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Employee Handbooks for the New Millenium

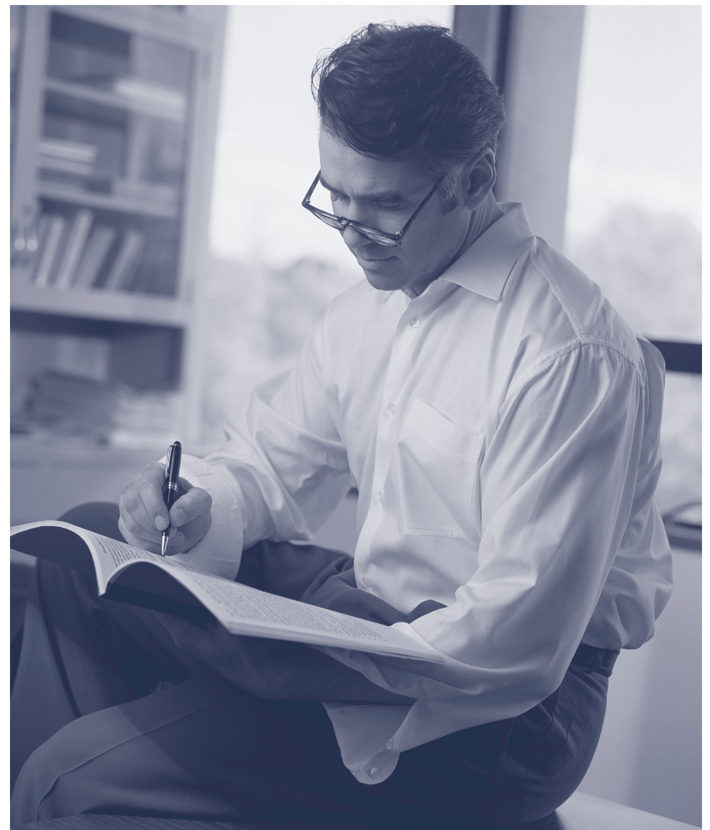
Introduction

Many Texas employers recently spent countless thousands of dollars and many hours making sure that their computers were "Y2K" compliant. Nobody wanted to be exposed to possible disasters (and the resulting legal liability) which could have been eliminated or at least limited by taking such precautions. In the midst of this firestorm of technological activity, it would be very easy to overlook another area where Y2K compliance is absolutely mandatory: your employee policy handbook.

Federal and state courts and legislatures spent the last decade pointing out (and expanding) employers' obligations under various employment laws. This guidance can be used to limit your potential legal exposure, but only if properly and effectively communicated to your employees in your policy handbook. Now that it's become clear that the feared millenium mayhem won't end the 21st Century before it even gets going, this is the perfect opportunity to review and update your handbook to make sure that it is also Y2K compliant.

While there is no such thing as a "perfect" policy handbook, there are many undeniable advantages to having a well written, well thought out policy handbook. Quite simply, a straightforward, clearly written, well-organized employee handbook is your best and most effective tool for communicating with your employees. Your policy handbook serves as written evidence of your company's expectations and requirements as well as of the types of conduct you deem to be totally unacceptable.

But, while a well-written handbook can certainly be a valuable weapon in your ongoing crusade to minimize possible legal liability, a poorly written handbook can spell disaster. Poor draftsmanship can include adopting language which destroys employment at will and results in the creation of an implied contract, or omitting crucial policies, disclaimers and information. And, the worst policies you can have are those which you ignore, selectively enforce, or are simply unaware of. Also keep in mind that new developments in employment law are occurring rapidly; what is valid and permissible one day can subject you to serious liability the next. This means your handbook should be constantly evaluated and updated to make sure that it remains compatible with ever-changing local, state and federal laws. And, for those employers with operations in a number of different states, the situation is even more complicated because employment laws can vary wildly from state to state. Employment policies and practices which are totally legal in Texas may be unlawful in New York or Florida. If you have multi-state locations, you must also make sure that your policies are legal in all of the states in which you operate.



Drafting your Policies

The first order of business is deciding what policies you are going to include in your handbook. Basically, this is your very best chance to tell your employees what is expected of them, what types of conduct will not be tolerated, and the consequences which will result from violating those standards. This paper sets forth a quick checklist of possible topics every Texas employer should seriously consider including in their handbooks, forms, and employment applications.

Too often, employers simply allow company policies to evolve. Unfortunately, policies and procedures created on such an "ad hoc" basis can lead to confusion, chaos, and sometimes, claims of discrimination or wrongful termination. If that happens, it can be a costly and time-consuming experience for an employer. Consequently, more and more employers are using employee handbooks to help avoid potential lawsuits and establish uniform personnel practices. When done correctly, an employee handbook is an invaluable personnel tool. It provides the company with a human resources road map.

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Once you have decided which policies are going to be included in the company handbook, it's time to actually draft the provisions. Because the primary function of an employee handbook is to explain the company's practices, procedures and rules to your workers, write the handbook with your audience in mind. Be sure to keep it as simple as possible: every employee you have should be able to read and comprehend the handbook in its entirety. The policies should be understandable and clear, with a minimum of "legalese". Use as many one-syllable words as you possibly can and keep sentences short and focused. One idea, one sentence. Define important terms (i.e., "sexual harassment", "drug", "relative") to avoid confusion and misinterpretation. Organize the handbook so that it's easy to find various rules and policies; an index or table of contents can be very helpful in this regard.

