Texas Business Today

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Proposed Changes to FLSA Overtime Regulations Go Forward: An Update

On January 22, 2004, the U.S. Senate approved the fiscal 2004 omnibus spending bill by a vote of 65 to 28. The bill was then sent to President George W. Bush, and includes $11.5 billion in federal funding for the U.S. Department of Labor (DOL). The spending bill was delayed by an earlier Senate filibuster over funding for the DOL to finish its proposed revisions to the Fair Labor Standards Act (FLSA) Part 541 regulations on overtime exemptions for "white-collar" exempt employees, including executive, administrative, professional, outside sales, and computer software professional employees. The DOL is now able to finish its revisions to the federal regulations (29CFR Part 541) clarifying the overtime pay exemptions.

These proposed regulations were first published for comment in the Federal Register in March 2003. Over 80,000 public comments were received within the 90-day comment period. However, immediately after the end of the comment period and before the DOL could act, opponents launched an effective congressional and media lobbying campaign, which delayed the issuance of a final rule.

The campaign against the proposed regulations, including the misleading assertion that some eight million workers would lose their eligibility to be paid overtime, has muddied the water about just exactly what is being proposed.

A Review: What's Proposed?

The proposed regs would interpret Section 213(a)(1) and 213(a)(17) of the FLSA, and are accessible on DOL's website at http://www.dol.gov/esa/regs/fedreg/proposed/2003033101.htm. It is important for employers to have an idea of what the new regulations are so that they can prepare for changes in exemption classification practices. Following is a brief outline of the most notable modifications the new regulations would make.

1. Instead of the old salary test divided into "long" and "short" tests that differ between categories of exempt employees, DOL proposed just two "bright line" dividing points: $425 per week and $65,000 per year. (Under current rules, an employee earning only $155 a week can qualify as a "white collar" employee not entitled to overtime pay.) Here's how they would divide salaried employees up:
   - Below a weekly salary of $425, all employees not covered by industry-specific exemptions would be non-exempt and entitled to overtime pay for hours worked beyond 40 in a seven-day work week;
   - If an employee earns at least $425 per week ($22,100 per year), but less than $65,000 per year ($1,250 per week), the new duties tests will apply to determine whether the employee is exempt.
   - If the employee earns at least $65,000 per year and performs non-manual work, the employee is a "highly-compensated employee" and presumed to be exempt as long as they perform at least one exempt duty.

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2. The long-standing prohibition against partial-day deductions from salary would remain in effect under the proposed new regulations.
3. Simplified duties tests. It would be hard to argue that the current "duties test," which hasn't been updated in over 50 years, is not only confusing, it is completely outdated in today's workplaces. The objective of clarifying which job duties qualify for overtime pay is to help employers and workers determine overtime eligibility for employees whose status is currently unclear.

The proposed new regulations:

- Delete the old "long test" requirement that an employee perform exempt duties at least 80% of each workweek.
- Clarify the Executive Exemption – under the proposed new test, an exempt executive employee's primary duty is management of the enterprise or a major division thereof, supervision of two or more employees, and the authority to hire and fire.
- Clarify the Administrative Exemption – the exempt administrative employee must hold a "position of responsibility" (perform work of substantial importance or that requires a high level of skill or training) in areas that involve the employer's general business operations.
- Clarify the Professional Exemption– in place of the usual requirement of a four-year college degree or higher, an exempt professional employee's work-related experience (including job experience, military experience, and training at a technical school or community college) may be considered equivalent to a college degree, but the work performed must be office or non-manual in nature.
- For the latter two categories, "consistent exercise of discretion and independent judgment" would no longer be required.
- Computer software professionals – under the proposed regulations, the salary test would be either $425 per week, or else $27.63 per hour straight-time pay for all hours worked, and the duties test would remain identical to the test currently reflected in FLSA section 213(a)(17).
- Outside sales representatives – instead of the current rule that no more than 20% of the workweek be devoted to non-sales work, the proposed regulations require only that the employee's primary duty be sales-related work and that such work be customarily and regularly performed away from the employer's regular place or places of business.
- Disciplinary deductions – under current regulations, docking an exempt employee's salary in increments of less than one full week at a time is allowed only in case of violations of "safety rules of major significance." The proposed change would allow such docking in units of a full day at a time in the case of suspensions without pay for infractions of workplace conduct rules, which would put disciplinary deductions on par with deductions for absences caused by personal business (the "vacation" deduction) and medical-related absences in a company that has a sick leave pay policy (the "sick leave" deduction). The new regulations would allow deductions from the salary of exempt employees for full-day absences taken for disciplinary reasons, such as sexual harassment or workplace violence.
- Window of corrections – the current "window of corrections" rule has been criticized as murky and difficult for employers to understand, as well as subject to inconsistent application by courts. The proposed rule seeks to clarify that an employer does not lose the overtime exemption because of isolated incidents of improper pay deductions. Only if the evidence shows a pattern and practice of improper deductions in the case of employees in the same type of job under the same manager would the window of corrections be lost. The proposed regulations would create a "safe harbor" for employers that have a written policy prohibiting wrongful pay deductions, inform employees of that policy, and reimburse employees for any inadvertent illegal deductions. Such an employer would lose the window of corrections only if the evidence is clear that the company effectively ignored the supposedly beneficial policy.

