

Texas Business Today

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Ron Lehman, Commissioner Representing Employers



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Many American Employers Unprepared for Coming Boom in Retirement

According to a new national study conducted by the Boston Center on Aging and Work, more than 25% of American businesses are not prepared for the possibility that millions of baby boomers – some 77 million workers born between 1946 and 1964 – will be eligible to retire in the next 10 years, potentially creating a worker shortage and a gap in experience and knowledge. Entitled the “National Study of Business Strategy and Workforce Development”, organizations could easily be caught off guard by the aging American workforce, especially if they refuse to let go of their insistence on a 40-hour work week. The study was based on data collected from 578 businesses nationwide.

“Companies that do not plan for this aging workforce may find themselves suddenly with a loss of labor, experience and expertise that will be difficult to offset, given the small pool of new workers and the competition for new talent likely to result from other companies facing the same problem,” reports Mick Smyer, co-director of the Center which did the study.

The organizations polled were primarily in the health care, manufacturing, retail and social assistance sectors. Key findings include:

- The majority of employers (60%) indicated that recruitment is already a significant human resources challenge.
- Almost half (40%) said that managerial skills are already in short supply at their organizations.
- Only 37% of the surveyed employers had strategies in place to encourage older workers to work past traditional retirement age, despite the fact that many career employees have higher skill levels, a stronger work ethic and professional networks and are more reliable workers.
- Only one third of the companies surveyed reported that they had made even cursory projections about the possible retirement rates of their employees, while 26% of the businesses surveyed haven’t planned at all.

Labor analysts predict that the American economy will face a shortage of six million workers by 2012, and 35 million workers by 2030. While some industries will be harder hit than others, the baby boomer “brain drain” is expected to affect the entire economy. Analysts predict that some businesses will have to scramble to find replacements for the senior engineers, technicians, managers and other key employees who retire: Generation X is only three-quarters as large as the boomer generation that precedes it.

According to James Sowers, a managing director for Houston-based Buck Consultants, “It’s not just a simple matter of replacing one body with another. A lot of experience and talent will walk out the door. That should be a major concern for companies.”

What Do Older Workers Want?

According to Marcie Pitt-Catsoupes, co-director of the Center on Aging and Work, flexibility resonates with older workers. Many baby boomers who would like to continue to work past traditional retirement age also want to avoid the five-day-a week/eight-hour-a day work schedule, she said. “Employers who fail to consider flexible work options may be missing important options to enhance both their business performance and their employees’ engagement.” However, a recent AARP survey indicated that only 16% of U.S. companies have any policies in place designed to keep older workers around.

A federal task force composed of members from the Social Security Administration and the departments of Commerce, Education and Labor has been studying the consequences of the nation’s aging workforce and will release their recommendations for action in summer 2007. Those who have studied the issues have already concluded that slowing the brain drain will mean persuading employers to give older workers more job flexibility, providing older Americans with enhanced

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economic incentives to keep working, and rewriting laws that have become outdated.

“New Cultural Norms” Needed

“We need some new cultural norms about work, some corporate creativity and some enlightened public policies,” according to Ryan Johnson, director of information development and public affairs for World at Work, an association of human resource professionals.

Comptroller General David Walker recently testified before Congress that America’s “culture of retirement” actually encourages people to stop working as soon as possible. And, once they begin to claim retirement benefits, he stated that they’re discouraged from continuing to work. For example, workers who take Social Security benefits between the age of 62 and their full retirement age of 65 or 66, give up \$1 in benefits for every \$2 or \$3 they earn in wages above a set threshold. And, pension laws have also prevented individuals from continuing to work for the same employer while they draw a traditional pension from that company.

“The Best Employers for Workers Over 50”

It’s probably not coincidental that more than 50% of the employers named on AARP’s most recent list of age friendly businesses are in health care, an industry that has been grappling with serious labor and skill shortages for years. For example, Mercy Health System of Janesville, Wisconsin, topped the list of AARP’s 2006 list of “the best employers for workers over 50.” Almost one third of its workers are 50 or older, a demographic proportion that’s expected to grow as the nursing shortage intensifies.



Mercy Health System’s “work to retire” program allows workers 50 and older to share jobs, work reduced hours, and, where possible, work from home. It also permits employees who are 55 and older to work 1,000 hours annually but still collect benefits for the entire year. “They can choose to work full time for six months and then take the other six months to travel, live in a warmer climate, or visit their families,” points out Javon Bea, Mercy’s president and chief executive officer. “All the while, they’re entitled to their job benefits.”

“Retirement Management”

According to Mr. Sowers of Buck Consultants, the energy industry also has an older workforce than many other areas, and there’s a growing trend toward rewarding engineers and geo-scientists who postpone retirement until their employers can find and train younger workers. “The oil and gas industry is short of middle-aged personnel because of the layoffs in the 1980s,” he said. “So, older workers who agree to stay for a few more years sometimes receive enhanced pensions or better retiree health care benefits when they do leave.”