Distributing Your Policy Handbook

Distribution of the handbook is every bit as important as good drafting of the policies themselves. You can have the most beautifully written and comprehensive handbook in Texas; however, if it remains in your file cabinet, desk drawer, or computer, it's totally meaningless. And, as far as your employees are concerned, it simply doesn't exist.

Also keep in mind that if you are to have any hope of prevailing on an unemployment claim filed by a former employee, you must be able to prove "work-related misconduct." One very common type of misconduct involves actions "in violation of a policy or rule adopted (by an employer) to ensure the orderly work and the safety of employees." Texas courts have long held that for an employer to prove misconduct "in violation of a policy," it must be able to show: 1. That a policy in fact existed; and 2. That the employee had actual and specific knowledge of this policy. (*Levelland Independent School District v. Contreras,* 865 SW2d 474 (Tex. App. – Amarillo 1993, writ denied)). The good news here is that to a large extent, you have the chance to define "misconduct" for your company. The more sobering news is that you are going to be expected to actually get the word out (and prove that your did so) to your employees.

Develop a standard mechanism to distribute the policy handbook to your employees. Many employers provide their policies at new hire training sessions or orientation programs. Ask all employees to acknowledge receipt of the company handbook and other documents by signing acknowledgment forms that you provide. If you are called upon to prove that an employee was actually made aware of your company's policies, such forms are considered the "best evidence" that the employee knew or should have known what was expected of them.

Updating Your Policy Handbook

It's very easy to become complacent about policies and handbooks which are already in existence but haven't been challenged recently. Don't let this "quiet before the storm" lull you into a false sense of security. Remember: procedures that are routinely ignored (but are promised in a handbook) and outdated or illegal policies can quickly turn into a lawsuit in search of a plaintiff's attorney.

The new millenium is the perfect moment to review, re-

vise and update existing employee handbooks. All outdated procedures and policies need to be revamped and redrafted. It can also be a very worthwhile investment of time and money to consult with private legal counsel to make sure that your policies are in compliance with current law. You may also wish to datestamp any updates or new policies to make sure that all of your employees are aware of and following the newest provisions. You may also want to collect and dispose of outdated employee policy handbooks to avoid misapplication or confusion about current company rules and regulations.

Many employers choose to put their handbooks in three-ring binders. That way, when changes, updates or revisions are made, it's very easy to remove the old pages and substitute the newest, most up-to-date version of the handbook.

It is also critical that new and updated policies are distributed to and acknowledged by all employees in a systematic fashion. Just as with the initial distribution of the handbook, a mechanism needs to be established and followed for all updates and changes, including requiring a signed acknowledgement that the distribution was made.

Your managers need to know that they do not have the authority to make any statements that sound like promises or policy amendments to your employees …you may end up paying for those promises.

Consistently Enforcing Your Policy Handbook

To get the full benefit of well drafted, widely distributed and carefully updated policies and procedures, it is imperative that they are consistently applied and enforced. To do otherwise is to invite allegations of discrimination under state or federal law.

This is an area where managerial training and consistency is especially important. For example, the landmark sexual harassment cases of 1998 made it very clear that an employer can – and will - be held liable for the discriminatory, harassing acts of its managers. Not only do your managers need to receive adequate training in what your policies say, they need to act in compliance with those policies, every time, with everybody – even with their favorite employees who sometimes "bend the rules."

It is also very important to make it clear to your managers/supervisors and all other employees who has (and doesn't have) the authority to amend your policies. Your managers need to know that they do not have the authority to make any statements that sound like promises or policy amendments to your employees; otherwise, you may end up paying for those promises.

Conclusion

While no policy handbook or manual is going to be perfect, if well done, it may very well protect you in some extremely tricky situations. It is simply not humanly possible to address every single issue that can arise during the course of the employer/employee relationship. And, new issues are constantly developing that require employers to revise their handbooks to ensure that they continue to be in compliance with the law. However, deciding matters on a day by day basis with no thought to consistency, legality or fairness is simply not an option in the 21st Century. If your handbook is well researched, clearly written, regularly updated and consistently enforced, it is still one of the best tools you have at your disposal.

The bottom line with policies is simply this: make them as clear, straightforward and easy to understand as possible. Carefully evaluate, widely disseminate, and thoroughly explain what it is you expect from your employees and what you simply won't tolerate. Develop policies that you can live with every time, with everybody. In this complicated and litigious era, you may well find that your policy handbook is your best offense and quite often the only defense in a world that often seems increasingly hostile to employers.

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Employee Handbook Checklist

Once a decision is reached to adopt, review or revise a policy manual or handbook, certain topics should be addressed. All policies and procedures should be included in the handbook. Every aspect of the employment relationship should be addressed. These areas can be divided into categories such as:

- **Employer expectations –** Employment at will, attendance, tardiness, progressive discipline, leaves of absence, job requirements, drug and alcohol testing policies;
- **Employee expectations –** Compensation - pay, hours of work, overtime, pay days, benefits, grievance procedures, equal employment opportunity, sexual harassment, non-discrimination, policy against retaliation, harassment complaint and investigation procedure;
- **Administrative issues –** Changes to the handbook and disclaimers.

