant, you may visit the Texas Workforce Commission's web site at www.texasworkforce.org, and type "Skills Development Fund" in the search window.

Congratulations to Becon Construction, Texas Workforce Solutions 2007 Employer of the Year Award Winner

Becon Construction (Becon) was named the 2007 Employer of the Year at the 11th Annual Texas Workforce Conference held in Houston in November. Nominated by the Southeast Texas Workforce Development Board and located in Port Arthur, Becon serves clients in the petroleum, chemical, industrial, power and mining industries, and is currently involved in two major Southeast Texas construction projects.

As the prime contractor for the Cheniere Liquid Natural Gas Project in Sabine Pass, Becon worked with Southeast Texas workforce center staff in early 2006 to assess, interview and hire 600 new employees.

The company will also provide construction services for the planned expansion of Motiva Enterprises, an oil refining plant in Port Arthur. With a budget of

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nearly $5 billion, the project will make Motiva the nation's most productive oil refinery, refining more than 600,000 barrels of oil each day. As many as 3,200 workers are expected to be employed during the peak of construction activity. With average wages of more than $20 per hour, workers' cumulative earnings are expected to exceed $65 million.

Other 2007 statewide Texas Workforce Solutions employer winners include Current Workforce Award Winner Caterpillar, Inc. (nominated by the Heart of Texas Workforce Development Board), Future Workforce Award Winner, H-E-B Grocery Co. (nominated by the Capital Area Workforce Development Board), and Transitional Workforce Award Winner Convergys, Inc. (nominated by the South Texas Workforce Development Board). Congratulations to all!

Grant to Provide Students with Construction Training

The North East Texas Workforce Board provided a grant to Texarkana College (TC) for $50,000 to enhance the new Construction Technology Academy. TC partnered with Texarkana ISD and Liberty-Eylan ISD to help the college provide construction technology training to area high school students.

Through the grant, TC will provide Introduction to Construction Technology for any school district that is not able to support such a program at their campuses. Texarkana ISD and Liberty-Eylan ISD are able to offer an introductory class, while TC will provide follow-up training to high school juniors and seniors in construction classes. These students will earn both high school and college credit in Construction Technology through concurrent enrollment.

The construction program uses curriculum developed by the National Center for Construction Education and Research, providing students with the fundamental skills in a variety of construction trades. Students will build a three-bedroom, two-bath house in the parking lot of the academy, that will be auctioned, with proceeds given to the academy. The first class began August 27, 2007 with 17 students enrolled.

For more information regarding the Construction Technology Academy, contact Scott Norton at Texarkana College at (903) 832-5565, ext. 3266.

TWC Awards $2 million for High-Tech Career Initiatives: Eight universities to share funds to promote computer science, engineering to youth

In mid-January 2008, the Texas Workforce Commission (TWC) awarded nine grants totaling nearly $2 million for the Texas Youth in Technology Strategic Workforce development initiative. The program is one of several workforce development strategies to support Governor Rick Perry's statewide industry cluster initiative.

"To increase Texas' global competitiveness, we must have an educated workforce that is ready to meet the growing demand of the industries of the future dependent on science and engineering," Governor Perry said. "Initiatives such as Texas Youth in Technology help Texas graduate more students in these emerging fields, positioning Texas to compete nationally and internationally for jobs in the 21st Century."

The Texas Youth in Technology initiative and resulting projects will establish programs to increase post-secondary enrollments, retention and graduates in engineering and computer science. Working with the Texas Engineering and Technical Consortium (TETC), the grant program also will increase collaboration between Texas employers, institutions of higher education and engineering and science departments.

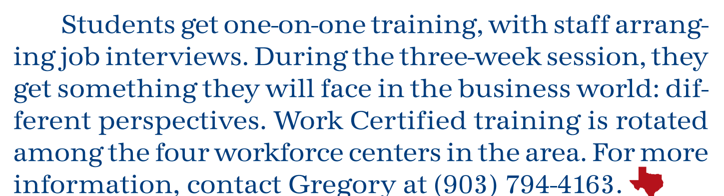
The eight grant recipients include Southern Methodist University, Tarrant County College District, Texas A&M University, Texas Tech University, the University of Houston, the University of North Texas, the University of Texas at San Antonio, and two grants to the University of Texas at Austin.

North East Texas Provides Free Work Certified Training

The North East Texas Workforce Development Board has implemented Work Certified training. The no-cost program addresses reading comprehension, computer skills, business math and writing, resume and interview skills, job-search strategies, customer service and basic business knowledge – skills workers need to get and keep a job.

"Basic employment skills include arriving at work on time and how to interact with co-workers," according to Stacie Gregory, director of the North East Texas Workforce Development Board's western region and Work Certified lead trainer. "It's also a good program for those who have been employed for many years and would like to pick up some skills they've lost along the way."

Students get one-on-one training, with staff arranging job interviews. During the three-week session, they get something they will face in the business world: different perspectives. Work Certified training is rotated among the four workforce centers in the area. For more information, contact Gregory at (903) 794-4163.



From the Dais – Fall 2007/Winter 2008

Dear Texas Employer,

I wish you a Happy New Year and every success in 2008.

As many of you have heard me say over the years, there are many reasons to be optimistic about the future of Texas. Not only are Texas employers creating more than 200,000 jobs per year, and more than one million jobs in the past four years, the state's employers are creating jobs at over twice the rate of the nation as a whole. Texas also has the eighth largest economy in the world, and has ranked number one in exports for several years.

Believing that the continued growth of our economy is the best way to create opportunity for all Texans, and in order to create the right operating climate to sustain this growth, a journey was launched several years ago by state leadership. In late 2005, Governor Rick Perry launched the Governor's Industry Cluster study, and the Texas Workforce Commission was proud to be a partner in that work.

