Texas Business Today

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DOL Issues Proposed Federal Wage & Hour Exemption Regulations

Earlier this year, the US Department of Labor (DOL) issued proposed changes to the federal wage and hour regulations under the Fair Labor Standards act (FLSA). The proposed regulations would make sweeping changes to the existing definitions of executive, administrative, and professional exemptions. The proposed regulations would also make changes to other exemptions often discussed under the broad heading of other "white-collar" exemptions. Employers have been waiting for these changes for quite a long time. The last time the duties tests of the regulations underwent substantial revision was back in 1949, and the salary test was last revised in 1975.

The proposed regulations would make two important changes:

- They modify the salary basis test.
- They change the duties tests for the executive, administrative, professional, and outside sales exemptions.

Minimum Salary Increases; "Standard Test" Replaces "Long" and "Short" Duties Tests

The current regulations employ a system of two duties "tests," a "long test" and a "short test," based on the amount of salary paid for the position under review. The current salary levels for the long and short tests are $155 per week and $250 per week, respectively. (With the salary levels under the current regulation dating all the way back to 1975, the long test has become virtually extinct as a result of the labor market that pays far in excess of $155 per week for any exempt position.)

The proposed regulations introduce the concept of a single "standard test" that would replace the current system of two tests. The standard test would require an employee in an exempt position to be paid a salary of not less than $425 per week, equivalent to an annual salary of $22,100. In addition, the position would also have to meet new duties tests depending on the particular exemption under the proposed regulations (discussed below). The salary of $425 per week was set by DOL based on a 2002 report by the Bureau of Labor Statistics that showed that 80% of salaried workers in the US earn at least that amount. It is important to recognize that DOL expects 1.3 million workers who are not eligible for overtime under current regulations to become eligible for overtime as a result of the increased salary test under the proposed regulations.

The Primary "White Collar" Exemptions: Executive, Administrative, and Professional

The Executive Exemption

The current short test does not require the employee in an exempt, executive position to have the authority to hire and fire. Under the "standard test" introduced in the proposed regulations, the position would have to involve all of the following duties:

- Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department of subdivision thereof;
- Customarily and regularly direct the work of two or more other employees; and
- Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.

The proposed regulations may allow more positions to be classified as exempt under the administrative and professional exempt categories. However, the most immediate effect of the proposed regulations is that it is almost certain that fewer positions will be eligible for the executive exemption. Employers must pay particularly close attention to the application of the executive exemption once the proposed regulations go into effect later this year.

The Administrative Exemption

In the proposed regulations, the DOL clearly states: "The current duties test for administrative employees is the most

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difficult to apply of all the duties tests." Unfortunately, Texas employers have already been aware of that challenge for years. In an effort to simplify the administrative exemption, DOL has proposed three significant changes to the regulations for this exemption.

Currently, in determining if the work is "directly related to management policies or general business operations," the regulations and the courts assess whether the work is "related to the administrative operations of the business as distinguished from production." This is referred to as the "production versus staff dichotomy," which DOL acknowledges is difficult to apply in the 21st century workplace. In addition, the regulations and the courts assess whether the work is "of substantial importance to the management or operation of the business." The proposed rules would reduce the "production versus staff dichotomy" in distinguishing between exempt and non-exempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management of general business operations of the employer or of the employer's customers.

The second major change would be to eliminate the requirement of the "exercise of independent judgment and discretion," as that element of the exemption has proven difficult to apply in practice. In its place, however, is the third major change: the addition of a new element. Instead of independent judgment and discretion, the exempt administrative employee will now be required to hold "a position of responsibility with the employer." To meet this requirement, the employee must either "perform work of substantial importance" or "perform work requiring a high level of skill or training."

Some examples of the types of work that meet the administrative exemption include tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, and similar activities.

The Professional Exemption

Current regulations require an employee to have an advanced, formal education to qualify for the exemption as a learned professional. This requirement often included an education beyond a four-year education. The proposed regulations expressly recognize that experience acquired on-the-job, technical skill training, or equivalent experience may satisfy the requirements for an employee to be classified as an exempt "learned professional" without the employee holding a college degree. This change is almost certain to result in a greater number of employees who may qualify for this exemption based on experience acquired on the job. Another dramatic change to this exemption, similar to the administrative exemption, is the elimination of the requirement of constant exercise of independent judgment and discretion. This change will only increase the availability of this exemption that much more. Unfortunately, for an employee to qualify for the learned professional exemption, the employee must perform office or non-manual work. This may render the exemption unavailable to individuals who work in unconventional settings despite having an extensive education. For example, applied scientists in a laboratory or in the field would likely not qualify. For the creative professional exemption, DOL intends no material changes from the existing regulations.