The following checklist includes some of the major topics that you may wish to address in an employee handbook or policy manual. It is not intended to be an exhaustive list but rather, consider it to be a starting point:

- Employment at Will Statement and Disclaimer;
- Notice of Employer's Right to Unilaterally Change Handbook;
- Non-discrimination and Equal Employment Opportunity Policy;
- Policy prohibiting retaliation;
- Policy against sexual harassment and acknowledgment form;
- Introductory or training period (as opposed to "probationary period");
- Drug and Alcohol Policy;
- Smoking Policy;
- House rules (i.e., company credit cards, expense accounts, parking, weather emergencies, behavior by employees when representing the company "off site");
- Grievances and complaints;
- Employment of relatives/nepotism policy;
- Leaves of absence;
- Conflict of Interest and Confidentiality;
- Personnel and Employee Files;
- Accidents and Safety;
- Reference Inquiries;
- Weapons Policy; Acknowledgment, Release and Consent form;
- Zero ToleranceWorkplace Violence Policy;
- Information considered confidential;
- Personal telephone calls;
- Telephone monitoring policy;
- Voice mail, e-mail, the Internet;
- Pay days, hours of work, overtime;
- Employee evaluations;
- Discipline, Rules of Conduct, Termination;
- Deductions from pay;
- Absenteeism/Attendance policy;
- Neutral leave of absence policy (duration, procedures for requesting leave, obligations during leave, status of compensation and benefits, return to work);
- Employee benefits;
- Holidays;
- Vacations (administration, eligibility, accrual, pay in lieu, pay upon termination);
- Sick leave (eligibility, pay in lieu, use, pay upon termination, procedures for requesting such leave, FMLA if applicable);
- Other Leaves of Absence (voting, personal, military, funeral, jury duty);
- Form Acknowledging Receipt of Employee Policy Handbook.

Observations from the Dais

An unemployment compensation case was recently brought to my attention that I would like to share with you. In it, the employer terminated the claimant for trading stocks across the Internet while on company time and using company equipment. At the hearing, the claimant admitted he had regularly traded stocks at work despite the employer's repeated warnings. Despite these facts, the Commission awarded the claimant benefits and charged the employer's account.

Why did this employer lose? She made two critical errors. First, she practiced inconsistent discipline. She admitted that she would warn the claimant one week that his behavior was unacceptable and that his job was in jeopardy, and then turn around the very next week and give him a raise. In fact, she had followed this exact pattern of alternating warnings and raises over a course of several years, despite the fact that his behavior never improved. Second, she picked a very poor final incident. Instead of waiting for an incident involving a stock transaction, she became exasperated and fired him for a completely unrelated incident involving an absence due to illness. At the TWC hearing, the testimony degenerated into a one-on-one swearing match, which the employer lost, over whether he was truly ill and whether company policy required him to provide a doctor's note upon his return.

What moral can employers learn from this case? First, sending mixed signals when disciplining employees is a major mistake. Following a warning with a reward completely negates the warning's effectiveness, so don't do it unless the employee's behavior has substantially improved. Second, pick the final incident carefully. It should involve conduct for which the claimant has been specifically warned in the past and you should be prepared to provide firsthand witnesses to the incident. In this case, the claimant had never been warned about excessive absenteeism. Finally, if your company has a progressive disciplinary procedure, follow it. Giving countless warnings past those required by the policy essentially condones the misconduct and robs the policy of meaning.

The bottom line is that employers who learn to discipline and terminate wayward employees in accordance with an effective disciplinary policy substantially improve their chances of winning an unemployment claim.

Commissioner Representing Employers

BUSINESS BRIEFS Spring 2000

Until the fall of 1999, the EEOC refused to defend undocumented foreign workers who were allegedly discriminated against by their employers. Then, for the first time in October 1999, the EEOC declared that undocumented foreign workers are entitled to the same remedies as any other workers who are discriminated against in violation of federal anti-discrimination laws. Now, the agency is about to put this new policy protecting undocumented workers to the test: the EEOC has announced that it will sue on behalf of three illegal immigrants in Chicago who filed charges of discrimination against their former supervisor.

Three women who worked at Algroup Wheaton, Inc, a plastics plant located in Des Plaines, Illinois, alleged that after they accused their supervisor of inappropriate conduct such as unwelcome touching, they were fired. The employer argued that the women never complained about the alleged supervisory misconduct, and that they were actually fired because it was learned that they were in the U.S. illegally.

The new guidelines provide that illegal aliens who were denied employment or fired are entitled to reinstatement as well as reasonable damages and back pay unless such an award would interfere with federal immigration laws. How a court decides to sift through these seemingly contradictory laws remains to be seen. This case could have implications for employers nationwide who illegally employ a segment of the workforce once ignored by anti-discrimination laws. Stay tuned.

According to the Department of Labor's Bureau of Labor Statistics, there were 16.5 million union members nationwide in 1999, an increase of 265,000 workers from the preceding year. Labor leaders point out that this is the largest increase in union membership in more than 20 years, saying they reversed a downhill trend by appealing to white collar workers.

However, while the nation added about 2.7 million jobs in 1999, the total percentage of workers carrying union cards remained stable at 13.9%. Here in Texas, union membership rose to a total of about 520,000 workers, an increase of approximately 17,000 members. About 6% of the state's total workforce was unionized in 1999, a slight increase from 5.9% in 1998. Texas has historically had a much lower percentage of workers unionized than other states.