Bill Byham, CEO of the human resource firm Development Dimensions International and author of “70: The New 50,” predicts a promising future for what he terms “retirement management.” He encourages employers to identify the key employees they risk losing to retirement in the next few years and then develop ways to keep the strong performers around. “The incentives don’t always have to be financial,” he said. “Some older employees would agree to continue working if they could give up their management duties and go back to doing what attracted them to their field in the first place.” He also points out that older workers may enjoy ending their careers by coaching younger workers.

Government Action Needed?

If the nation is to avoid slower economic growth and a labor shortage, gentle nudging from the government will also be required, according to Ms. Pitt-Catsouphes. “Even though many corporate executives don’t understand what they’re up against with boomer retirements, some elected officials are beginning to recognize the stakes involved in persuading older workers to stay,” she observed.

For example, in 1950, there were eight working-age Americans for every person 65 or older. By 2000, there were five for every older American adult. However, by 2050, there will be only three. Keeping more senior citizens in the workplace would moderate that trend and take pressure off the Social Security system. While some policymakers want to push Social Security’s early retirement age back from 62 to 64 because the full retirement age is already jumping from 65 to 67, others

say such a proposal would penalize workers with physically demanding jobs who need to retire early.

Other experts predict that the federal government is more likely to make continued employment so attractive to older workers and their employers that more Americans will stay on the job into their late 60's and early 70's, and more businesses will provide incentives to keep them.


The pension reform law passed in 2006 already gives older workers a good financial reason to keep working, said Chantel Sheaks, the legislative counsel for tax and benefits at Workplace Flexibility 2010, an initiative of the Alfred P. Sloan Foundation. Until now, defined-benefit pension plans forced employees to leave their employers in order to collect their benefits. The new law will allow workers 62 and older to begin drawing on a traditional pension plan from their current employers and keep working for them. As soon as the IRS resolves the new law's technical issues, employers will have the option of amending traditional pension plans to take advantage of this change. (Defined-contribution plans already permit workers to withdraw funds at age 59-1/2).

Mr. Byham also expects more workers to accept part-time employment with their current employers, supplementing their reduced wages with partial pension benefits until they finally retire. "This reform could stem many boomer retirements later in the decade," he said.

A New Way of Thinking

The new chairman of the Senate Aging Committee, Herb Kohl, recently introduced legislation that would give tax credits to employers that create flexible work arrangements for employees 62 and older without reducing pension benefits or health care. The credit would be equal to 25% of the older employees' wages.

"The boomers' retirement threatens to limit our economy's potential," Senator Kohl said. "But demography isn't destiny. We must encourage businesses to adopt policies today so that they can confront the labor shortage that's expected tomorrow."

According to Ms. Young of the Conference Board, adjusting to an aging workforce shouldn't be difficult; it simply takes a new way of thinking: "Businesses need to stop seeing older workers as a vulnerability and start seeing them as a competitive advantage." 

From the Dais – Spring 2007

Dear Texas Employers,

Here's some very good news: for the first time since 1992, the state Unemployment Compensation Trust Fund is above the statutory ceiling, which means that approximately 360,000 Texas employers will receive a Surplus Tax Credit this spring.

Surplus Tax Credits will be available to experienced employers after the Employer's Quarterly Report for the quarter ending March 31, 2007, has been filed and paid in full. At that time, refund checks will be issued to those employers that have no outstanding reports or indebtedness on their tax accounts. Annual domestic filers will receive their 2007 tax credit after their annual report is filed and taxes are paid in January of 2008.

Credits are based on state unemployment insurance taxes paid from October 1, 2005 through September 30, 2006, and are disbursed based on taxes employers pay in 2007 and after. Credits cannot be applied to quarterly amounts due in lieu of normal payment. The amounts refunded are based on a percentage of the employer's current quarter tax payment. The majority of employ-

ers will realize their full Surplus Tax Credit after the first quarter of 2007. However, the refund process will continue as successive quarterly returns are filed and paid until all credit balances are exhausted.

Employers with outstanding debt to the Texas Workforce Commission are encouraged to pay off those obligations so they can become eligible to receive the benefits of the Surplus Tax Credit. Unused credits will remain on the system for three years, after which time they will be cancelled. Be sure to review your employer account today and assure your eligibility for a Surplus Tax Credit.

More Good News: Texas Employers Qualified for Nearly \$130 Million in Federal Tax Credits in 2006

In fiscal 2006, the Texas Workforce Commission (TWC) assisted Texas employers by identifying nearly \$130 Million in federal tax credits. The Work Opportunity Tax Credit (WOTC) and Welfare-to-Work (WtW) Tax Credit are available to employers that hire jobseekers from targeted populations that may be facing barriers to employment.

By filing for these valuable tax credits, Texas employers can positively impact not only their businesses, but also their workers and communities. Every time our state's employers qualify for WOTC and WtW, they are not only making a positive difference to themselves, but also to Texas' economy.