This study identified the industry clusters that were identified as engines of growth, and included:

- Advanced Manufacturing
- Aerospace and Defense
- Bio-tech and Life Sciences
- Energy (all forms)
- Information and Computer Technology
- Petrochemicals

Input was sought from more than 1,000 business, community and education leaders from across the state. At the conclusion of this effort, recommendations were given to the legislature and other state organizations, many of which were enacted into law, while many others are being implemented on an on-going basis.

Now, it is time to take another major step forward in order to not only validate, update or enhance the scope of the recommendations, but to increase the depth and breadth of collaboration on the new recommendations, and even accelerate the rate of implementation. The next step was initiated by the Governor in late 2007 when he launched the Governor's Competitiveness Council. It shares some similarity to the National Competitiveness Council, which has operated for many years and provided numerous far-reaching, long-term recommendations for the nation.

An Update on the Governor's Competitiveness Council

Governor Rick Perry named 29 industry leaders, public and higher education officials, and representatives of key state regulatory agencies to the Governor's Competitiveness Council. As the Commissioner Representing Employers at the Texas Workforce Commission, I am honored and excited to be a part of the Council.

The Council's mission will be to find ways to enhance and support a blueprint for continued economic growth in Texas, recognizing that in a global economy, this state is not only competing against other states, but other countries as well. The group will advise state agencies on policies needed to drive the Texas economy in the 21st Century, identify impediments to the state's ability to remain competitive in a global marketplace, and recommend steps the state should take to improve its economic footing.

According to Governor Perry, "to remain competitive in the 21st Century global economy, Texas must create a seamless system of opportunity and innovation, starting when young Texans enter grade school and continuing until they graduate from college, qualified for jobs that will keep our state at the forefront of the global market... This council will further support ongoing efforts to enhance Texas' economic competition by bringing together leaders in state government, higher education and the private sector to ensure we have a blueprint for continued economic growth in Texas."

It is a bit too early to predict the exact issues or recommendations that may emerge from the Council's work. However, reviewing some of the early meetings, issues such as electricity distribution and the need for stability in regulating electricity generation, improved transportation systems in urban areas, expanded broadband access, especially in rural areas, improvements to the entrepreneurial climate, and of course, the critical importance of having a ready supply of talented workers who can compete globally, are already topics of discussion.

The Council will be making final recommendations in August, and I'll provide updates in upcoming issues of this newsletter. I also encourage you to stay abreast of the activities of the Council, which will soon be posted on a website under development at www.governor.state.tx.us.

More Good News: 2008 State Unemployment Insurance Rates to be Lowered by 0.12%

The healthy Texas economy and strong business climate have combined to give the Texas Workforce Commission (TWC) the opportunity to enact a one year suspension of the 0.12% replenishment tax. I am pleased to inform you that in addition to the surplus tax credit that will be distributed during 2008, your 2008 tax rate will be lowered by 0.12%. This is a change from the tax rate notice that Texas employers received in December, and is expected to save 370,000 Texas employers a total of $90 million for calendar year 2008.

Your revised 2008 tax rate notice was mailed in mid-February, and will include this one year suspension of the replenishment tax. Please use this rate to calculate your 2008 Employer's Quarterly Tax Report rather than the rate notice you received in December 2007.

The components of the revised State Unemployment Tax rate include:

- The General Tax – the unemployment insurance component of your Effective Tax rate, and is based on claims against you account. If TWC 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.
- The Employment Training Assessment – charged to all employers who are eligible for a computed tax rate to finance the Skills Development Fund Program. The Employment Training assessment calculation is a separate line item on the Employer's Quarterly Tax Report, and is the same rate for all employers.

Because the surplus credit you are due is a credit against future unemployment insurance (UI) tax liability, in some cases, an employer will owe only the Employment and Training Assessment and not owe any UI taxes for 2008. If this is the case, your 2008 surplus credit check, which is a credit against actual unemployment insurance taxes paid will be available and mailed during 2009 and 2010.

As always, I pledge our continued efforts to keep your taxes as low as possible.

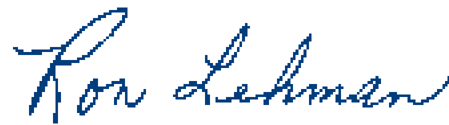
Give Texas Workforce Solutions a Try in 2008

The primary goal of Texas Workforce Solutions - the Texas Workforce Commission and its 28 partner workforce boards statewide - is to meet the needs of Texas employers through locally designed, market-driven workforce development initiatives and programs. Whether it is customized training funded by a Skills Development grant, job-matching through WorkInTexas.com, or through collaboration with middle schools and high schools to prepare the workers of the future, a well-trained workforce is the pivotal factor in attracting and keeping businesses in Texas. A world class workforce is also critical to keeping Texas globally competitive. All employers, workers and job seekers are eligible to take advantage of these services, and I encourage you to do so in 2008.

For more details on TWC and to learn about the many programs it has to offer you in partnership with its network of local workforce development boards, call 512-463-8556, or visit the agency's website at www.texasworkforce.org.

As always, it is a privilege to represent you at the Texas Workforce Commission, and I look forward to cheering your successes in the new year.

Sincerely,



Ron Lehman
Commissioner Representing Employers

Business Briefs – Fall 2007/Winter 2008

Texas Workforce Commission Now Accepting Credit Cards for Tax Payments

The Texas Workforce Commission (TWC) recently announced that most of the state's 400,000-plus employers have the option of paying their quarterly state unemployment insurance (UI) taxes by credit card. Until now, Texas employers could only make their quarterly UI payments by electronic funds transfer, check or bank debit.

Only larger companies - those owing $250,000 or more in UI taxes annually - will still be required to pay by electronic funds transfer.