It is important to keep in mind that as of the date this article was last updated (early April 2004), the proposed regulations changing the exempt employee classification standards had not yet been adopted. In the meantime, the old regulations continue to apply. In addition, employers should note that the basic principles applying to exempt employees continue to be important: the white collar exemptions are intended for the most important, highest ranking, and most

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highly skilled employees, the ones for whom it is generally impossible to standardize their work with respect to time, and the ones whose decisions substantially impact the company as a whole.

The DOL has posted an "Overview of Proposed Changes" on its website at http://www.dol.gov/_sec/media/speeches/541Handout.htm. The agency also has a very useful chart comparing the old exemption standards with the new proposed standards at: http://www.dol.gov/_sec/media/speeches/541_Side_By_Side.htm.

Now What?

First, observers expect that the final regulations may increase the "salary level test" from the minimum $425 per week (or $22,100 per year) to a slightly higher level. Such a change would increase the number of workers who are eligible to receive overtime pay and would refute the charge that the purpose of the regulations is to reduce the number of employees who are eligible to receive overtime pay.

Second, there will probably be further clarification of language under the "job duties test" – especially the new "position of responsibility" criterion.

Third, it's unknown whether the new "highly compensated employee" salary test of $65,000 will be modified. The DOL will probably provide further examples of circumstances and jobs that would continue to allow for overtime pay, even for these highly compensated workers.

When Can We Expect the Final Regulations to Become Effective?

The most frequently asked question is when employers can expect the new regs to go into effect. Barring a court-ordered stay, the new FLSA Part 541 overtime regulations will most likely have an effective date between 90 and 120 days after final promulgation of the rules.

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Dear Texas Employers,

As the Commissioner Representing Employers at the Texas Workforce Commission (TWC), I am writing this article for two reasons. First, to recognize the substantial contributions you make to this state. For your hard work, for the important role you play in growing our vibrant economy, and for your contributions to your communities, I thank you.

Second, I want to discuss how you can further help the TWC control the cost of unemployment insurance taxes assessed to your businesses.

According to audit results recently released by the federal Department of Labor, nationally, the Unemployment Insurance system erroneously pays billions of dollars to claimants who do not qualify to receive benefits for various reasons. In 2002, these overpayments amounted to $3.7 Billion, or nine percent of the total $41 Billion paid to claimants nationwide.

In Texas alone, employers pay over $43 Million every year for unrecoverable overpayments that arise when decisions that are initially made in favor of UI claimants are later reversed. Those claimants can collect benefits for weeks, or even months, pending the outcome of employers' appeals. By the time a hearing officer reverses the decision, the benefits have long been spent. Although my office has aggressively pursued this issue for a number of years, and we work hard to collect those overpayments from the claimants, we want to improve our ability to prevent the overpayments from being created in the first place. It is obvious that we must do better, and this is where you can help.

Many employers (and their service agents) have adopted the strategy of presenting little or no information during the initial claims investigation. This may appear to reduce short-term costs, and in some cases, the claimants' own admissions result in disqualification. However, the strategy also risks long term costs not only for individual businesses, but also to the state's unemployment insurance trust fund. Employers that lose otherwise winnable claims at the initial level must appeal in order to protect their interests. This requires arranging for documentation, coordinating witnesses and setting aside time to participate in the hearing. It also means that the claimant is successfully collecting unemployment benefits pending the outcome of the hearing. These are benefits that the Commission may or may not be able to recoup at a later date.

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A far better strategy would be for employers to vigorously protest all claims as early in the process as possible. Both claims examiners and hearing officers rely heavily on the statements of witnesses, and a witness statement is always stronger and more credible the closer in time it is made to the relevant incidents. That is especially true when a disputed work separation is involved. Memories fade, witnesses may leave the company, and appeal hearings are often held six to 10 weeks after the unemployment claim is filed. Making your witnesses available to claims examiners during the initial investigation helps you by creating a record of the events while memories are fresh. You also increase your chances of winning a disputed claim by providing as much information as possible to the TWC claims examiner as soon as possible during the claims process.