WOTC is a federal tax credit of up to \$2,400 per employee, which is designed to encourage employers to hire new employees from nine targeted groups of jobseekers that many of you are already hiring. The targeted groups include:

- Temporary Assistance For Needy Families (TANF) recipients
- 18 to 39-year-old food stamp recipients
- 18 to 24-year-old residents of one of the federally designated Empowerment Zones (EZ), Enterprise Communities (EC) or Renewal Communities (RC)
- 16-to-17-year-old EZ, EC or RC residents hired as Summer Youth employees
- Veterans who are members of families receiving, or that have recently received, food stamps

- Persons with a disability who have completed, or are completing, rehabilitative services from a state or the U.S. Department of Veterans Affairs
- Ex-felons
- Supplemental Security income (SSI) benefit recipients
- Qualified long-term assistance recipients

WtW offers up to \$9,000 per employee in tax credits to employers who hire from families that have received long-term TANF benefits.

And, the potential for even more Texas employers to receive these tax credits is enormous. Although nearly \$130 million in qualified tax savings for 2006 is significant, only about 2 percent of Texas' more than 400,000 employers took advantage of WOTC or WtW last fiscal year. Millions in tax credits are available to additional employers who file for WOTC or WtW.

Applications for the credits can be submitted year-round to TWC's WOTC Unit for certification. Employers must mail the forms to the unit within 28 days of a qualifying worker's employment start date. To help employers recognize WOTC or WtW qualified job applicants, TWC mails conditional certifications to qualified jobseekers, who can then take the forms to their job interviews. For additional information about WOTC or WtW, please visit www.texasworkforce.org, or www.irs.gov, or call TWC's WOTC Unit at 1-800-695-6879.

As always, it is an honor to represent you here at the TWC. It's also time to pat yourselves on the back. Through your hard work, seasonally adjusted non-agricultural employment in Texas increased by 15,000 jobs in March 2007 - the most recent data available. This increase followed a revised gain of 32,100 jobs in February 2007. With an annual job growth rate at 2.3 percent, Texas employers created 225,500 jobs over the past 12 months, and the Texas unemployment rate now stands at 4.3 percent, below the national unemployment rate of 4.4 percent. Congratulations, and I wish you continued success in the future. 🇹🇽

Sincerely,

Ron Lehman
Commissioner Representing Employers



Business Briefs – Spring 2007

Electronic State Unemployment Tax Filing Initiative Begins

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

Employer Tax Information Online:

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

QuickFile:

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

Magnetic Media:

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

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

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



Don't Leave Money on the Table: State Tax Refund for Employers of Medicaid Clients

A Texas employer may qualify for a state tax refund if the business:

- pays certain State of Texas taxes (franchise, state sales and use, boat and boat motor, Public Utility Commission gross receipts, inheritance, hotel and/or manufactured housing), **and**
- pays wages during the first year of employment to an employee who is a Texas resident and received Medicaid benefits or Temporary Assistance for Needy Families any month within six months of their hire date, **and**
- provides and pays for a part of the cost of qualifying major medical insurance for the employee.

Employers can recover a refund of up to \$2,000 per covered employee during the first year of employment. For more information about the Medicaid State Tax Refund and other tax credits, please call the Texas Workforce Commission's Work Opportunity Tax Credit Unit at 1-800-695-6879, or visit www.twc.state.tx.us/svcs/wotc/tanf/html.

New Evidence that Tort Reform is Working

According to the Texas Medical Board, which is responsible for licensing and regulating the practice of medicine in the state, there are so many doctors seeking Texas medical licenses that the board is facing a certification backlog. Consider these numbers: the board processed a total of 2,446 medical licenses in fiscal year 2001. By fiscal year 2006, that number had risen to 4,026.

While more doctors who earn their medical degrees in Texas now choose to remain here, more physicians from out of state also seek to move here.

Many credit historic tort reform enacted in 2003 as the reason for this change. That legislation capped non-economic damages in malpractice lawsuits at \$250,000. Just five years ago, skyrocketing malpractice insurance premiums and the legal climate combined to make Texas an unattractive place for physicians to make a living. However, malpractice rates have fallen by almost 30% since Texas voters approved Proposition 12.

The medical malpractice debate is often a legal and economic abstraction. However, the Texas experience provides hard data that reasonable reforms can have dramatic real world results that can improve access to

health care. And, while researchers are warning of a nationwide critical shortage of doctors, this influx of medical professionals to Texas is a welcome exception to that trend.

As Workplace Testing Increases, Workers' Drug Use Falls to New Lows

Fewer employees are using drugs at work, thanks to an increased awareness of workplace drug testing policies and employer crackdowns. In fact, drug use in the workplace nationwide hit a new low in 2006, according to the recently released Drug Testing Index issued by Quest Diagnostics, a workplace drug testing service.

That new report also indicates that amphetamine use by workers mandated by the U.S. Department of Transportation to undergo drug testing (including truck drivers, pilots and others) fell by 20% last year. Marijuana usage, the most commonly detected drug, dropped 6.3% in the general workforce according to Barry Sample, the director of science and technology for Quest's employer solutions division.

More businesses than ever before are requiring their employees to undergo drug screening, including the majority of Fortune 100 companies. According to Sample, drug users have apparently caught on to the trend, and learned to look elsewhere for employment if they know they can't pass a drug screen. 🇺🇸

World's Best Technologies Showcase

May 15-17, 2007 • Wyndham Arlington Hotel

The recent World's Best Technologies Showcase (WBT) was a premier event, showcasing the world's largest collection of undiscovered technologies emanating from top universities, labs, and research institutions from across the country and around the globe. Participating technologies were selected by – and presented to – seasoned venture investors and Fortune 500 licensing scouts representing a variety of industries. Most technologies were presenting for the very first time.