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UNEMPLOYMENT INSURANCE LAW UPDATE: TEMPORARY HELP INDUSTRY

The growth of the temporary agency industry has been strong in the last few years. More and more employers seem to be taking advantage of these kinds of arrangements. Being taken out of the picture in unemployment insurance claims is one reason, among many, that employers like using temporary workers. However, each unemployment claim that an employer avoids is potentially passed on to the temporary agency that provided that employee. For this reason, it is critical for the temporary industry to understand how unemployment insurance law applies to their unique situation.

Before we can update you on some new precedents, a little history is in order. The Texas Labor Code treats the temp industry differently than most other employers. Legislation passed a few years ago places special requirements on temp industry employers. Section 207.045 (h) requires temporary industry employers to (1) advise their employees that they must contact the temporary help firm on completion of assignments and (2) that unemployment benefits may be denied if the temporary employee fails to do so. If the temporary help firm follows these two requirements and the employee fails to contact the temporary help for future assignments, the work separation is viewed as a voluntary quit without good cause. That means that if the employee files a claim for unemployment their benefits will be denied. On the other hand, if an employer does not follow these two requirements, the employee's failure to report back for a new assignment constitutes a discharge for reasons other than misconduct. This means any unemployment claim filed will be paid.

Over the years, the Texas Workforce Commission (TWC) has applied Section 207.045 (h) to hundreds, if not thousands, of claims. TWC has adopted precedents to apply to some of the many different fact scenarios that can arise when an employee finishes an assignment. One of the biggest problems for the temporary industry has been to prove that a given employee failed to report for reassignment, even though the proper statutory advisories were given. Many claimants for unemployment benefits contend that they called the temporary agency and spoke with a representative of the company. Sometimes that representative does not testify or provide information to TWC to rebut the claimant's allegations.

A recent precedent decided by the Commission gives the temporary help industry one way to show that an employee did not report back for further assignment. The case is digested in the Appeals Policy and Precedent Manual, VL 135.05, Appeal No. 99-011197-10-111299. The Appeals Policy and Precedent Manual is an incredibly important body of law for any employer that regularly contests unemployment insurance claims. The Manual can be viewed online at TWC's web site: http://www.twc.state.tx.us.

In the new precedent case the claimant was employed by a temporary help firm. The claimant was aware that the employer's policy required employees to make themselves available for reassignment within the 24 hour period immediately following the close of the last involved temporary position. The employer's policy indicated that availability for reassignment was to be accomplished via the employee signing in on the employer's availability logbook. While the claimant went to the employer's office within 24 hours of having been informed of the close of his last assignment, the claimant did not sign the employer's availability logbook at that time and thus was not considered to be available by the employer. THE COMMISSION HELD: The claimant was voluntarily separated from his last position of employment without good work-connected cause. The employer's requirement that employees make themselves available by signing in the logbook constituted a reasonably promulgated policy and the claimant's failure to follow that policy constituted a failure on the claimant's part to make himself effectively available for reassignment as per Section 207.045(h) of the Texas Labor Code. The claimant was disqualified from the receipt of benefits.

The Employer Commissioner's Office at TWC hopes this new case will prove useful to the temporary help industry. We encourage the industry to learn the law and to vigorously challenge unwarranted unemployment insurance claims.

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WAGE DEDUCTIONS: COMPLYING WITH THE TEXAS PAYDAY LAW

This edition of Texas Business Today focuses on the subject of policies. Since nothing gets an employer's attention more quickly than the bottom line, payroll deductions should be a critical policy for every employer. As some of you know, the Texas Payday Law strictly regulates why, when and how much money can be deducted from an employee's wages. Unfortunately, many employers don't learn about the legal requirements associated with payroll deductions until it's too late. Although the Texas Payday Law and the Texas Workforce Commission (TWC) Administrative Rules interpreting this subject have been in existence for several years, some employers are still losing claims that have the potential to be won. Therefore, in addition to just writing about the subject, this article will provide some actual deduction authorization forms that have withstood TWC's scrutiny in the wage claim process or forms to which TWC staff gave tentative approval.

A short magazine article cannot substitute for the knowledge employers will gain from actually familiarizing themselves with the law. Therefore, the following source material citations are provided for you. The Texas Payday Law is located in Chapter 61 of The Texas Labor Code. The Texas Payday Rules are found in the Texas Administrative Code at 40 TAC 821. Copies of both laws, as well as other Labor Law information, can be viewed on TWC's web site at www.twc.state.tx.us.

The Texas Payday Law states that an employer may not withhold or divert any part of an employee's wages unless the employer:

1. is ordered to do so by a court of competent jurisdiction;
2. is authorized to do so by state or federal law; or
3. has written authorization from the employee to deduct part of the wages for a lawful purpose.

WRITTEN PERMISSION

The withholding of child support, student loan repayments, federal taxes, etc. is governed by the first two elements noted above. As you may have suspected, the vast majority of deductions will fall under the third prong that requires you to get written permission from the employee. Here are a few examples of things that require written permission before they can be deducted: accidental wage overpayments, loans and advances, insurance premiums, uniform cleaning costs, lost or non-returned company property (cell phones, pagers, lap top computers, keys, uniforms, etc), absences of salaried employees that are not covered by accrued leave balances, drug screens and other costs associated with background investigations, costs of new locks if an employee fails to return door keys, credit card service charges from an employee's tips, penalties for negligent work performance. These examples merely scratch the surface of the type of things that employers often end up wanting to deduct from an employee's pay.