To make payments by credit card, interested employers need to register on the TWC Web site's Unemployment Tax Services page at http://www.twc.state.tx.us/ui/tax/emtaxinfo.html. The TWC site offers encrypted, secure payment processing, and the agency will not retain credit card information between financial quarters.

Now Available: Diabetes at Work Workshop Toolkit

The National Diabetes Education Program's (NDEP) Business Health Strategy Work Group recently announced that the Diabetes at Work Workshop Toolkit is now available. Developed for NDEP partners and others in the business and healthcare community, the free toolkit provides all of the materials necessary for successfully conducting workshops that help employers understand the important role they can play in workplace intervention in diabetes prevention and control.

The workshop toolkit includes:

- A step-by-step plan for coordinating and executing a Diabetes at Work workshop.
- Sample letters, agendas, checklists, presentations, promotion and media materials and other resources, in both English and Spanish.
- A reference list with brief summaries of articles on worksite productivity, diabetes prevention and management in the workplace, and the return on investment that can be realized by providing workplace diabetes programs.

The toolkit focuses on the www.diabetesatwork.org website as a diabetes education, prevention and management resource for the business community. Initially launched in April 2002 by NDEP, the site provides a multitude of evidence-based, copyright-free tools and materials to assis in developing workplace diabetes programs.

The workshop toolkit on CD-ROM can be ordered from NDEP by calling 1-800-438-5383, or by ordering online at www.ndep.nih.gov to download the 24-page Workshop Planning Guide.

Don't Forget About Returning Troops: An Overview of USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is intended to minimize the disadvantages to an individual that occur when that person needs to be absent from their civilian employment to serve in this country's uniformed services. USERRA protects service member rights and benefits by clarifying the law, and improving enforcement mechanisms. It also provides employees with Department of Labor assistance in processing claims.

USERRA establishes the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights for five years (the previous law provided four years of active duty, plus an additional year if it was for the convenience of the government). There are important exceptions to the five-year limit, including initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

And, USERRA covers virtually every individual in the country who serves in or has served in the uniformed services, and applies to all employers in the public and private sectors regardless of size. This includes federal employers. The law seeks to ensure that those who serve their country can retain their civilian employment and benefits, and can seek employment free from discrimination because of their service. USERRA provides protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability.

Despite the theory behind the law, a recent Pentagon survey of reservists in 2005 through 2006, released in November 2007 by the Senate Health, Education, Labor and Pensions Committee, looks at the increasing level of discontent among returning troops, strained by extended tours in Iraq. Forty-four percent reported being dissatisfied with the Department of Labor's handling of their complaints of discrimination based on their military service, up from 27% in 2004.

Legal experts believe that the Pentagon's findings may only represent the tip of the iceberg. Formal complaints of employment discrimination to the Department of Labor by reservists hit almost 1,500 in 2005 – the greatest number since 1991. And, that doesn't count the thousands more cases reported annually to the Pentagon for mediation. Typically, reservists file an initial complaint with the Employer Support of the Guard and Reserve (ESGR), an office of the Pentagon. If that effort fails, the reservist can go to the federal Department of Labor to pursue a formal complaint and possible litigation by the Department of Justice.

And, a jump in complaints is very likely once the Iraq war begins to wind down and more troops return after an extended period during which their employers were forced to restructure to cope while their employees were away on active duty. A word to the wise: with the large number of soldiers that will be returning to Texas, employers would do well to know and follow this law.

Filing W-2 Reports Electronically Is Easy with Business Services Online

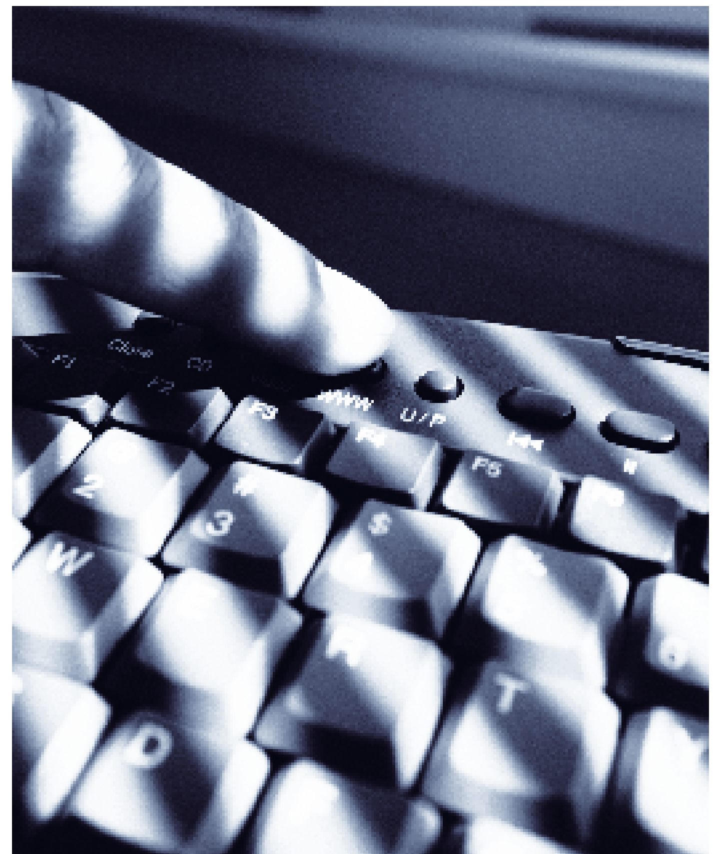
Businesses of all sizes are making the switch from filing paper W-2/W-3 Forms to electronic reporting using the Social Security Administration's Business Services Online (BSO) website. If you haven't switched yet, here's some information you'll want to know to help you get started.

Filing electronically is free, fast and secure. Employers that use BSO to file their W-2 reports have an extended filing deadline of March 31, 2008. BSO also provides an electronic receipt and tracking number which allows businesses to check the status of their reports after submission.