The WBT is designed to support the movement of world-class technologies from leading laboratories and universities into the marketplace by providing the opportunity for entrepreneurs, scientists, commercialization program managers, and seed investors to develop new relationships. By facilitating these new relationships, the WBT serves as a catalyst between university and lab-based technologies, the investment community, and ultimately, the marketplace.

Each year's Showcase represents the collaborative effort of investors, licensees, and tech commercialization experts. Presenting technologies are selected solely on the merits of their innovation and the specific investment or licensing opportunity. Exhibit space is limited to selected presenting technologies and event sponsors only.

Since 2004, this annual event has featured more than 200 world-class technologies from federal labs and research universities, securing \$300 million in venture funding. The Showcase attracts over 400 attendees each year, including more than 100 bona fide investors and Fortune 500 licenses.

For information about the 2008 Showcase, please visit the WBT's website at www.wbtshowcase.com. 🇺🇸

Legal Briefs – Spring 2007

“Travel Time” and Your Company

One of the many areas of confusion in employment law centers around the rules and regulations for the payment of “travel time”. This is a very popular topic on our employer hotline and at our Texas Business Conferences. A basic rule: any travel on company business that cuts across the normal workday is compensable time worked, regardless of whether such travel occurs on a day the employee is normally scheduled for work. In other words, travel time that is “all in a day’s work” must be paid.

The wage and hour regulation at 29 C.F.R. (Code of Federal Regulations) 785.33 states that whether time spent in travel must be considered working time depends upon the kind of travel involved. The general rule is found in 29 C.F.R. 785.35, which provides that “normal travel from home to work is not worktime”. That means that the normal commute from home to work and vice-versa is not compensable. However, home to work travel and back again that falls outside of the regular hours may be compensable hours worked. For example, if the worker is called back to work somewhere on an emergency basis for one of the employer’s customers and must travel a “substantial” distance, the travel time would be compensable. The regulations do not provide that all such travel time is compensable; the decision would presumably be made on a case-by-case basis.

Similarly, a special temporary assignment in another city would involve compensable travel time, but the employer could disregard the time corresponding to the normal commute and the time spent on meals (to be non-compensable, meal breaks must be at least 30 minutes long, and the employee must be fully relieved of all work-related duties while eating the meal).



Time spent traveling between worksites during a workday is compensable under 29 C.F.R. 785.38. For example, if a worker reports to the main office to start the day and is then told to report to another job site, all time spent traveling to that worksite and back again to the main office should be paid. Some workers normally report to a number of job sites each day as part of their duties; all such time is compensable. If the worker does not have to report back to the main office after finishing at the last job site, but instead returns directly home, the time spent returning home is not compensable.

Many questions arise concerning travel to other locations involving overnight stays. 29 C.F.R. 785.39 states that “travel away from home is clearly worktime when it cuts across the employee’s workday. The employee is simply substituting travel for other duties.” However, if the employee travels as a passenger outside normal working hours, the time is not compensable. An employee who serves as a driver or a pilot for other employees would be paid for the entire travel time. This same rule applies, even in the case of travel on days not normally worked. For instance, if an employee’s normal hours are 8 am to 5 pm, Monday through Friday, and the employee must perform job-related travel on Sunday from 3 pm to 7 pm, the employer would need to pay only for the time from 3 to 5 pm. Similarly, work performed while traveling must be counted as hours worked.

According to a federal Department of Labor wage-hour opinion letter issued on September 21, 2004, travel between an out-of-town worksite and the employee’s home that the employee undertakes for his or her own personal convenience (i.e., voluntarily), is not compensable.

Compensable travel time should be paid at the employee’s regular rate of pay; however, it is permissible to have a wage agreement whereby employees are paid at a lower rate (at least minimum wage) for compensable travel time and other types of non-productive work time. Any such agreement should be clearly expressed in a written wage agreement signed by the employee, and the time so distinguished must be carefully and exactly recorded. Further, if such work results in overtime hours, the overtime pay must be calculated according to the weighted average method of computing overtime pay, as provided in 29 C.F.R. 778.115. Due to the complexity of the overtime calculation method necessary and the recordkeeping involved, any company attempting this should have the agreement prepared with the assistance of an attorney experienced in this area of the law. 🇺🇸

The Emphasis on Return to Work – What It Means to Employers

Returning injured employees to work in a timely and medically appropriate way is a central goal of the entire workers' compensation system.

Workers' compensation costs are among the top business concerns for employers. Having a proactive return to work process, so that injured employees can continue to perform valued work during their recovery, provides employers with the tools necessary to better manage costs and reduce the overall negative impact of job related injury on the injured employee.

Employers often feel that they lack control over their workers' compensation costs and have little ability to participate in the management of their workers' compensation claims. An established return to work process provides the tools to do both.