Additionally, please take steps to protect your appeal rights by making some response to every unemployment claim notice, even those in which you know the claimant was laid off due to a lack of work. For example, respond immediately with: "We are currently examining this claim and may be providing more information shortly. Please preserve our appeal rights." Even if you ultimately decide not to dispute the work separation, it is important to preserve appeal rights in order to retain the ability to contest other issues. Failing to respond causes the employer to lose all rights in connection with the claim. For example, if you fail to respond and later learn that the individual is not looking for work, has refused an offer of suitable work, or is unavailable due to medical reasons, you have no appeal rights and will not be able to effectively contest the issue.

The bottom line: Respond to every claim notice and preserve your appeal rights.

All employers benefit from controlling overpayments by having appropriate disqualifications imposed as early as possible in the claims process. Although it is true that overpayments cannot be charged directly to any one of your individual tax accounts, the state's employers ultimately bear the cost of all unrecoverable overpayments. In fact, 2004's minimum tax rate of 0.67% is more than double 2002's minimum rate of 0.30%. Participating fully in the claims investigation is the best way to bring these costs under control for all employers.

As always, it is a privilege to represent you here at the agency. Working together we can continue to build an employer-driven workforce system in Texas. If my staff or I can be of assistance, please call my office at 512-463-2826 or 800-832-9394 (toll free in Texas).

Sincerely,

Ron Lehman
Commissioner Representing Employers

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Small Business Administrator Commends Action taken to Extend Small Business Job Creation Program

U.S. Small Business Administrator Hector V. Barreto recently praised action taken to extend reauthorization for one of the SBA's most important job creation programs, the 504 Loan Program. The House and Senate passed the legislation during the second week of March, and President George W. Bush signed it into law on March 15, 2004.

According to Barreto, "Thousands of small business owners depend on the 504 Loan Program to help them expand their businesses and create good new jobs. These loans go to companies that are leading the way in our economic recovery. They are buying new technology, new office space, and new property. They are creating good jobs across America."

The 504 Loan Program is designed to be a job creator – it exists to help small businesses expand and create full time, permanent jobs in their communities. The 504 program provides long-term, fixed-rate financing to small businesses to acquire real estate, machinery, or equipment for expansion or modernization. The loans are delivered through Certified Development Companies, which are private, nonprofit organizations dedicated to helping businesses grow and thrive in their local communities.

The 504 program operates with no appropriated dollars and at no cost to the taxpayer, yet in fiscal year 2003 supported nearly $8 billion in project financing; and over the

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life of the program, it has created approximately one million jobs. The 504 Loan Program requires statutory authority to charge the fees to cover the cost of the program. In other SBA news –

SBA Proposes Legislation to add $3 Billion to 7(a) Loan Program

The U.S. Small Business Administration recently announced a new legislative proposal that is expected to add at least $3 billion in lending authority to the 7(a) loan program this year. If enacted, the bill would allow the agency to increase lending authority by more than 30%, providing money for thousands more small loans in fiscal year 2004. The bill would also remove the current lending cap of $750,000 and allow loans up to $2 million.

By expanding the SBA Express program, which allows lenders to apply for 7(a) loans using their own forms and processes instead of lengthy and bureaucratic government forms, the entire 7(a) program would move to a lower guaranty rate of 50%. Based on 2003 numbers, this change could have resulted in more than 22,000 additional loans to America's entrepreneurs. If enacted for fiscal 2004, the lower guaranty rate and increased number of loans could provide capital to create as many as 500,000 new jobs.

For more information, access the House Committee on Small Business at www.house.gov/smbiz. The Senate Committee on Small Business and Entrepreneurship website can be accessed at http://www.sbc/senate/gov. For additional information about all of the SBA's programs for small businesses, visit the SBA's website at www.sba.gov.

National Science Board Sounds Alarm Bell for Science and Engineering Workforce

The National Science Board's (NSB) recently completed three-year study of the nation's science and engineering (S&E) workforce not only contains troubling news, it also makes an urgent call to recognize and counter disturbing demographic projections, trends and global competition. *"The Science and Engineering Workforce: Realizing America's Potential"* concludes:

- "Global competition for S&E talent is intensifying, such that the United States may not be able to rely on the international S&E labor market to fulfill unmet skill needs; and
- The number of native-born S&E graduates entering the workforce is likely to decline unless the Nation intervenes to improve success in educating S&E students from all demographic groups, especially those that have been underrepresented in S&E careers."

Science and technology are widely recognized to provide the cornerstone of economic growth in the U.S. and will continue to do so in the future. According to the National Science Foundation's *Science & Engineering Indicators* – 2002, the long-term projected growth rate for S&E occupations is four times that of than non-S&E occupations. However, in spite of these projections, the number of S&E degrees awarded to U.S. born graduates has declined 1.1% since 1985. If biological sciences are excluded, the number of native-born S&E baccalaureate degrees awarded has fallen an alarming 18.6%.