After completing a simple online registration form, employers can use Business Services Online to:

1. Upload a W-2/W-3 File – Requires payroll software capable of producing W-2 reports in the Social Security Administration's electronic file format called EFW2.
2. W-2 Online – Allows you to complete up to 20 W-2 Forms at a time, submit them online and print copies suitable for distribution to employees. No special software is needed and forms print on plain paper.
3. W-2c Online – Complete up to five W-2 Correction Forms at a time and submit them online. Forms print on plain paper.
4. Verify Employee Names/Social Security Numbers – Verify that employee names and Social Security Numbers match data on Social Security Administration records. A special code is required to activate this service to ensure that only authorized employees have access to this sensitive data.

For more information about W-2 reporting and Business Services Online, visit the Social Security Administration's employer website at www.socialsecurity.gov/employer.



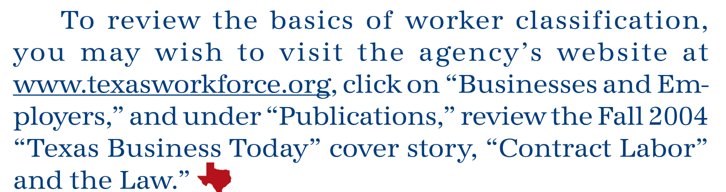
Be Careful How You Classify Workers: FedEx fined $319 Million by IRS for Misclassifying Drivers

FedEx Corp was recently fined $319 million by the Internal Revenue Service after the agency concluded that drivers for FedEx subsidiary FedEx Ground, deemed “pick-up-and-delivery-owner-operators” by the company, were misclassified as independent contractors and should be reclassified as employees for federal employment tax purposes. The $319 million (plus interest) penalty was assessed on December 20, 2007 for the 2002 calendar year. FedEx could face additional penalties, as an audit for calendar years 2004 through 2006 is ongoing.

FedEx noted that that the company “anticipates continuing changes to its relationships with its contractors, which are expected to increase the cost of operations, and it is reasonably possible that such cost increases could be material.”

Just days before the IRS penalty was assessed, Massachusetts Attorney General Martha Cookley cited FedEx Ground for intentionally misclassifying 13 pickup and delivery drivers as independent contractors rather than employees. FedEx Ground was fined more than $190,000 in penalties for violating that state’s independent contractor law. The company was ordered to adjust the drivers’ employment status and pay them restitution. There are more than 400 FedEx Ground drivers in Massachusetts alone, and the Attorney General’s investigation is ongoing.

To review the basics of worker classification, you may wish to visit the agency’s website at www.texasworkforce.org, click on “Businesses and Employers,” and under “Publications,” review the Fall 2004 “Texas Business Today” cover story, “Contract Labor” and the Law.”



New Program Offers Small Employers Assistance In Returning Injured Employees to Work

The performance of a small company’s employees can have a direct impact on the profitability of an employer’s business. When an employee has had a work-related injury or illness, employers can benefit if the employee is able to continue working or return to work as soon as it is medically appropriate. However, many small employers cannot afford the workplace modifications that may be needed for an injured employee to continue working or return to work.

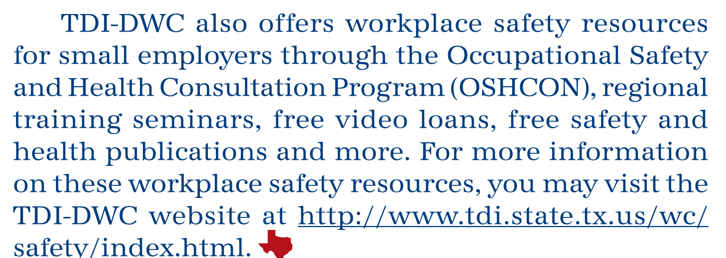
The Texas Department of Insurance, Division of Workers’ Compensation (TDI-DWC) can now reimburse small employers for expenses incurred for workplace modifications, including special equipment, tools, furniture or devices, or other associated costs which can allow an injured employee to start work or return to work. A small Texas employer that carries workers’ compensation insurance coverage and has two to 50 employees may now be eligible to receive reimbursement up to $2,500 for qualified expenses. The program also allows for guaranteed repayment of expenses associated with workplace modifications that have been preauthorized by TDI-DWC.

A return-to-work pilot project for small employers was created by the Legislature in 2005, and 2007, lawmakers approved legislation allowing Commissioner of Workers’ Compensation Albert Betts to preauthorize reimbursements to employers participating in the pilot project.

“Returning injured employees to the workplace when they are medically able is a main goal of the Texas workers’ compensation system. The pilot program will benefit small employers and injured employees in Texas by assisting them in their efforts to achieve this outcome,” according to Commissioner Betts.

To apply for the reimbursement, a small employer must submit an *Application for Reimbursement from the Return-To-Work Account for Small Employers* (DWC Form-008) to TDI-DWC. The form is available for download from the TDI-DWC website at http:www.tdi.state.tx.us/wc/rtw/index.html. For more information on the Return to Work Reimbursement Program for Small employers, you may contact TDI-DWC Return-To-Work Services by calling 512-804-5000, or e-mailing rtw.services@tdi.state.tx.us.

TDI-DWC also offers workplace safety resources for small employers through the Occupational Safety and Health Consultation Program (OSHCON), regional training seminars, free video loans, free safety and health publications and more. For more information on these workplace safety resources, you may visit the TDI-DWC website at http://www.tdi.state.tx.us/wc/safety/index.html.



Legal Briefs – Fall 2007/Winter 2008

Pay and Benefit Discussions Among Employees

How many businesses have a policy like the one below?