The longer an employee is unable to work, the more difficult it becomes for the employee to ever return to full duty employment. Unfortunately, lost time has become routine and expected for even relatively minor injuries. Injured employees who return as soon as possible following an injury are less likely to become treatment dependent. Even the most dedicated employee's attitude, outlook, and condition may diminish if the person remains out of the workplace for an extended period of time. Unless lost time is medically indicated, it is always better for the employer to make every reasonable effort to keep an injured employee on the job.

Eliminating medically unnecessary lost time by providing appropriate work assignments during recovery from an injury provides significant benefits for employers and their employees.

The recovering employee continues to do work of value and to contribute to the business. They are earning actual wages instead of being paid workers' compensation benefits. Appropriate work activity becomes part of the employee's medical treatment and contributes to recovery. The trained employee is retained so costly turnover is averted. Early return to work eliminates opportunities for fraud.

Business costs related to workers' compensation absences can be significant. When an injured employee misses work, their work still has to get done. Employers may have to pay overtime to other employees or hire a replacement. Temporary Income Benefits (TIBs) are being paid at the same time wages are being paid to another employee to do the work.

Injured employees who work while they are healing recover better and faster than employees who remain off work. Less medical care and medication is required, resulting in lower medical costs.

Injured employees who remain appropriately active, connected to their work- place, and productive are less likely to develop secondary complications, such as depression and de-conditioning, that can lengthen recovery time and possibly lead to more serious disability. They retain employment related benefits and job skills. Injured employees maintain important social interaction and supportive relationships with fellow employees. Family and social lifestyles are maintained. Financial difficulties are avoided. Recovery time is shortened and the risk of permanent disability from the injury is reduced.

Employers, doctors, insurance carriers and employees share the responsibility for return to work. Communication and working together are the keys to success.

Doctors identify the current abilities and functions that the injured employee can safely perform. Employers can then match these functional abilities to available work assignments for the injured employee. Communication between the treating doctor, the employer, the insurance carrier, and the injured employee is an essential factor in successful and appropriate return to work. A completed "Work Status Report" (DWC-73) is the document the doctor is required to complete to communicate the information to the employer, injured employee and the insurance carrier. To ensure proper placement, additional communication may be necessary to clarify understanding of the employee's capabilities, the anticipated duration, and their applicability to the workplace.

Insurance Carriers are required to offer an employer return to work coordination services before the 8th day of lost time. Carriers must review claims that have the potential for lost time as early as practicable to determine whether skilled case management is appropriate and helpful in returning the injured employee to work. Employers that carefully monitor their workers' compensation claims, communicate regularly with adjusters handling their claims, and provide appropriate return to work opportunities, have better outcomes than employers who don't.

The Texas workers' compensation system actively supports and encourages return to work efforts. The

Texas Department of Insurance/ Division of Workers' Compensation provides return to work education opportunities for employers. Employers can access additional return to work information and resources from the Texas Department of Insurance-Division of Workers' Compensation website at www.tdi.state.tx.us or by calling (512) 804-4683.


The Division has adopted Disability Management rules, including the use of specific Treatment and Return to Work Guidelines to optimize healthcare and return to work outcomes for injured employees. Other changes mandate that health care providers and others will be held accountable for ensuring that improvements are made and maintained in getting injured employees back to productive work. The Division of Workers' Compensation is working closely with the Department of Rehabilitative Services and the Texas Workforce Commission to assist more seriously injured employees and those employees who are less likely to be able to return to their previous employment.

Because of the emphasis on return to work, it is likely that more injured employees than ever before will be released to return to productive work before they are 100% recovered from their injury. Employers that have an established return to work process for their injured employees will be prepared ahead of time to reap the benefits by eliminating medically unnecessary lost time.

The primary goal of early return to work is to return an injured employee to his or her original job as soon as possible. Having your trained and experienced em-

ployee continue to do work they already know how to do is the best option. Regular jobs are usually made up of a series of individual functions and tasks. Often the injured employee can continue to do at least some of their regular tasks and functions while they are recovering. Temporary modifications to their regular work assignments, a part time work schedule, reduced capacity requirements or sharing parts of work with other employees should be considered as viable options. Monitoring the injured employee's recovery progress following return to work to ensure appropriate work assignments and adherence to medical restrictions will help ensure successful transition back to full duties.

Small employers, having between two and fifty employees, may be reimbursed by the Texas Department of Insurance, Division of Workers' Compensation for up to \$2500 for the costs of workplace modifications, equipment, tools, furniture or devices, or other related costs that the employer may have paid for to bring an injured employee back to work. For additional information on the Return to Work Pilot Program for Small Employers, call (512) 804 5000.

The Division of Workers' Compensation provides various safety services to promote safe workplaces, including free safety and health consultations on OSHA regulations, regional safety training, publications, free safety training video loans, drug free workplace programs and the Safety Violations Hotline. For more information on these services, visit the TDI website at <http://www.tdi.state.tx.us/wc/mr/division> or call 800-687-7080. 

Emergency Preparedness: Is Business Interruption Coverage Right for Your Company?