According to the NSB report, the U.S. economy grew increasingly dependent on foreign-born engineers and scientists during the 1990's: "for all degree levels, the share of U.S. S&E occupations filled by scientists and engineers who were born abroad increased from 14 to 22 percent" between 1990 and 2000. For doctoral degrees, the increase was even greater, rising from 24% in 1990 to 38% 10 years later.

As the economies flourish in nations that have traditionally exported many of their brightest minds to the U.S. for education and careers, and as American corporations expand their outsourcing to research and development activities, the chances of foreign S&E graduates coming to school in the United States or remaining after graduation diminishes.

The NSB calls for the federal government and its agencies to "step forward to ensure the adequacy of the U.S. science

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and engineering workforce. All stakeholders must mobilize and initiate efforts that increase the number of U.S. citizens pursuing science and engineering studies and careers." *The Science and Engineering Workforce: Realizing America's Potential* is available at http://www.nsg.gov/nsb/documents/2003/nsb0369/start.htm.

Congress Reauthorizes Fair Credit Reporting Act (FCRA)

President Bush signed legislation extending the FCRA at the end of the last session of Congress. The bill includes language that would mitigate the adverse human resources consequences of a 1999 Federal Trade Commission opinion letter that hindered employers when they investigated alleged misconduct in the workplace. The FTC's interpretation in 1999 was that if outside law firms or agencies were used to help conduct a workplace investigation into alleged employee misconduct (for example, sexual harassment), the FCRA required the employer to provide advance notice and obtain the consent of the worker being investigated.

The FTC's earlier interpretation presented a dilemma for employers: on the one hand, they risked losing their affirmative defenses for conducting workplace investigations under employment discrimination laws as emphasized by the United States Supreme Court in several landmark cases. On the other, they risked the threat of punitive damages and serious liability under the FCRA

Under the new FCRA amendments, employers have been exempted from the advance notice and disclosure requirements when investigating alleged workplace misconduct. However, if adverse action is taken against a worker based in whole or in part on such an investigation, an employer must provide the employee with a summary of the investigative report, but not the sources of information the report is based on.

Federal Tax Cut Helps Small Businesses with New Commercial Vehicle Purchases

The federal tax cuts that took effect in 2003 include provisions designed to encourage small businesses to purchase new commercial vehicles and equipment. Small businesses can use some of the tax provisions to have the government underwrite part of their costs for purchases of new trucks weighing more than 6,000 pounds, if used exclusively for business purposes. President Bush signed the bill into law on May 28, 2003, benefiting small firms that are investing in new vehicles or equipment by temporarily quadrupling the annual amount that small businesses can write off against their taxes for spending on capital goods.

The law increased the amount of equipment purchases that small businesses can expense immediately, rather than depreciate over time, to $100,000 from $25,000, until the end of 2005. The threshold will revert to $25,000 thereafter. For additional information, visit the Internal Revenue Service website at www.irs.gov.

The Fair Debt Collection Practices Act: Know Your Rights

Many employers contact the Employer Commissioner's hotline with questions and concerns about debt collectors calling their employees during working hours. Such calls are disruptive, time consuming, and let's face it: you aren't paying your workers to deal with their bill collectors during office hours. That's where knowing about the Fair Debt Collection Practice Act (FDCPA) can come in very handy.

The FDCPA applies to personal, family and household debts. This includes money borrowed for the purchase of a car, for medical care, or for charge accounts. The FDCPA prohibits debt collectors from engaging in unfair, deceptive, or abusive practices while collecting these debts.

Rights Under the FDCPA:

- Debt collectors may only contact debtors between the hours of 8 AM and 9 PM.
- Debt collectors may not contact employees at work *if they know that their employers disapprove*.
- Debt collectors may not harass, oppress, or abuse debtors.
- Debt collectors may not lie when collecting debts, such as falsely implying that the debtor has committed a crime.
- Debt collectors must identify themselves on the phone.
- *Debt collectors must stop contacting a debtor if they are asked to do so in writing*.

Establish a clear, written company policy that employees are prohibited from speaking to debt collectors while they are at work. You may require them to contact the debt collector in writing to request that the contacts stop. If the debt collector refuses to do so, they can be reported to the Federal Trade Commission. For further information, visit the FTC's website at www.ftc.gov/bcp/conline/pubs/credit/crdright.htm.

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The Troops are Coming Home; Are You Ready? Facts, Questions and Answers for Employers about the Uniformed Services Employment and Reemployment Rights Act (USERRA)

Beginning in December 2003, the Pentagon began moving 130,000 troops out of Iraq and another 105,000 into that country in a series of complicated maneuvers; in fact, this is the largest troop rotation since World War II. With hundreds of Texas workers called to provide duty in the "uniformed services" in the past few years, employers need to know about those returning workers' rights under this federal law. Congressional intent was to encourage noncareer uniformed service so that the nation could receive the protection of those services, staffed by qualified individuals, while balancing the needs of the private and public employers who also depend on these same individuals.