Confidentiality of Salary and Benefit Information

Employees are prohibited from discussing their salary or wage levels and company benefits with other employees. Such information is confidential and may not be discussed in the workplace. Any employee violating this policy will be considered to have committed a breach of confidentiality and will be subject to disciplinary action, up to and possibly including termination of employment.

Look familiar? Chances are good that most companies have either a formal policy similar to the one above, or else have a tradition or practice of responding to pay and benefit discussions with disciplinary action. Those same companies would likely be surprised to learn that such policies generally violate federal labor law. Indeed, the National Labor Relations Act contains a provision, Section 7 (29 U.S.C. § 157), that gives all employees the right to "engage in concerted activities", including the right to discuss their terms and conditions of employment with each other. Section 8(a)(1) of the NLRA (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to deny or limit the Section 7 rights of employees. Based upon those two provisions, the National Labor Relations Board (NLRB) has taken the position for decades now that employers may not prohibit employees from discussing their pay and benefits, and that any attempts to do so actually violate the NLRA. Courts have basically uniformly supported that position. Moreover, those particular sections of the NLRA apply to both union and non-union employees, so there is no exception made for companies where the employees are non-unionized.

Despite the seeming inflexibility of the NLRB's position regarding policies against pay and benefit discussions, there are some limits, as explained below.

One limit involves the manner in which employees exercise their rights to discuss wages or benefits. The law entitles employees to have such discussions, but does not require employers to allow employees to do so during times they are supposed to be working. However, singling pay discussions out for prohibition, while allowing other types of conversations unrelated to work, might be evidence of intent to violate employees' Section 7 rights, so employers should be careful in that regard.

Another limit would concern the content of such discussions. Certain employees may have benefits that could potentially involve privacy issues under other laws, such as the ADA or HIPAA. Discussing such benefits in a way that involves releasing information that should be confidential under such laws, particularly in the case of two employees talking about an uninvolved third party's medical conditions, could potentially lose the gossiping employees the protection otherwise afforded under the NLRA. The NLRB would consider whether employees were on notice that releasing such information violates company policy and the law, and also the extent to which the employer actually keeps such information confidential.

Finally, it is clear that it makes a difference under the law as to how employees obtain the salary and benefit information they are discussing. Employees discussing their own information are protected, as are employees discussing the pay and benefits of others if they obtained that information through ordinary conversations with others. However, if in order to get the pay and benefit information they discuss with others, they access offices or files known to be off-limits to them, or cause others to break access restrictions and give them confidential information, and the company has clearly taken steps to restrict the information and uphold its confidentiality, then they may well find themselves unprotected by the NLRA if they are disciplined, even discharged, for participating in the access violation. A major case on point is that of *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Circuit,1990).

Practical Tips

As an alternative to flatly prohibiting employees from discussing their pay and benefits, consider the following:

- In the context of a general discussion about the importance of devoting oneself to work during

work hours, counsel employees that it is all right to discuss various things at work (keep in general – do not single out pay and benefits as topics), but that as in most things, moderation usually works best, and there is a fine line between being informative or conversational and being a busybody, a time-waster, or perceived as self-important. In discussing such a thing, take care not to do it in a threatening manner, such as implying that anyone who talks too much about their job conditions will be shunned by coworkers. That could easily be perceived as promoting a chilling effect on employees exercising their Section 7 rights.
- Do not be afraid to promote what is right in your company. Make it easy for employees to know that your pay and benefit practices are competitive with other companies within your industry, and promote your company's practices regarding advancement opportunities, merit increases in pay, and open-door policies.

The more that employees know where they stand, and the more they feel that they have a stake in the company and its success, the less need they will feel to spend time talking about their pay and benefits.

Use Caution!

Many employers use sample policies that they have found on the Internet or in collections of policies in popular office software, and some employers simply draft their own policies. With some areas of employee relations, that can work. Concerning pay and benefit discussion policies, though, it is not a good idea at all to "roll your own". This area of the law is so little-known by most employers and employees and so fraught with potential problems that any employer considering writing or enforcement of a policy restricting discussion of pay and benefits should definitely consult an employment law specialist who is knowledgeable about NLRA issues before taking any actions.

Reporting Requirements for Employers that Do Not Carry Workers' Compensation Insurance

While Texas employers are not required to carry workers' compensation insurance, those that do not subscribe to such policies are required to report their non-coverage status and work-related injuries to the Texas Department of Insurance, Division of Workers' Compensation (TDI). Texas employers are also required to notify their employees if they don't carry workers' compensation insurance.

Reporting No Workers' Compensation Insurance Coverage

The Texas Labor Code, Section 406.004(a) requires all employers in Texas that do not carry workers' compensation insurance to notify TDI in writing. Employers should report this information using the form, *Employer's Notice of No Coverage or Termination of Coverage* (DWC Form-005):

- within 30 days after hiring an employee;
- within 30 days after receipt of a TDI request (within 10 days for employers principally located outside of Texas); or
- within 10 days of notifying their workers' compensation carrier of their intent to cancel the policy, unless the employer purchase a new policy or becomes a certified self-insurer.

Employers must also file DWC Form-005 annually on the anniversary date of the original filing for as long as they remain in operation and do not carry workers' compensation insurance

The Equal Employment Opportunity Commission's New Retiree Health Rule: Employers May Now Offer Different Plans to Those Over 65

On December 26, 2007, the federal Equal Employment Opportunity Commission (EEOC) announced that employers could eliminate or reduce health insurance benefits for their retirees when they become eligible for Medicare at age 65. This new regulation allows employers to create two distinct classes of retirees: those who are eligible for more generous benefits and are under the age of 65, and those with more limited benefits – or none at all – who are age 65 or older.

According to Naomi Earp, the EEOC's chairwoman, "This rule will help employers continue to voluntarily provide and maintain these critically important health benefits."