With the start of the 2007 hurricane season on June 1, it's impossible not to remember the devastation and loss suffered by thousands of employers and their workers when Hurricanes Katrina and Rita hit in August and September 2005. Many small businesses have still not fully recovered; many others never will.

It's no secret that having to temporarily close a business damaged by a hurricane, fire, natural disaster, or other catastrophic event could cause significant financial hardship for your company. A commercial property insurance policy might pay to rebuild your physical property, but many business owners also buy business interruption coverage to pay for lost income, operating expenses and extra expenses while they're restoring their operations after experiencing a covered loss. Undoubtedly, many in the path of Katrina

and Rita wish they had carried such coverage before disaster struck.

How Business Interruption Coverage Works

Business interruption coverage compensates you for lost income and certain operating expenses if you are forced to vacate your business because of a loss covered in your policy. Payments typically begin 24 to 48 hours after the loss occurs or after you pay a deductible. You will receive payments only if your property is damaged or destroyed by a risk or peril covered by the language of the policy. Typically, business interruption coverage policies cover losses from fire, lightning, windstorms (except along the Gulf Coast), vandalism and theft, vehicles, aircraft, and civil commotion.

Most commercial property policies exclude flood coverage. If you bought separate policies for flood or windstorm coverage, ask your agent if those policies also include business interruption coverage.

Business interruption coverage policies usually won't cover losses from earthquakes, disease pandemics, terrorism, weather-related evacuations, or loss or electricity or utilities not directly resulting from damage to your property. Make sure that you understand what your policy does and does not cover before an emergency is staring you in the face. And, make sure that you know your policy's dollar limits. Review your policy carefully, and talk to your agent if you need clarification.

Types of Coverage

There are four types of coverage that are typically associated with business interruption coverage. Determine in advance which coverages are important to you.

- **Business income coverage.** Business income is net profit or loss before taxes and continuing normal operating expenses, including payroll. The amount of the payment you'll receive is determined by previous sales volumes and expenses based on the business' financial records.
- **Extra expense coverage.** Extra expenses are those above and beyond your normal monthly expenses that are expended to restore a business, either at the original or at a temporary location. This coverage can also be purchased alone and could provide sufficient coverage without purchasing business interruption coverage.
- **Contingent business interruption coverage.** This coverage compensates you for any income you might have lost due to property loss or damage at a supplier's or customer's location. For instance, this coverage would pay you for lost income if you own a florist shop and your main flower supplier's business location suffers fire damage.
- **Civil authority coverage.** This coverage would pay for loss of income or extra expenses incurred as a result of a government denying you access to your business due to a covered loss at a location owned by someone else.

How to Get Coverage

- Through a commercial property policy. Many commercial property insurance policies include business interruption coverage, either within the body of the policy or as an endorsement. Ask your agent if it's included in your policy.
- Through a business owner's policy (BOP). BOP policies are tailored to the needs of small busi-

ness owners and combine property, liability, and business interruption coverage in one policy.

- Through a separate business interruption policy.

Shopping for a Policy

Keep a few key points in mind when shopping for business interruption coverage and deciding how much coverage you need.

- Ensure policy limits are sufficient to cover your business for more than a week while you're getting the business running again. Consider the cost of rent payments, utilities, salaries, equipment lease payments, and all other operating expenses.
- Consider the likelihood of a covered cause of loss affecting your business. If your business is near the Gulf Coast, for example, you may be at a greater risk for hurricanes than businesses located inland.
- Consider how long it would take to resume normal business operations at a permanent or temporary location after suffering a loss. If necessary, would it be easy to relocate and resume business quickly?
- Premiums will likely be based on the business' risk of suffering damage caused by a covered peril. A restaurant, for example, might be charged a higher premium than a doctor's office because of the greater risk of fire.
- Make sure that you understand the exact dollar amount of the coverage and the length of time it will pay. Review the policy carefully or ask your agent for an explanation.

For More Information

If you have questions about business interruption coverage or other types of insurance, you may call the Texas Department of Insurance's Consumer Help Line, or visit the agency's website. You may call 1-800-252-3439 or 512-463-6515 (in Austin), or visit the website at www.tdi.state.tx.us.

If you have an insurance-related complaint, the Texas Department of Insurance may be able to help. You may file a complaint with the agency in a variety of ways:

- by completing the online complaint form
- by e-mail at ConsumerProtection@tdi.state.tx.us
- by fax at 512-475-1771 or
- by mail at:

Texas Department of Insurance
Consumer Protection Program
P.O. Box 149091
Austin, TX 78714-9091 

Monitoring Employees' Use of Company Computers and the Internet

Business-related use of the Internet has grown by leaps and bounds in the last few years. At the same time, more and more employees must use computers in their work at least part, if not all, of the time. All in all, this increasing use of technology has helped fuel an unprecedented expansion of the state and national economies. However, along with the benefits, there are several risks for employers. This article will examine some of the basic issues and offer some solutions to business owners who are mindful of the risks involved. First, let's look at some of the risks of the electronic revolution.