What is it and Who's Covered?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994 and significantly updated in 1996, 1998 and 2000. The Act provides protection and rights of reinstatement to persons who perform duty, voluntarily or involuntarily in the "uniformed services." The "uniformed services" include the Army, Navy, Marine Corps, Air Force or Coast Guard and their Reserve units, the Army or Air National guard, the Commissioned Corps of the Public Health service, and any other category of persons designated by the President in time of war or emergency.

Covered service includes active duty, training for active duty, inactive duty, training (such as drills), initial active duty training, and funeral honors duty performed by National Guard and reserve members as well as absences from work to take exams to determine fitness to perform such duty.

USERRA covers all employees except those serving in positions where there is "no reasonable expectation employment will continue indefinitely or for a significant period." USERRA applies to virtually all American employers, regardless of size.

The pre-service employer must reemploy Service members returning from a period of service in the uniformed services if they meet five general tests:

- Job: *All* civilian jobs are covered, unless an employer can prove the job was genuinely temporary. USERRA applies to all private sector employers, state governments, and all branches of the federal government. Unlike most discrimination statutes, there is no "small business" exception.
- Notice: Unless precluded by military necessity, advance notice must be provided, either orally or in writing. While Congress did not provide a detailed definition of "timeliness of notification," employees who participate in the National Guard or Reserve should provide their employers with as much notice as possible.
- Duration: Generally, there is a five-year cumulative total limit on the amount of time members can be absent from their civilian job with a single employer. The five-year total does not include inactive duty training (drills), annual training, involuntary recall to active duty, or additional training requirements determined and certified in writing by the Service secretary, and considered to be necessary for professional development or for completion of skill training or retraining.
- Character of Service: Veterans who have separated from the armed forces must have received an honorable or general discharge to be covered. Veterans who received dishonorable discharges, bad conduct discharges, under other than honorable conduct discharges, and those who were dismissed or dropped from the rolls are not covered by USERRA protection.
- Prompt Return to Work: USERRA sets forth varying time limits for returning to work depending on the length of the absence due to military service. For specific information, visit the Department of Labor's website at www.dol.gov/dol/vets.

Reinstatement: If an employee is injured or incurs a disability during military duty, the deadline for reinstatement may be extended for up to two years while they are convalescing, and employers must make reasonable accommodations for the impairment. For all other employees returning to work after a military leave of absence, the position into which they are reinstated is determined by priority, based on the length of their military service.

USERRA specifies that returning employees must be "promptly reemployed." What is considered "prompt" will depend on individual circumstances. For example, reinstatement after three years of active duty might require two weeks to allow giving notice to an incumbent employee who might have to vacate the position. For specifics regarding

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reinstatement, visit the National Committee for Employer Support of the Guard and Reserve (EGSR) website at www.egsr.org/faqemployers.html

The Federal Department of Labor's veterans' Employment and Training Services (VETS) enforces USERRA. However, the law also allows an employee to enforce his or her rights by filing a court action directly without first filing a complaint with the DOL.

Issues involving USERRA may be extremely complex. To obtain additional information about USERRA and all other VETS programs, visit the DOL's website at www.dol.gov/dol/vets, call the National Committee for Employer Support of the Guard and Reserve, the Department of Defense, at 1-800-336-4590 to request Ombudsman Services, or contact John McKinny, Director of Veterans' Employment and Training Service for Texas at 512-463-2814 or mckinny-john@dol.gov.

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Criminal Background Checks Can Help Avoid Liability for Negligent Hiring by Texas In-Home Service and Residential Delivery Companies

Effective September 1, 2003, House Bill 705 requires in-home service companies and residential delivery companies to obtain criminal history record information on officers, employees, or prospective employees whose job duties require them to enter another person's home. Because thousands of Texas employers are affected, it's important to review what this new law does – and does not- require.

The bill defines an "in-home service company" as an entity that employs a person to enter a consumer's home for a fee to repair an appliance, a heating, air conditioning and ventilation system, or a plumbing or electrical system. The bill also defines a "residential delivery company" as an entity that employs a person to enter a consumer's home for a fee to deliver and install, place or assemble, a product.

The purpose of the law is to protect consumers from potential criminals, and covered employers from liability should a criminal case arise. For example, if a covered employer conducts a criminal background check on an employee in accordance with the law and that employee is later accused of assaulting a customer and the employer is sued, the employer would be presumed to be non-negligent in hiring by the court.

Criminal records can be searched through the Texas Department of Public Safety Crime Records Service website at http://records.txdps.state.tx.us. Questions regarding how an employer may get direct access to this special database should be directed to the Texas DPS at (512) 424-2079. Employers will be able to apply for access to the website and purchase credits that will allow them to search the website for criminal history record information. The cost is $1.00 per credit (one credit is good for one search). As of now, this is the only approved avenue for employers to obtain criminal history records to comply with the law.