Currently, over 10 million American retirees rely on employer-sponsored health care plans as a supplement to Medicare, or as their primary source of coverage. However, premiums for such employer-sponsored plans have been rising rapidly. According to surveys released by the Kaiser Family Foundation, employer-sponsored health plan premiums rose an average of 6.1% in 2007, and have risen 78% since 2001. According to the EEOC, because of these rising costs and the longer life expectancy of workers, many employers simply cannot afford to provide health benefits.

What Does the New Rule Do?

The rule allows employers who provide retiree health benefits to continue the practice of coordinating those benefits with Medicare, without ensuring that Medicare eligible retirees are receiving the same benefits as younger retirees. Some employers coordinate with Medicare by supplementing the Medicare benefit; others simply provide retirees under age 65 with health insurance to "bridge" the gap between the time they retire and the time they become eligible for Medicare. The rule allows retirees to continue receiving the benefits they currently enjoy. The rule will also allow labor unions to negotiate for health benefits that coordinate with Medicare.

The rule does not affect the benefits that employers provide to their current employees.

What About the Age Discrimination in Employment Act?

The EEOC enforces the Age Discrimination in Employment Act (ADEA) as well, which prohibits age discrimination in all aspects of employment for workers age 40 or older. However, the EEOC is taking the position that the ADEA also authorizes the agency to approve exemptions to the law in those instances when applying the law would be contrary to the public interest.

The EEOC asserts that the new rule was needed because in 2000, in *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3d Cir.2000), a federal court ruled that if an employer provides retiree health benefits, the ADEA requires that the health insurance benefits received by Medicare-eligible retirees be the same, or cost the same, as the health insurance benefits received by younger retirees. After the EEOC adopted this interpretation of the ADEA as its enforcement position, employers, labor organizations, and state and local governments told the EEOC that it was contrary to existing practice, and that if they were forced to ensure that Medicare-eligible retirees received benefits identical to those of younger retirees, they would comply by reducing or eliminating the retiree health benefits that they were currently providing. (In fact, that is exactly what happened when the *Erie County* case was settled in March 2002: the County's plan gave older retirees the same benefits they had prior to the litigation, but required younger retirees to pay more for health benefits that offered fewer choices.)

According to Dianna Johnston, an EEOC attorney, many employers and labor organizations told the agency during public hearings on the rule that "if they had to provide identical benefits for retirees under

65 and over 65, they would just drop retiree health benefits altogether for both groups." She also observed that federal law does not require employers to provide health insurance benefits to either current or retired employees.

The EEOC also observed that because the agency was repeatedly advised that the *Erie County* decision would contribute to a continuing decline in the availability of employer-provided retiree health benefits, it was in the best interest of employers, employees, and retirees to allow employers to coordinate benefits with Medicare-eligibility without having to also consider the ADEA. The EEOC pointed out that it did not reach this conclusion lightly, acting only after performing an extensive study that included meeting with interested groups representing all viewpoints, carefully reviewing the available information about retiree health programs, and considering comments received from the public.

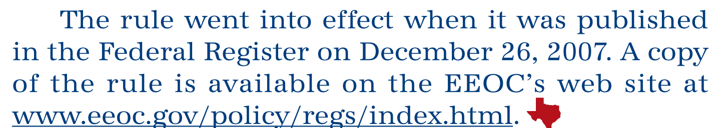
The EEOC's authority to adopt this exemption has been confirmed by a federal district court and the Court of Appeals for the Third Circuit, the same Philadelphia court that issued the *Erie County* decision. After AARP sued the EEOC in federal court, arguing that it was not authorized to issue the exemption, the courts ruled not only that Congress gave the EEOC authority to issue the rule, but also that the agency carefully considered the evidence before it and that the rule was a "reasonable, necessary and proper exercise of (EEOC's) authority."

According to Helen Darling, the president of the National Business Group on Health, which represents large employers, the rule is a welcome change. "If employers could not coordinate with Medicare, they would be far less likely to provide health coverage" to retirees, she said. "They could not afford to."

And, Gerald Shea, assistant to the president of the AFL-CIO, also saw merit in the new policy: "Given the enormous cost pressures on employer-sponsored health benefits, we support the flexibility reflected in the rule as a way to maximize our ability to maintain comprehensive coverage for active and retired workers."

When Does the Rule Go Into Effect?

The rule went into effect when it was published in the Federal Register on December 26, 2007. A copy of the rule is available on the EEOC's web site at www.eeoc.gov/policy/regs/index.html.



What's On Your Mind? Questions Frequently Asked at Texas Business Conferences

As the staff of the Employer Commissioner's office travels around the state conducting the Texas Business Conferences, attendees ask a number of wide-ranging and important questions about employment laws that impact their companies – and may very well impact yours, too. This article will share some of the most frequently asked questions and answers on a variety of topics with you. Because each situation is unique, we still encourage you to consult a qualified employment attorney to discuss the specifics of your situation.

Q. If a worker was injured on the job, can the employer tell them which doctor to use?

A. Under the Texas Workers' Compensation Act, if the employer and employees are in a workers' compensation health care network, the employee must choose a doctor from those who are with that network. Otherwise, the employee may choose his or her own doctor. Public-sector employees must choose a doctor according to the rules of the public sector employer. The bottom line is that if an employee claims medical inability to work, or the need for special medical limitations, then the employer has the right to require the employee to document such a claim. The employee must then obtain the needed medical documentation however he or she can. See: http://www.tdi.state.tx.us/wc/employee/workerrights.html.

Q. We include non-discretionary "bonuses" in rate of pay for overtime calculations. What about such items as "employee of the quarter" cash or gift cards? How do we determine awards that are included in pay for overtime?