LAWFUL PURPOSE

In addition to obtaining written permission, the law requires that the deduction be made for a lawful purpose. Fortunately the Texas Payday Rules define lawful purpose as one that "is authorized, sanctioned, or not forbidden, by law". The phrase "or not forbidden" means that almost anything can be deducted if you have the employee's written permission because very few

WAGE DEDUCTIONS continued

things are forbidden by law from being deducted. One more common restriction on deductions has its origin in federal law. The federal regulations interpreting the Fair Labor Standards Act (FLSA) allow employers to fine or penalize exempt salaried employees only if a major safety rule has been violated. Therefore, making a deduction contrary to this restriction would be an example of a deduction that is questionable under the law, or one that at least affects the exempt status of an employee. Of course, deductions for gambling, purchase of illegal drugs and other such items would be prohibited. Hopefully none of the employers reading this article will ever have questions about such exotic deductions!

While the lawful purpose phrase was liberally interpreted in the Texas Payday Rules, other Rule provisions are not so friendly to employers. For instance, the Rules provide that written authorizations must:

1. be specific as to the lawful purpose for which the employee has accepted the responsibility or liability;
2. be sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and
3. give a clear indication that the deduction is to be withheld from wages.

REASONABLE EXPECTATION

Although most employers do pretty well on points one and three, a lot of them fail to give their employees a reasonable expectation of the amount of wages that will be withheld from pay. For example, merely stating that an employee "will be responsible for any damage they cause to a company vehicle" does not clearly convey a reasonable expectation to the employee of the specific amount that will be deducted. A better way to phrase such a deduction would be to state that the employee will be responsible for damages up to a certain amount ($5000 for example) and that the employee agrees to allow the employer to deduct for this purpose.

The placement of deduction authorization language in the body of a policy handbook or manual also causes problems for some employers because the Texas Payday Rules have special requirements for these circumstances. The Rules state that if an employer uses a policy manual for wage deduction authorization purposes, the employee's signed acknowledgment of receipt of the company manual can be authorization to withhold wages only if the acknowledgment includes language that states that the employee agrees to abide by or be bound to the authorization for deduction. This means that burying deduction language in the middle of your lengthy company policy won't bind an employee unless two things occur. First, language at the signature line at the end of the policy handbook must specifically refer back to the deduction language found in the handbook. Second, the language above the signature line must state that the employee agrees to be bound by the authorization for deduction.

The easiest way to avoid all this confusion is to simply make the employees sign a separate deduction authorization form that is not part of the standard company policy. Not only does it get around the special deduction rules directed at policy manuals, but it serves to put employees on clear notice that they will be held responsible for certain items.

EXAMPLES OF DEDUCTION FORMS

FIRST FORM:

I, _______________, warrant that I agree and understand that my employer may deduct wages from my paychecks for the following purposes and in the following amounts:

First Purpose: ________________ Amount: $_________
Second Purpose: ______________ Amount: $_________
Third Purpose: ________________Amount:$_________

I agree to and authorize my employer to deduct money from my wages for the above outlined circumstances.

Employee
Signature Line:______________________Date: _______

SECOND FORM:

1. All uniforms will be purchased through Employer from Joe's Uniform Company.
2. All uniforms will cost what the purchase order states, plus taxes.
3. All uniforms that have not been paid for in full will be paid for with a deduction from your paycheck upon departure from Employer.

EMPLOYER HAS THE PERMISSION TO DEDUCT
Employee
Signature Line:______________________Date: _______

FOURTH FORM:

If you should decide to discontinue your service to Employer while you are driving, let your dispatcher know so that you may be routed to the terminal in an orderly manner. Failure to do so will result in your being charged $.75 (seventy-five cents) per mile for off-route or unauthorized miles.

I, ________________________, have read and understand the preceding employment agreement.

Further, I have read and understood the schedule of fines and penalties, and understand that, if applicable, those fines will be deducted from my paycheck. I understand that fines, penalties, and cash advances will be deducted from my paycheck, and give my unconditional permission for their collection in this manner.

Employee
Signature Line: ___________________Date: ________

THE EFFECT OF MINIMUM WAGE ON AUTHORIZED DEDUCTIONS

Although the Texas Payday Law allows employers to make deductions for lawful purposes that have been authorized in writing by employees, the federal FLSA places restrictions on those deductions. The FLSA requires almost all employers to pay employees at least the federal minimum wage. The current minimum wage is $5.15 per hour. Therefore, when making most deductions, a wise employer will not deduct an employee's wages below the federal minimum wage. In reality, this restriction most often affects employers who are already paying at or near minimum wage or those employers who try to recoup non-returned property from the final paycheck at the time of an employee's termination or resignation. While not exhaustive, the following is a list of deductions that are not affected by the minimum wage prohibitions:

1. Loans and Advances
2. Voluntary Wage Assignments (e.g. employee contributions to a retirement or health plan)
3. Employee Payroll Taxes
4. Court Ordered Garnishments, etc. (e.g., child support and student loans).

CONCLUSION

It is well worth an employer's time to develop written deduction authorization forms. Experience has taught that very few employees will sign a form at the time of their job separation. Getting voluntary signatures from employees on these forms is easiest at the time of hire, before the need for a deduction ever arises. Nothing makes an employer angrier than being powerless to recoup money or property from an unscrupulous employee. Don't get caught in this dilemma. Draft your payroll deduction authorization form today.