The DPS criminal records provide only Texas, not nationwide, information. Employers will be able to search the website for criminal history record information using the name and other identifying information of the person on whom they are conducting the search.

Once an employer is approved to gain access to criminal history records, they may perform single-name searches, for which results are immediately available, or batch searches for multiple names, which are processed within 24 hours. (More information and an online application are available at the Crime Records Service website, http://records.txdps.state.tx.us).

What the Bill Requires:

1. It requires criminal background checks be made on employees who perform repairs on plumbing, electrical or heating, air conditioning and ventilation systems, or an appliance in a residence.
2. It requires background checks on employees who deliver and install, place or assemble, products in a residence.
3. These background checks must come from either the Texas DPS or a vendor approved by the DPS. However, at this time, the DPS has not approved any private vendors.

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4. It allows employers to contract directly with the Texas DPS to receive criminal background records for current and prospective employees for a $1.00 fee, plus a small convenience charge for each check.
5. It grants a presumption that an employer is not negligent for sending an employee into a customer's home if the employee's background check did not reveal any felony convictions during the last 20 years or any misdemeanor convictions during the last 10 years for crimes against a person, property, or for public indecency.
6. It allows employers to hire subcontractors to perform these job duties and still receive the presumption of non-negligence if they ask their subcontractor, in writing, to obtain criminal history background checks in accordance with this bill before sending an employee into a customer's home.
7. It allows employers to send multiple employees into a residence, if at least one of those employees has been checked in accordance with the law, and while they are in the residence, that employee directly supervises and accompanies any employees who have not been checked.

What the Bill Doesn't Require:

1. There is no penalty given for failing to comply with this law. While the bill provides an incentive to hire individuals who do not have criminal records (i.e. a presumption that the hiring was non-negligent), it provides no penalty for hiring individuals with criminal records.
2. There is nothing specifying how often the criminal background checks should be conducted.
3. The bill does not prohibit an employer from keeping an employee on the payroll or hiring an individual who has a criminal record.

Sample Criminal Background Check Release Form

Before an employer makes any criminal background check on current or prospective employees, whether the business is covered by the new law or not, make sure to obtain written authorization and a release from liability to do so. For example,

Criminal Background Check Authorization and Release Form

I, _____, hereby authorize any law enforcement agency to furnish XYZ Corporation or its agent information related to my criminal history. I hereby release XYZ Corporation and all of its agents and employees, the law enforcement agency and all employees of law enforcement agencies furnishing information, from all liability resulting from the furnishing of this information to XYZ Corporation. I certify that the statements made by me on this form are true, complete and correct to the best of my knowledge and belief and are made in good faith. I understand that any false statements made herein will void my consideration for employment/continued employment, and could result in disciplinary action including termination.

Signature_____

Date_____

A Few Final Thoughts

Many Texas employers already conduct criminal background checks on employees who perform the jobs covered by this new law and other sensitive positions (for example, workers in nursing homes, hospitals and school districts). Such checks are frequently based on an employee's county and state of residence for the previous five to 10 years. To align with the new legal requirements, wise employers should expand the time period to 20 years. (And, extending the search to other states where the employee has lived and the time period to 20 years may provide an extra level of liability protection.)

Just as with any new law, there are many unanswered questions about how to comply and how courts will interpret the law once a case comes before them. While this article is an effort to provide additional information to covered Texas employers, it is not intended to be a substitute legal counsel. Please consult a knowledgeable employment attorney if you have additional questions or concerns about how this new law impacts your business.

Unemployment Rates: Where do the Numbers Come From?

While there are many divergent views on how to help the economy and small businesses grow, almost everyone agrees that small businesses play a major role in creating American jobs. According to the U.S. Small Business Administration, small firms create about 75% of all new jobs nationwide. Here in Texas, approximately 94% of all businesses have fewer than 20 employees.

However, when reporting the number of new jobs, it appears that the official federal "number crunchers" leave new entrepreneurial activity – and the jobs that they create – out of these widely anticipated monthly reports. In other words, entrepreneurs may be better at creating new jobs than the government is at capturing and reporting the data accurately.

The reports that quantify unemployment levels and job creation come from two different surveys. On the one hand, the Bureau of Labor Statistics (BLS) telephones established businesses to learn how many jobs have been lost or gained. This Payroll or "Establishment" Survey has counted a net gain of 522,000 jobs during the past three years. This survey asks individual businesses about the total number of workers on their payroll each month.

On the other hand, the Household Survey is a major component used to calculate the unemployment rate. Individuals are called at home and asked if they are in the job market looking for work or if they have jobs. In sharp contrast to the Payroll Survey, the Household Survey indicates that 2.4 million new jobs have been created in the past three years.