Electronic Mail

Electronic mail, or e-mail, has become the communication medium of choice for many employees and businesses. No one doubts its time-saving qualities, but employers must consider the dangers as well:

- Employers can be liable for employees' misuse of company e-mail
- Sexual, racial, and other forms of harassment can be done by e-mail
- Threats of violence via e-mail
- Theft or unauthorized disclosure of company information via e-mail
- E-mail spreads viruses very well

Internet

The Internet is like a super-network connecting countless other computer networks around the world. Literally millions of computers are connected to this vast resource. Every imaginable type of information is available on the Internet if one knows where and how to search for it. As with any kind of resource, it has its good and bad sides. Not surprisingly, employers have had some problems with employees' use of the Internet:

- Unauthorized access into for-pay sites
- Sexual harassment charges from display of pornographic or obscene materials found on some sites
- Trademark and copyright infringement problems from improper use or dissemination of materials owned by an outside party
- Too much time wasted surfing the World Wide Web
- Viruses in downloads of software and other materials from Web sites

Company Computers

Even with company computers that are not connected to the Internet, employers are finding problems with employees abusing the privilege of having computers to use at work:

- Software piracy - employees making unauthorized copies of company-provided software
- Unauthorized access into company databases
- Use of unauthorized software from home on company computers
- Sabotage of company files and records
- Excessive time spent on computer games
- Employees using company computers to produce materials for their own personal businesses or private use

Many employers wonder what they can do to protect themselves against these kinds of risks and to ensure that company computers and networks are used for their intended purposes. Fortunately, Texas and federal law are both very flexible for companies in that regard. With the right kind of policy, employers have the right to monitor employees' use of e-mail, the Internet, and company computers at work. Doing so successfully requires both a good policy and knowledge of how computers and the Internet work.

Policy Issues

Monitoring employees' use of company computers, e-mail, and the Internet involve the same basic issues as come into play with general searches at work, telephone monitoring, and video surveillance. Those basic issues revolve around letting employees know that as far as work is concerned, they have no expectation of privacy in their use of company premises, facilities, or resources, and they are subject to monitoring at all times. Naturally, reason and common sense supply some understandable limitations, such as no video cameras in employee restrooms, and no forced searches of someone's clothing or body, but beyond that, almost anything is possible in the areas of searches and monitoring. Let's turn to some specifics.

Every employer needs to have a detailed policy regarding use of company computers and resources accessed with computers, such as e-mail, Internet, and the company intranet, if one exists. Each employee must sign the policy - it can be made a condition of continued employment. The policy should cover certain things:

- Define computers, e-mail, Internet, and so on as broadly as possible, with specifics given, but not limited to such specifics
- Define the prohibited actions as broadly as possible, with specifics given, but not limited to such actions
- Remind employees that not only job loss, but also civil liability and criminal prosecution may result from certain actions (illegal pornography, participation in spamming operations or other scams, involvement in computer hacking (see 18 U.S.C. § 1030, among other laws))
- Company needs to reserve the right to monitor all computer usage at all times for compliance with the policy
- Right to inspect an employee's computer, HD, floppy disks, and other media at any time
- Right to withdraw access to computers, Internet, e-mail if needed
- Consider prohibiting camera phones (also called cell phone cameras) and other types of image and video recording devices; such phones and other devices have been implicated in gross invasions of other employees' privacy and in theft of company secrets
- Make sure employees know they have no reasonable expectation of privacy in their use of the company's electronic resources, since it is all company property and to be used only for job-related purposes

How to Monitor Compliance

Here is where you as an employer must know at least a few things about computers and the Internet. Naturally, you will leave many of the technical details to certain trusted computer experts on your staff, or you can contract with one of any number of private computer services companies out there. However, you should be armed with some technical knowledge so that you can make better use of the experts' time and be able to tell whether your efforts are successful.

Have your information technology department or computer person set up software monitoring capabilities. Some software can only detect which computer was used on a network, not who used it. An alternative would be to set up a "proxy server" – users have to log in with their own user names and passwords. With regard to the Internet, specific sites can be blocked by Web site addresses and keywords. Some software can analyze the hard drive of each computer on a network, thus establishing who might have unauthorized software or files on their computer.

Where to look for unauthorized computer and Internet activity? On PCs, look in C:\Windows\ for the following folders:

- Cookies - contains "cookies" left on the employee's computer during visits to Web sites - cookies are little files that let Web sites know whether someone has visited the site before
- History - this records the name and Web address of every site visited by the employee
- Temporary Internet Files - this folder contains a copy of every Web page, graphic image, button, and script file found in or on each Web page visited by the employee
- Start Menu: "Documents" – this shows what is in the user's "Recent" folder (recently-opened or recently-used files)

With the files found in the above folders, it is possible to reconstruct an employee's entire Web surfing session.

Other places on the computer may yield clues. On PCs, look in the "Recycle Bin" – some people forget to empty that folder when they delete files. Using whatever graphics application you find on the computer, click "File" and look at the recent files in use - you may be surprised at what images the employee has viewed. On Macs, look under "Recent Documents" or double-click the "Trash" icon to see deleted files.