A. "Employee of the quarter" bonuses are considered extra pay for work already performed and would be included in the calculation for the regular rate of pay. Gift cards would be considered discretionary bonuses, not includable in the regular rate of pay, if they are not promised to employees in any way, i.e., both the fact and the amount of the payment are completely up to the employer. The Department of Labor (DOL) regulation covering the distinction between discretionary and non-discretionary bonuses is 29 C.F.R. 778.211. Gifts, Christmas, and other special occasion bonuses are covered in 29 C.F.R. 778.212. See http://www.twc.state.tx.us/news/efte/k_bonuses_exclusions.html.

Q. Do you deduct taxes from the pay of a 15-year-old making less than $100.00?

A. The answer is most likely not, due to the low gross wage amount, but employers should always consult the IRS publications on questions relating to federal tax issues. In this case, the IRS publication would be Publication 15, available from www.irs.gov.

Q. Is a real estate office with nine employees covered by the Federal Fair Labor Standards Act?

A. The company is covered as an enterprise if it affects interstate commerce and has gross annual revenues of at least $500,000. However, even if the company is not covered that way, the employees are covered as individuals if their work affects interstate commerce. It is practically impossible to be in a modern, networked economy (i.e., using the Internet, e-mail, telephone, and accepting out of state credit cards) and not be engaged in interstate commerce. See http://www.twc.state.tx.us/news/efte/coverage_under_the_flsa.html.

Q. Can an employer make direct deposit mandatory in a policy handbook?

A. This is a very complicated issue. In general, as long as the employer does not require the employee to have an account at a particular bank, and the direct deposit procedure does not involve a bank fee that would effectively reduce the employee's pay below minimum wage, and the direct deposit requirement does not have the effect of discouraging minority applicants from applying, a Texas employer may make acceptance of wages by direct deposit mandatory. Existing employees must be given at least 60 days' advance written notice of the transition to a direct deposit wage payment plan. See http://www.twc.state.tx.us/news/efte/electronic_fund_transfer_wages.html.

Q. As an HR office, we collect all job applications. Since we need to distribute the applications to hiring officials at various locations, we are looking into doing this through our company's e-mail system, since we do not have an intranet or application system available to do this through other means. Would this method be considered a violation regarding the applicant's information? Our job applications do not carry personal identifier information, such as social security numbers.

A. There would be no legal problem with transmitting job applications to other internal company departments via e-mail. It is always best to have normal safeguards in place, such as password access to files, encrypted e-mails, and the like. Consult your company's IT department for suggestions on how to implement such security.

Q. Is it possible to have exempt employees with a base salary and "compensatory" or additional wages for specific projects? If so, how do you report the additional compensation?

A. Under DOL rules, paying exempt salaried employees extra pay for extra work, on whatever basis, does not violate the salary basis test for the exemption. The extra compensation would be reported as any other wages are reported. If compensatory leave is given instead of cash, then the leave pay would be reported for the calendar quarter in which the employee used such leave. See http://www.twc.state.tx.us/news/efte/salary_test.html.

Q. Our production manager has family in Mexico that he wants to come to Texas to work at our company. How can we get them work permits? Our production manager is a U.S. citizen.

A. That would be an issue under federal immigration law. The best place to start would be the Web site of the U.S. Customs and Immigration Services bureau: see http://www.uscis.gov/portal/site/uscis.

Q. How do we handle a difficult employee? He is not a team player, gossips, complains, and says if he is dismissed, more will go with him. He constantly lets us know that he is looking for a job and says he is discriminated against.

A. It appears that you have one of those proverbial "bad attitude" employees. Left alone, he will probably end up spreading his poor attitude to others, so it will be important to deal effectively with him. Make sure that he is not singled out for unfair treatment or adverse actions that are unrelated to what he is doing or failing to do, but counsel him and let him know in no uncertain terms that the company expects him to do his job as best he can and that he will be held accountable for poor performance or rule violations just like anyone else would be under the same circumstances. Do not let his tough talk intimidate you into inaction. Be ready at any time to act when appropriate – remember, it is a form of discrimination against other employees to give a complainer better treatment than non-complainers. In the event of an unemployment claim, do not start off arguing that the claimant was fired for a "bad attitude" – when TWC hears that from an employer, the agency often concludes that the employer just did not like the claimant for some reason and that the underlying problem was a personality conflict, which is not misconduct. Always give specific examples of how the claimant's poor attitude and under-the-radar bad conduct affected other employees, damaged customer relations, interfered with the flow of work within the office, and so on. Let your examples guide the TWC claim examiner or hearing officer to their own conclusion about the claimant's attitude. That way, your

company has a better chance of proving misconduct and prevailing on the unemployment claim.

Q. Should post-secondary educational institutions follow the rules for public employers, since they are considered political subdivisions of the state? Is it mandatory to make copies of I-9 documents or is that just good business practice? If you are headquartered in Texas, but have employees all over the world, some as employees employed directly and others working on a contract where we are a prime or sub-contractor, is it safe to say that Texas laws trump any of the other state laws? Or, should we have employees follow Texas and that state's laws where they are consistent? What if there are inconsistencies?

A. Post-secondary educational institutions, while not always political subdivisions (some are private), are treated the same as public employers only in the case of the Family and Medical Leave Act (FMLA) and for purposes of state unemployment tax (both types of employers are generally reimbursing employers with respect to unemployment benefit chargebacks). Making copies of I-9 documents is optional. Some employers do so if they want to prove in the case of an I-9 audit that they had a good-faith belief that the documents were genuine. However, some employers do not make copies precisely because they fear the opposite, i.e., that an auditor might sanction them for not recognizing a counterfeit document that to the auditor seems like an obvious fake. With regard to employees abroad, in general, your company should follow the laws of the country or countries where the employees work. For purposes of unemployment tax, it is possible under certain circumstances to report all wages for all employees to Texas. For details, contact TWC's Tax Department at 1-512-463-2700.