A critical difference between the two surveys is that the Household Survey accounts for both small, emerging businesses that might be overlooked by the Payroll Survey and those who are self-employed. The number of businesses in the U.S. is a fluctuating number, but the "fixed list" that the BLS uses to call established businesses does not reflect this new entrepreneurial activity.

There is evidence that job growth is stronger than the current Payroll/Establishment Survey estimates suggest. While there have been various substantive improvements in the methodology of this survey (including more regular updates to the businesses included in the survey and more rigorous sampling techniques for determining which businesses to include in the survey), it remains problematic.

As business writer Haseeb Ahmed recently commented in Ecoomy.com, "Something is amiss in the Establishment Survey." He maintains that "the revision patterns of the early 1990s recovery cycle" will repeat themselves. At that time, in the first 21 months after the end of that recession, a total of 1.4 million job gains were revised upward to 2.9 million.

While the BLS tries to correct the oversight of new entrepreneurial activity, even they admit that the inputs they use – based entirely on historical observations – do not catch hiring upturns. Small businesses are generally the first to begin hiring when there is an overall labor market upturn and, according to Ahmed, "Initial estimates from the Establishment Survey, therefore, tend to understate employment gains in the early stages of the hiring cycle. In the past, subsequent revisions, based on more comprehensive data, have corrected this problem and lifted the originally reported numbers."

In fact, we may already be seeing the first signals of solid economic recovery: the American job market sprang to life in March 2004, adding 308,000 jobs – the largest monthly increase since the final days of the last economic boom.

December 2003 job figures indicate that the unemployment rate fell to 5.7%; however, many expressed concern due to the tiny job growth for the month (1,000) and the number of "discouraged workers."

According to the Household Survey, a "discouraged worker" is an individual who reports that there is no work for them, and that they have therefore dropped out of the workforce. After reviewing the December 2003 count in comparison to the entire year, Small Business Survival Committee Chief Economist Raymond Keating, stated that, "This category offers no seasonally adjusted numbers, so the levels jump around rather dramatically."

Keating's review found that the December "discouraged worker" count (433,000) was the lowest monthly total during 2003, except September (388,000), but was higher than

Unemployment Rates ... cont.

December 2002 (403,000). Keating comments that, "On the 'discouraged worker' issue, this category remains rather vague and a certain degree of skepticism is warranted. People move in and out of the workforce for many reasons. The key on all these job numbers is to look at the trends, which are solid."

And, when comparing the current unemployment number to the previous 20 years, a 5.7% unemployment rate stacks up rather well. The current rate beats the average unemployment rate of the 1990s (5.8%) and the 1980s (7.3%).

The role that small businesses play in the health of the economy is especially important to understanding their importance in bringing the country out of a downturn. Hopefully, when the "revisions occur," small businesses will get the credit they deserve as the fuel and the source for getting the U.S. economy back on track.

Ron Lehman
Commissioner Representing Employers

Workforce Roundup – Spring 2004

Texas Workforce and Economic Development: Reasons for Optimism

While interest rates remain at historic 40-year lows, consumer spending is strong and confidence is up at the national level, there is also a great deal to be optimistic about here in Texas. Never before have so many organizations worked together in alignment to accomplish mutual goals in the areas of Economic Development, Education and Employment opportunities. And, the efforts are paying off.

The Texas Workforce Commission and a network of 28 local, employer-led workforce boards around the state continue to create an employer-driven system where business is both a primary customer and a co-designer of the system. In 2003, this network served 35,000 employer customers and helped place 600,000 Texans in jobs.

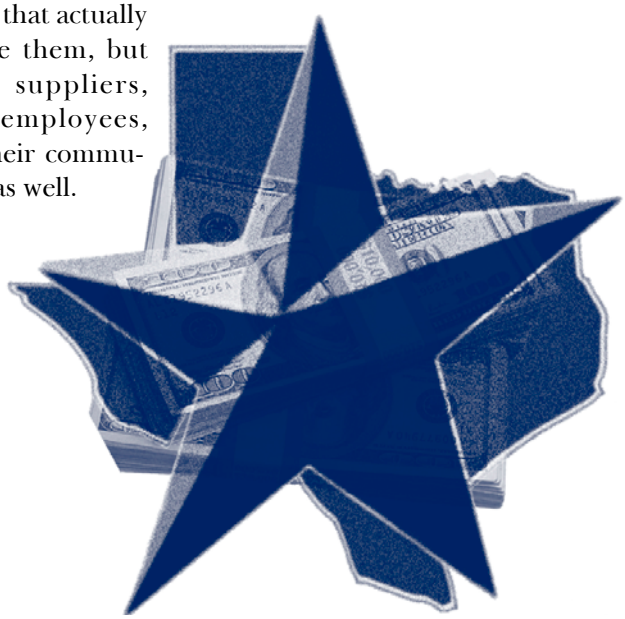
Economic Development has moved to the Governor's office, and in 2003, Governor Perry successfully urged the Texas Legislature to appropriate $295 Million to the Texas Enterprise Fund to help Texas attract business, create new jobs and grow its economy.