Aaron Haecker
Attorney at Law

CHRONIC ABSENTEEISM: IS THERE A CURE?

As Texas' hot economy continues to drive the unemployment rate down, businesses are employing more workers that they would not have even considered hiring ten years earlier. Judging from the calls Commissioner Lehman's office receives, the single largest personnel complaint employers have is not that the employees are unqualified, but rather that some employees are not willing to show up for work at all. The prevailing sentiment of today's employer is "Send me an employee who is dependable and willing to work, and I will train them." On the other hand, at least some of today's employees seem to operate under the philosophy that "I'll show up when I'm up to it, and if that's not sufficient, plenty of other employers are desperate for workers."

What is a business to do? What kinds of policies can you adopt and enforce that are legal, will vigorously encourage your employees to attend work, and provide a strong foundation to support a termination if you ultimately must fire an employee for excessive absenteeism?

There are two primary types of formal attendance policies in use today. The first is the "No Fault" attendance policy, which is usually accompanied by some form of point system. Under this system, a company measures incidents, as opposed to days, of absence. A tardiness will usually count as one-half point, while an absence will count as a full point. Any combination of tardies and absences adding up to certain levels within a set period will result in an appropriate disciplinary action being taken. For example, some companies provide a verbal warning at five points, a written warning at seven, a final written warning at nine, and then terminate the employee after ten points. At each level of discipline, all of the points will have accumulated within the previous twelve rolling calendar months.

As under no-fault policies, businesses usually allow warnings under a fault-based system to "time out" after certain periods of time have passed.

The second form of attendance policy is the fault- or excuse-based system. Under this system, the employer only counts unexcused absences, i.e., those that have not been either authorized by management in advance, or those where the employee cannot provide a compelling or substantial reason for the absence or tardiness. After predetermined numbers of unexcused tardies and absences, the employer will progressively warn, then write up, and finally terminate the employee. As under no-fault policies, businesses usually allow warnings under a fault-based system to "time out" after certain periods of time have passed.

Many businesses do not have a formal absenteeism policy at all, and no law requires one. These companies handle attendance problems on a case-by-case basis, which is an acceptable approach. However, it does have two major drawbacks. First, a formal system of progressive discipline makes it easy to establish that an employee knew his job was in jeopardy. An ad hoc approach makes it far more likely that an employee will claim that the termination was a surprise. Second, a formal system helps to ensure all employees are treated fairly and equally. An ad hoc approach lends itself to preferential treatment for favored employees, which can be very difficult to defend in a discrimination complaint.

In concept, developing and implementing an attendance and absenteeism policy is simple. In practice, however, employers must pay constant attention to the interplay between their policies and state and federal laws. Statutes such as the Family and Medical Leave Act, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Texas Workers' Compensation Act and the Texas Unemployment Compensation Act combine to make the decision to terminate an employee who is chronically absent due to illness an inherently risky call.

For example, the Family and Medical Leave Act (FMLA), which applies to all public employers and to those private employers with 50 or more employees, requires employers to provide employees with up to 12 weeks of unpaid leave for the birth or adoption of a child, for the employee's serious health condition, or for providing care to an immediate family member with a serious health condition. Covered employers who are considering terminating an employee for chronic absenteeism should first evaluate whether the absences are caused by one of the FMLA-protected conditions. The birth and adoption conditions are usually fairly easy to recognize, but a "serious health condition" is more difficult to distinguish. In fact, it may be easier to identify by describing what it does not cover. It does not include routine physical exams or minor illnesses where the individual

CHRONIC ABSENTEEISM continued

self-treats his condition with over-the-counter medications and does not seek the advice of a health care provider. There are some conditions where an employee who does seek medical condition is not protected by the FMLA, but as a practical matter, covered employers should assume that these employees are protected until the evidence shows otherwise. The first step in documenting a serious health condition is to ask the employee to provide a completed "Certification of Health Care Provider." This certificate, Form WH-380, is available for downloading from the U.S. Department of Labor's web site at http://www.dol.gov. If the provider indicates on the form that the illness was not a serious health condition, the absence may not be protected by the FMLA; however, the employer must also consider whether the employee is protected by other statutes.

The Americans with Disabilities Act (ADA), which applies to all state and local government employers and to private employers with 15 or more employees, prohibits discrimination against qualified individuals with disabilities. A disability is a physical or mental impairment that substantially limits one or more major life activities. The ADA also protects those who have a record of a disability, those regarded as being disabled, and those associated with the disabled. Some disabilities are obvious, such as blindness, deafness, or the loss of a limb, but some are not. For example, a disease such as diabetes will be a protected condition under the ADA in its later stages, but in its early stages, when it is controlled through diet and/or insulin shots, it is not substantially limiting any major life activities and therefore is not a covered condition.

Believe it or not, employees are not required to specifically request an accommodation under the ADA. If an employee requests assistance and has previously made references to an ADA-protected condition, even though the condition is not readily apparent, a court can hold that the business was on notice and should have conducted an inquiry into the potential for a reasonable accommodation before disciplining or terminating the employee.