Q. I have a staffing agency. One of my employees has decided that she now wants to work for herself - using my agency, thereby, changing my employee from (tax-wise) W-4/W-2 to W-9/1099. Can I change her into an independent contractor starting at any time?

A. No. That is a trap for the unwary, and that person would still be an employee. Just because an employee wants to or agrees to be treated as an independent contractor does not mean they are independent contractors in the eyes of the law. If she wants to be self-employed badly enough, she would need to start her own staffing firm, going all the way with a DBA or a corporate structure, and become one of your competitors.

Q. An employee is on commission. The employer has reduced the opportunities to make commission. Can the employee qualify for unemployment insurance (UI) benefits?

A. Perhaps – if the reduction in pay is 20% or more, the employee may have good cause connected with the work to resign and qualify for UI benefits. If the reduction in commission work is due to some form of discrimination or unfair treatment, the employee may have good cause to quit, but the burden of proving that would be on the employee if they quit and file a UI claim.

Q. How long does an employee have to work for you before they are eligible to file for unemployment benefits? My understanding was the employee had to work for you for six months before they were eligible to file for unemployment.

A. There is no trial employment period in Texas, and there is no minimum amount of time an employee has to work for any particular employer before they can file a UI claim if they lose their job. What really matters is whether the employee has worked enough in the past (during their "base period") to be monetarily eligible to file a claim. The criteria are fairly complicated, but TWC makes that determination via computer-based wage records. For details, see section B of "Unemployment Insurance Law – Eligibility Issues" at http://www.twc.state.tx.us/news/efte/ui_law_eligibility_issues.html. Where the length of time someone works for you becomes important is the question of whether you are a base period employer, which depends upon the timing of the initial claim (see the same article for a graphic chart of the base period). If the claimant loses a short-term job and files an unemployment claim fairly soon after that short period of employment, the last employer is not likely to have reported wages during the base period of the claim, and thus would not be financially liable in the claim. If that were the case, it is likely that preceding employers would be subject to the unemployment insurance charges, if any.

Q. What is the difference between terminating and firing an employee? What is the difference between an employee quitting and leaving voluntarily?

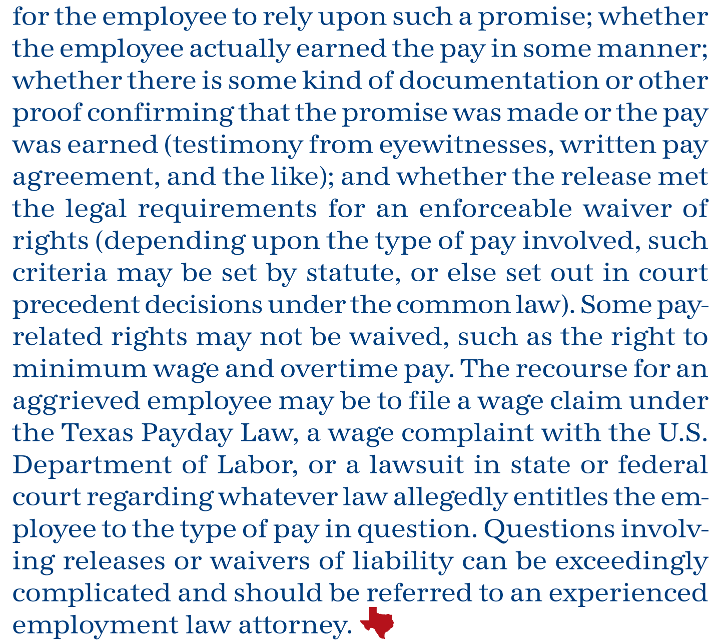
A. From a legal standpoint, there is no difference between terminating, firing, or discharging an employee. The only difference is semantic. Similarly, there is no particular legal difference between terms such as "quitting" and "leaving voluntarily". For purposes of unemployment claims and wage claims under the Texas Payday Law, TWC distinguishes only between voluntary and involuntary work separations, i.e., work separations initiated by the employee and those initiated by the employer. For details, see "Types of Work Separations" at this link: http://www.twc.state.tx.us/news/efte/types_of_work_separations.html.

Q. I just hired an employee and told him he could only work 40 hours a week, although he went ahead and worked over 50 hours. Do I have to pay him?

A. Yes. The schedule deviation is a disciplinary issue, not a pay issue. Under the federal FLSA, you have no choice but to pay employees for all hours actually worked. Address schedule violations under your company's regular corrective action policy. Let your employees know, in writing, that in the future, all overtime must be approved by their supervisor in advance, and that failure to obtain such approval can lead to discipline, up to and including termination. If the excess hours resulted from some kind of supervisory negligence, there would also be an issue to address with regard to the responsible supervisor.

Q. If an employee is terminated and promised "pay", but forced to sign a "release" that they will not sue to receive the pay, do they have recourse?

A. Depending upon the circumstances, the employee may have some kind of recourse. It depends upon whether the one who promised the pay had actual or apparent authority to do so; whether it was reasonable for the employee to rely upon such a promise; whether the employee actually earned the pay in some manner; whether there is some kind of documentation or other proof confirming that the promise was made or the pay was earned (testimony from eyewitnesses, written pay agreement, and the like); and whether the release met the legal requirements for an enforceable waiver of rights (depending upon the type of pay involved, such criteria may be set by statute, or else set out in court precedent decisions under the common law). Some pay-related rights may not be waived, such as the right to minimum wage and overtime pay. The recourse for an aggrieved employee may be to file a wage claim under the Texas Payday Law, a wage complaint with the U.S. Department of Labor, or a lawsuit in state or federal court regarding whatever law allegedly entitles the employee to the type of pay in question. Questions involving releases or waivers of liability can be exceedingly complicated and should be referred to an experienced employment law attorney.



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