According to Governor Rick Perry, "The State of Texas is now one of the most aggressive states in the nation when it comes to competing for jobs because we want to create unlimited opportunity and prosperity for all Texans. We recognize there is no more stable source of revenue for critical public investments than good paying jobs and economic growth."

For example, in late February 2004, Governor Rick Perry announced a $35 million commitment by the Texas Enterprise Fund to Vought Aircraft Industries, Inc., to assist the companies' expansion in Texas. Vought, the largest privately owned aerostructures manufacturing company in the United States, will bring 3,000 jobs to the Dallas area by 2009. The Governor also announced that Texas will provide job training assistance through the Texas Workforce Commission.

Earlier, the state committed $50 million to enhance engineering and computer science programs at the University of Texas at Dallas. That investment played a key role in Texas Instruments' decision to build a new $3 billion research and manufacturing plant in Richardson. The state also committed $1.5 million to Maxim for a new semiconductor facility in San Antonio that will likely create 600 new jobs over the next three to four years.

These investments of public funds benefit not only the businesses that actually receive them, but their suppliers, their employees, and their communities as well.



Workforce Roundup ... cont.

Toyota Partners with Alamo Community College District for $2.15 Million Job Training Grant from TWC

The Alamo area workforce will benefit from a $2.15 Million job training grant from the Texas Workforce Commission's Skills Development Fund. Toyota Motor Corporation has partnered with the Alamo Community College District for the grant. It will be used to custom train workers who will fill 2,000 new jobs as assemblers, operators, managers, machinists, fabricators, clerks and more. Upon completing the training, workers will receive an average hourly wage of $15.

"Toyota's decision to build here in San Antonio was based on many factors including a multifaceted and available workforce,' said state Representative Carlos Uresti. "With 2,000 associated jobs, this Skills Development Fund grant lays the foundation for training our workforce and making it job-ready for Toyota's specific needs. Job creation and skills training are key to our future economic development."

In Fiscal Year 2003, 32 Skills Development Fund grants created or upgraded 12,840 jobs (4,214 and 8,626 respectively). The jobs paid an average hourly wage of $17.16. The grants totaled $12 Million and helped 20 consortia of 164 Texas employers. The Legislature has appropriated $25 Million to the Skills Development Fund for the 2004-05 biennium. Employers seeking more information about the Skills Development Fund may visit the TWC's website at www.texasworkforce.org.

Workforce Trends of the Future: New Employer/Worker Relationships Developing

According to a report recently released by the Herman Group, a management consulting group specializing in workforce issues and future trends forecasting, employer-worker relationships are changing. In addition to the traditional part-time, full-time, and job-sharing options, businesses are creating and enhancing new kinds of alternative relationships with other individuals and employers in contingent arrangements.

According to the report, outsourcing will increase at a rapid rate over the next few years. Not-for-profits, for-profit corporations, school systems and government agencies will all give work to outside contractors. More small companies will be formed to meet this expanding need, resulting in an increase in the number of outsource services providers. Smaller companies will appear in this field because of the requirement to be highly responsive to the outsourcing/host company and the need to develop close personal relationships with them.

A variation on outsourcing, "insourcing" refers to work done inside an organization's workplace by individuals who are employees of an outside company. These workers perform in what is described as a "transparent" or "seamless" environment. In other words, if a visitor didn't know they were actually employed by another business, it would appear that they were employed by the host organization. This application is already being used to supply training and development services, staffing, human resources, logistics, information technology and maintenance services. Businesses are able to increase accountability, cut their payroll and still keep the functions together in one workplace.

"Resourcing" involves finding individuals to work for the business on a contract basis as an outside resource. These workers invoice the company and are self-employed. They may work from their own facilities, at a location where an assignment needs to be done or inside or outside of a customer's location. Service technicians, project managers, programmers, and interim executives can fit into this category.

"Flexsourcing" provides workers to an employer on an as-needed basis. These workers provide a flexible workforce that can respond to changing needs. Some of these workers will be employed by or be contract resources of staffing companies while others will build their own relationships directly with employers, similar to substitute teachers.

Businesses will feature these kinds of contingent relationships in the future, undoubtedly with far-reaching implications for employers and workers alike. For further information, visit www.hermangroup.com. (From "Herman Trend Alert" by Roger Herman and Joyce Giola, Strategic Business Futurists.)

Index of Back Issues of *Texas Business Today* Available Online

Back issues of Commissioner Lehman's newsletter *Texas Business Today* are available online at www.texasworkforce.org. Simply click on the "Businesses and Employers" icon, and locate the heading entitled "Publications, Resources and Upcoming Events." Here is an index of the available articles.

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