More Exemptions: Computer Employees and Outside Sales Representatives

Computer Employees Exemption

A new regulatory subpart called simply "Computer Employees Exemption" would bring together all of the regulations on the computer professionals exemptions. The proposed exemption, as with the exemptions above, eliminates the "consistent exercise of discretion and independent judgment" element from the exemption. The proposed rule keeps the current standard that an hourly wage of $27.63 per hour for all hours worked will satisfy the exemption, or a weekly salary of $425.

Outside Sales Exemption

Current regulations limit an employee within the outside sales exemption to spend no more than twenty percent of hours worked on non-exempt tasks, but DOL has eliminated the twenty- percent limitation in the proposed regulations. The primary duty of making sales or obtaining orders continues from the current regulations to the proposed regulations, but the elimination of the twenty- percent limitation could expand the exemption to more workers.

New and Improved!

So far, we have covered the highlights of changes to the common exemptions: executive, administrative, professional (learned and creative), computer professionals, and outside sales representatives. Now we will move on to some new subjects included in the proposed regulations. These new topics include highly compensated employees, business owners, and disciplinary suspensions.

Highly Compensated Employees

The proposed regulations include a provision for a new salary level referred to as "highly compensated employees." This new classification includes employees who earn at least $65,000 per year performing office or non-manual work. At this salary level, an employee would qualify as an executive,

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administrative, or professional if they have one identifiable function (executive, administrative, or professional) under the standard duties test. The example cited by DOL involves a manager earning $65,000 per year or more and who supervises two other workers but without any authority to hire or fire. The manager in this example would be within the executive exemption, having a function that is identifiable as an executive function under the standard duties test.

New Exemption for Business Owners

The executive exemption under the proposed regulations would extend to any employee who owns an equity interest of twenty percent of more in the employing enterprise. The exemption would apply even if the employee met none of the salary requirements in the regulations. The restriction under the current regulations with respect to the amount of time that can be spent on non-exempt work is eliminated under the proposed regulations.

New Rule for Disciplinary Suspensions

Current regulations generally prohibit docking the salary of an exempt employee for partial-day deductions. The proposed regulations retain this prohibition but would permit deductions for absences of a full day or more for disciplinary suspensions. For example, an employer could now impose an unpaid suspension of three days without pay (as opposed to a whole workweek suspension) for inappropriate behavior such as sexual harassment or workplace violence. For Texas employers, this new provision opens new opportunities that do not exist under current regulations. Right now, exempt employees cannot be suspended without pay except in cases of "infractions of safety rules of major significance." Unfortunately, DOL under current regulations defines safety rules of major significance to "include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." An employee who engages in hazardous conduct that endangers customers without risking the plant or other employees would not be within the current definition, but the proposed regulations would change that.

What's Next, and What Should You Do in the Meantime?

Many commentators believe that many workers who are now in positions that do not qualify for exemption would be exempt under the proposed regulations. However, the increase in salary to $425 per week will cause some workers who are currently exempt to be entitled to overtime pay when working more than forty hours in any workweek. Employers should review existing positions to determine the nature of the position from a perspective of the duties involved, because that is the focus of the exemptions.

DOL expects to implement the new regulations later this year. What can you do now? The biggest problem faced by employers after misclassifying employees as exempt is the failure to maintain the required records. If DOL audits you and concludes that your salaried employee is non-exempt, will you be able to prove that the employee did not work seventy hours per week? Remember that the employee, even if exempt, has no right to be free from the duty to maintain time records. Losing a dispute with DOL on the classification of one or more workers will be far less painful if you can prove that there was only 15 hours of overtime worked last year and not 1,500. Therefore, we present here for your convenience a brief summary of the recordkeeping requirements for non-exempt employees.