An employer can require a current employee to consent to a medical examination in order to verify that the condition is ADA-protected and that an accommodation is necessary, but only when the condition is not obvious, and the employer must be able to show that the examination is job-related and necessary to conduct the business. For example, an employer could permissibly require a warehouseman with a bad back to undergo an examination to determine the extent he can lift heavy objects because a bad back is not obvious and would directly affect the employee's ability to perform his job. However, an employer could not require a bookkeeper who has lost a leg to undergo a similar examination, because the disability is obvious and would have no effect on the essential functions of her position. If the employer decides to require an examination, he should remember to limit it to confirming that a disability exists and discerning how the disability affects the employee's ability to perform the job. Do not request detailed information about the employee's medical situation in general. Providing a current job description, with a list of the position's essential functions, to the employee to take to the health care provider can assist the provider in assessing the disability's effects on the employee's ability to perform the job. Once the employee returns, sit down with that individual to have a good faith, open discussion as to whether a disability exists, whether an accommodation is necessary, and what the accommodation might be.

Once the employee returns, sit down with that individual to have a good faith, open discussion as to whether a disability exists, whether an accommodation is necessary, and what the accommodation might be.

In the context of absenteeism and tardiness, a reasonable accommodation under the ADA often includes allowing employees time off for medical treatments and for recuperation. However, an employer can require that employees work with the health care provider in attempting to schedule appointments that do not impose an undue hardship on the business. Employers can also require advance notice of scheduled appointments in order to make arrangements to cover for the employee's absence.

The Pregnancy Discrimination Act (PDA), which applies to all government employers and to private employers with 15 or more employees, prohibits discrimination on the basis of childbirth, pregnancy or related medical conditions. It does not require businesses to provide any specific amount of leave to a pregnant employee, nor does it require a business to provide any other sort of

CHRONIC ABSENTEEISM continued

preference. Employers merely cannot treat pregnancy any differently than they would treat any other temporary disability. One technique for recognizing PDA requirements is to substitute the term "broken leg" for "pregnancy." Any amount of leave or other accommodation the business has provided in the past, or is willing to provide in the near future, to a similarly situated employee with a broken leg, should also be offered to the pregnant employee.

The Texas Workers' Compensation Act (TWCA) provides another area of concern for employers. Section 451 of the TWCA prohibits employers from discriminating against employees who have filed, or otherwise participated in, a workers' compensation claim. This prohibition even protects employees who have been injured on the job but have not yet filed a claim. This area of the law so complicated, and the risk of litigation so high, that employers considering the termination of a frequently absent employee who has filed a workers' comp claim should review the personnel file with private legal counsel before taking that final step.

Which brings us to the Texas Unemployment Compensation Act (TUCA). The TUCA does not, in and of itself, prohibit the termination of any employee for any reason. However, if the business fires an employee who later files a claim for unemployment benefits, the Texas Workforce Commission will grant the benefits and charge the employer's account unless the employer demonstrates that it fired the employee for misconduct. The TUCA does provide a special exception in the case of a separation caused by a medically verifiable illness of the employee or the employee's minor child. In that situation, the employer's account should not be charged, even though the former employee will be entitled to benefits. However, in order to gain this "medical chargeback protection," the employer should be prepared to demonstrate that the absences or medical restrictions were so substantial that the replacement of the employee became a business necessity. There are no precedent cases establishing the minimum length of time an employee must be out before the employer becomes eligible for this protection, but absences of less than two or three weeks rarely meet the standard.

Most businesses are very tolerant of absences due to genuine illness. However, when an employer notices that 75% of an employee's absences are occurring on Mondays, Fridays, and the first day of deer season, suspicions begin to rise. Let's assume for the moment that the employer has carefully reviewed the laws described above and come to the following conclusions:

- The employee is not protected by the FMLA because:
  - the employer is a private business with fewer than 50 employees, or
  - the employee has not yet worked 12 months and 1250 hours, or
  - the employee is not taking time off for one of the protected reasons, i.e., birth or adoption of a child, the serious health condition of the employee, or the serious health condition of a member of the immediate family.
- The employee is not protected by the ADA because:
  - the employer is a private business with fewer than 15 employees, or
  - the employee does not fit into a protected class because he does not have a physical or mental impairment that substantially limits one or more major life activities, he has no record of such an impairment, the employer does not otherwise regard the employee as impaired, and the employee is not associated with the disabled.
- The employee is not protected by the PDA because:
  - the employer is a private business with fewer than 15 employees, or
  - the employee is not pregnant or suffering from medical problems related to pregnancy.
- The employee is not protected by the TWCA because:
  - the employer is a non-subscriber to workers' compensation, or
  - the employee has not alleged any on-the-job injuries or become involved in others' workers' compensation claims.

Assuming an employer finds all the above to be true, he is in a much better position to directly address the issue. At this point, management can sit down with the employee in a formal counseling session and point out that his absenteeism has become excessive and that his pattern of taking off Mondays and Fridays has raised concerns that he is using sick leave for "mental health" days instead of legitimate illnesses. The employer should inform the employee that, in the future, the employee must provide a note from a health care provider upon his return substantiating that each and every day of absence was due to the illness of the employee or his minor child. All absences for personal reasons must be submitted for approval at least one week in advance,

CHRONIC ABSENTEEISM continued

and management reserves the right to deny those requests. The business should also take this opportunity to reinforce other aspects of its attendance policy, such as call-in requirements. Finally, management should specifically warn the employee that his job is in danger, and that failure to comply with these requirements can lead to termination. All of these items should be listed in a written warning to the employee.