There are some warning signs for computer abuse:

- the employee spends a lot of time online, more than is reasonably needed for the job, yet is strangely non-productive
- you hear a lot of hurried clicking as you approach, and the employee greets you with a red face
- the Temporary Internet Files folder is filled to capacity
- the employee's computer crashes more than anyone else's – viruses and excessive demands on RAM
- an increase in spam e-mail from employees leaving their addresses all over the Internet ("spam" is unsolicited commercial e-mail).

Why Companies Should Be Concerned

Abuse of company computers, networks, and the Internet can leave a company at real risk for an employee's wrongful actions. If an employment claim or lawsuit is filed, it is standard for plaintiff's lawyers and administrative agencies to ask to inspect computer records. Deleting computer files does not completely erase the files – there are many traces left on the user's computer, and forensic computer experts can easily find such traces and use them against a company. Tools exist to make data unretrievable, but one must be not only aware of the tools, but has to know how to use them.

An employee in a large semiconductor manufacturing firm was recently arrested on charges of child pornography after a coworker alerted company managers and the managers called law enforcement authorities. Upon detailed inspection, his office computer was found to have hundreds of illegal images stored on the hard drive. The company's quick action probably prevented what could have been legal problems for the employer itself. In a Central Texas county, a sheriff's department employee was fired after many sexually explicit images were found on his office computer. The department had no problem searching his computer, since it had a well-written policy regarding computer and Internet usage.

Focus on E-Mail

A good e-mail policy will let employees know that the company's e-mail system is to be used for business purposes only and that any illegal, harassing, or other unwelcome use of e-mail can result in severe disciplinary action. Let employees know that monitoring will be done for whatever purposes. If unauthorized personal use is detected, note the incident and handle it as any other policy violation would be handled. Whatever you do, do not allow employees' personal e-mail to be circulated at random by curious or nosy employees. Such a practice could potentially lead to defamation and invasion of privacy lawsuits. Have your computer experts attach a disclaimer to all outgoing company e-mail that warns of the company's monitoring policy, lets possible unintended recipients know that confidential company information might be included, and disavows liability for individual misuse or non-official use of e-mail. Here is an example of such a disclaimer:

IMPORTANT MESSAGE AND DISCLAIMER

Internet communications are not secure, and therefore ABC Company does not accept legal responsibility for the contents of this message. However, ABC Company reserves the right to monitor the transmission of this message and to take corrective action against any misuse or abuse of its e-mail system or other components of its network.

The information contained in this e-mail is confidential and may be legally privileged. It is intended solely for the addressee. If you are not the intended recipient, any disclosure, copying, distribution, or any action or act of forbearance taken in reliance on it, is prohibited and may be unlawful. Any views expressed in this e-mail are those of the individual sender, except where the sender specifically states the m to be the views of ABC Company or of any of its affiliates or subsidiaries.

END OF DISCLAIMER

Court Action

A significant court case in the area of e-mail is *McLaren v. Microsoft Corp.* (No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *1 (Tex. App.- Dallas 1999, no pet.)), in which a state appeals court in Dallas ruled that an employee had no claim for invasion of privacy due to the employer's monitoring and distribution of the employee's e-mail. The court noted that having a password does not create reasonable expectation of privacy for an employee, and that since the e-mail system belonged to the company and was there to help the employee do his job, the e-mail messages were not the employee's private property. In addition, the court observed that the employee should not have been surprised that the company would look at the e-mail messages, since he had already told the employer that some of his e-mails might concern a pending investigation.

Another court ruled in 2001 that an employer did not violate the federal law known as the Electronic Communications Privacy Act of 1986 (amended by the USA Patriot Act in 2001) when it retrieved an employee's e-mail sent on a company computer to a competitor company in order to encourage the competitor to go after the employer's customers (*Fraser v. Nationwide Mutual Insurance Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001)). The employee had sent the e-mail, the recipient at the competitor company had received it, and so the employer had not intercepted the e-mail while it was being sent, which is the only thing protected by the ECPA. On December 10, 2003, the Third Circuit Court of Appeals affirmed that part of the federal district court's judgment (Appeal No. 01-2921). An important note here: an employer can do anything with e-mail messages sent and received on company computers, even including intercepting them during the process of transmitting or receiving, as long as it has notified employees, preferably in a signed, written agreement, that they have no expectation of privacy in the use of the company e-mail system, that all use of the e-mail system may be monitored at any time with or without notice, and that any and all messages sent, relayed, or received with the company's e-mail system are the property of the company and may be subject to company review at any time. For an example of how such a policy might be worded, see the sample policy titled "Internet, E-Mail, and Computer Usage Policy" in the "The A-Z of Personnel Policies" portion of Especially for Texas Employers (online at <http://www.twc.state.tx.us/news/efte/tocmain.html>).

Evidence of Misconduct

If an employee is disciplined or discharged based upon computer or Internet problems, have your company computer experts collect both digital and printed copies of whatever e-mail messages or

computer files contain evidence of the violations. The evidence can then be used to defend against various kinds of administrative claims and lawsuits, such as an unemployment claim or discrimination lawsuit.

Conclusion

For business owners, technology makes things both easier and harder. Every company has to ensure that its electronic resources are used properly and not abused by employees. The more you as employers know about computers and the Internet, the better off, and safer, your company will be. 🇺🇸

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