Recordkeeping for Non-Exempt Employees

Part 516 of the wage and hour regulations (Title 29, Code of Federal Regulations) governs the recordkeeping obligations of employers under the FLSA. Employers should not regard the recordkeeping requirements as optional in any respect. Not only does the law require it, but keeping accurate, reliable records regarding payroll matters is simply good strategy. The reason is simple: if an employee claims unpaid wages, and especially unpaid overtime, and the employer is unable to counter the claim with any documentation, the "best evidence" rule used by the DOL will generally mean that the wage claimant will prevail on the question of hours worked, unless there is some independent reason to disbelieve the claimant. Below are the types of information for which employers must maintain records for possible inspection by DOL, as specified in 29 C.F.R. 516.2(a):

- employee's full name - this is the same name as appears on Social Security records;
- employee's home address - current address, including the employee's zip code;
- employee's date of birth - this only applies if the employee is under 19 years of age. An alternative is to maintain an age certificate or other proof of the child's age - in Texas, such an age certificate is available from the Labor Law Department of the Texas Workforce Commission;
- employee's gender and occupation - this is to allow verification of compliance with the Equal Pay Act provisions of the FLSA (see also 29 C.F.R. 1620.32);
- workweek applicable to the employee;
- employee's regular rate of pay - this applies to workweeks in which overtime is worked. In addition, the records must also reflect any payments to the employee that are not included in the regular rate;
- wage payment basis - this is the basic pay rate applied to the employee's straight-time earnings;

DOL Issues ... cont.

- hours worked by the employee - the records of hours worked should show hours worked each day and total hours for each workweek;
- employee's straight-time earnings - total earnings on a straight-time basis, excluding overtime pay;
- overtime pay on a workweek basis - this shows total overtime compensation for each workweek in which overtime is worked;
- deductions from and additions to each employee's pay - these records must be maintained individually for each employee and must reflect the types of deductions or additions, the amounts deducted or added, and the dates of deductions or additions;
- total wages paid - this is the total compensation paid to each employee for each pay period, broken down by straight-time earnings, total weekly overtime pay, and deductions or additions to pay;
- pay periods - the records must show the dates on which each employee is paid, as well as the pay period applying to each employee's wage or salary payment; and
- back pay - this relates to any government-supervised back or retroactive pay to employees that is given as a result of employment claims or lawsuits. Such records must reflect the employees receiving the back pay, the amount of the payment, the period covered by the payment, the date such payment is made, and date of receipt of the payment by the employee.

While some wage and hour records must be kept only two years, others require retention for three years, and since many payroll tax disputes involve employee pay issues, it is a good idea to keep all wage and hour records for three years at the very least.

Conclusion

Today, the current wage and hour regulations remain in effect, but it is only a matter of time before we have new regulations. Please monitor the US DOL website (http://www.dol.gov/) in addition to the Businesses and Employers page at the TWC website (http://www.twc.state.tx.us/customers/bemp/bemp.html) for the most up-to-date information. In addition, follow future issues of *Texas Business Today* for the latest developments in wage and hour law after the new regulations go into effect.

Jonathan Babiak
Attorney at Law

Employer Recognition

Texas Governor's Committee on People with Disabilities

Statewide Employment Awards

The Governor's Committee will recognize outstanding contributions by employers for employing and empowering Texans with disabilities. The awards are presented annually during October. Each year nominations are sought in various employer categories.

Past Award Winners

- Candies by Vletas, Abilene
- Alvin Sun Advertiser Newspaper, Alvin
- Wal-Mart Store #163, Nacogdoches
- Hyatt Regency, Austin
- CA One Services, San Antonio
- Brinker International, Dallas
- Memorial Healthcare System, Houston
- Radio Shack, Fort Worth
- Red Lobster Restaurant, Irving
- NASA Johnson Space Center, Houston

A Resource for You

The Governor's Committee is a resource for you on interviewing, hiring, & accommodating Texans with disabilities. The Committee also provides technical assistance on customer and employee access and information on disability laws and policies, statistics, recognition, and local committees.

For Information & an Entry Form

Cindy Counts, Community Outreach and Public Information Texas Governor's Committee on People with Disabilities, 512-463-5740 (voice) or Dial 711 for Relay Services, ccounts@governor.state.tx.us
http://www.governor.state.tx.us/divisions/disabilities/awards

The Committee requests entries for consideration before *December 31, 2003*.