Finally comes the most difficult part of the termination process: selecting a defensible final incident. It should involve a violation of policy the employee was specifically warned about in the past, it must involve conduct that was within the employee's control, and the employer should be able to prove up the incident, if necessary, through the testimony of firsthand witnesses. These requirements point up the primary weakness of attendance policies, and no-fault attendance policies in particular: even though a properly administered policy will adequately put an employee on notice that his job is in jeopardy, if the employee is ultimately fired for a legitimate illness, he will be eligible for unemployment benefits. True illness is never misconduct under the unemployment compensation system because it is not within the employee's control. This is true even all the employee's prior absences were for completely frivolous reasons. The Workforce Commission almost always focuses on the last incident before the discharge, and if the employee has brought in a doctor's note verifying the illness, it's not time to terminate the employee. However, if the employee claims illness but does not bring in the required note, you are not terminating the employee for the illness, but rather for failing to comply with the documentation requirement.

Reprimanding and terminating employees who are chronically absent due to minor illnesses can be a very demanding task. However, an employer who adopts a formal attendance policy, applies progressive discipline, and pays attention to the relevant laws will impress upon his employees the importance of showing up for work on a dependable basis. In the case of workers who do not get the message, these practices will reduce the employer's risk of lawsuits and substantially increase the odds of winning unemployment claims.

Mark Fenner
Attorney at Law

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At-Will Employment Statements and Your Employee Handbook

While the at-will doctrine is still alive in Texas, it is constantly under attack by both courts and legislatures around the country. Even in Texas, courts will carefully examine an employee handbook to decide whether a fired employee had an employment contract for a specific period of time, meaning that they could only be fired for cause. It is critical that any employee policy handbook contains a clear and unequivocal statement that all employment with the company is at will, that the policy handbook does not create a contract for employment, and that the employer retains the right to unilaterally withdraw or amend the handbook at any time, with or without notice. All employees should be asked to sign a statement acknowledging receipt of the handbook.

A. ***Sample At-Will Statement and Disclaimer in Applications for Employment*:**

I understand that nothing in this application, or in any prior or subsequent written or oral statement, creates a contract of employment or any rights in the nature of a contract. I agree and understand that if I am hired by the XYZ Corporation (XYZ), my employment will be at-will, for an indefinite period of time, and may be terminated at any time, with or without cause or notice, at the option of XYZ or myself. I understand that I have the right to end my employment at any time and that XYZ retains that same right. I also understand that no one has the authority to enter into any contract, agreement or modification of the foregoing unless such contract, agreement or modification is in writing and signed by the president of XYZ.

B. ***Sample At-Will Statement and Disclaimer in Employee Handbook*:**

THE POLICIES AND PROCEDURES SET FORTH IN THIS EMPLOYEE HANDBOOK ARE NOT A BINDING EMPLOYMENT CONTRACT. THIS HANDBOOK PROVIDES GENERAL GUIDELINES ONLY AND NONE OF ITS PROVISIONS ARE BINDING OR CONTRACTUAL IN NATURE. I UNDERSTAND THAT ALL EMPLOYMENT WITH XYZ IS "AT WILL," MEANING THAT MY EMPLOYMENT MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT NOTICE, FOR ANY REASON OR NO REASON, BY EITHER XYZ OR THE EMPLOYEE.

THIS HANDBOOK IS NOT A CONTRACT GUARANTEEING EMPLOYMENT FOR ANY SPECIFIC PERIOD OF TIME. WHILE WE CERTAINLY HOPE THAT YOUR EMPLOYMENT RELATIONSHIP WITH XYZ WILL BE SUCCESSFUL AND LONG TERM, EITHER XYZ OR THE EMPLOYEE MAY END THIS RELATIONSHIP AT ANY TIME, WITH OR WITHOUT CAUSE, NOTICE OR REASON. NO MANAGER, SUPERVISOR OR REPRESENTATIVE OTHER THAN XYZ'S PRESIDENT OR CHIEF OPERATING OFFICER HAS THE AUTHORITY TO ENTER INTO ANY AGREEMENT GUARANTEEING YOU EMPLOYMENT FOR ANY SPECIFIC PERIOD OF TIME OR TO MAKE ANY WRITTEN OR ORAL PROMISES, AGREEMENTS OR COMMITMENTS CONTRARY TO THIS POLICY. FURTHER, ANY EMPLOYMENT AGREEMENT ENTERED INTO BY THE PRESIDENT OR CHIEF OPERATING OFFICER WILL NOT BE ENFORCEABLE UNLESS IT IS IN WRITING.

THIS HANDBOOK REPLACES AND SUPERCEDES ALL EARLIER XYZ PERSONNEL PRACTICES, POLICIES AND GUIDELINES.

C. ***Sample Acknowledgement and Receipt of Employee Handbook Form:***

RECORD OF RECEIPT OF EMPLOYEE HANDBOOK

I (employee) acknowledge receiving the employee policy handbook. I CLEARLY UNDERSTAND THAT THIS POLICY HANDBOOK DOES NOT CREATE A CONTRACT FOR EMPLOYMENT WITH XYZ, AND THAT XYZ MAY CHANGE OR MODIFY THE POLICIES AND PROCEDURES FOUND IN THIS HANDBOOK AT ANY TIME.

EMPLOYEE
SIGNATURE______________________DATE______

Renée M. Miller
Attorney at Law

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