Mark Your Calendar for October 24, 2003

This year employers will be recognized at an evening event on October 24, 2003 at NASA Johnson Space Center, Gilruth Center, Alamo Ballroom. For event information contact Lillian Villarreal, Chair, Houston Mayor's Committee for Employment of People with Disabilities at 713-640-2160 or Dial 711 for Relay Services.

October
National Disability Employment Awareness Month
"America Works Best When All Americans Work"

FLSA Regulations: Current and Proposed

Executive Employees

	Current "Short Test"	Proposed "Standard Test"
Salary	$250/week	$425/week
Duties	Primary duty of the management of the enterprise or a recognized department or subdivision. ***and*** Customarily and regularly directs the work of two or more other employees.	Primary duty of the management of the enterprise or a recognized department or subdivision. ***and*** Customarily and regularly directs the work of two or more other employees. ***and*** Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).

Administrative Employees

	Current "Short Test"	Proposed "Standard Test"
Salary	$250/week	$425/week
Duties	Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers. ***and*** Customarily and regularly exercises discretion and independent judgment	Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. ***and*** Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.

Professional Employees: "Learned" Professionals

	Current "Short Test"	Proposed "Standard Test"
Salary	$250/week	$425/week
Duties	Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. ***and*** Consistently exercises discretion and judgment.	Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.

FLSA Regulations: cont.

Professional Employees: "Creative Professionals"

	Current "Short Test"	Proposed "Standard Test"
Salary	$250/week	$425/week
Duties	Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employees

	Current "Short Test"	Current § 13(a)(17) test	Proposed "Standard Test"
Salary	$250/week	$27.63/hour	$425/week or $27.63/hour
Duties	Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering. ***and*** Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. ***and*** Consistently exercises discretion and judgment.	Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; ***or*** (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; ***or*** (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; ***or*** (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. ***and*** Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.	Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; ***or*** (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; ***or*** (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; ***or*** (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. ***and*** Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

FLSA Regulations: cont.

Outside Sales Employees

	Current "Short Test"	Current § 13(a)(17) test	Proposed "Standard Test"
Salary	$250/week	$27.63/hour	$425/week or $27.63/hour
Duties	Employed for the purpose of and customarily and regularly engaged away from the employer's place of business in making sales; or in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. ***and*** Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.	No separate short test	Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. ***and*** Customarily and regularly engaged away from the employer's place or places of business.

NOTES: The terms "short test" and "long test" used in the chart above refer to the "duties" tests under the current regulations. Generally, current regulations provide that a position is exempt if the employee is paid on a salary basis and performs certain duties. Current regulations provide a "long test" of duties for employees paid at least $155/week, and a "short test" of duties for employees paid at least $250/week. Obviously, the salary levels under current regulations are so low that the long test is rarely if ever applied. As a result, only the "short test" is covered in the table above.

The one exception to this occurs under the Outside Sales Employee information above. Under both the current and proposed regulations, there is no minimum salary that must be paid to the employee who holds a position as an exempt outside sales employee. As a result, there is only one current "test" applied within the context of that exemption, and it is referred to as the "long test," although there is no corresponding "short test."

From the Dais – Summer 2003

Dear Texas Employers,

The 78th Regular Session of the Texas Legislature recently ended, and a number of bills were passed that will have an impact on Texas businesses. While Texas has long had an excellent reputation as a good place to do business, efforts to maintain and even improve the existing business climate demand constant attention. We can thank both Governor Perry and the Texas Legislature for their leadership and for making some very tough decisions to support business during this last session.

Among the highlights are:

- SB 1771 – creates the $295 million Texas Enterprise Fund. This is a very positive step that sends the message to companies that Texas wants to support business growth, expansion and job creation. Tightening the linkage between workforce development and economic development is absolutely critical, and our policymakers are to be commended for taking this approach.
- HB 3324 – allows TWC to issue bonds to raise money for the Unemployment Insurance Trust Fund instead of borrowing from the federal government. Due to the downturn in the economy, the Unemployment Insurance Trust Fund is currently below the statutory minimum balance, and the State is borrowing from the federal government to pay unemployment benefits. The interest rate on federal borrowing for calendar year 2003 is 6.08%, a cost that is paid by the employers of Texas. This bill will allow the issuance of bonds on the open markets if bond financing is more cost-effective than borrowing from the federal government and could potentially save Texas employers hundreds of millions of dollars over the next few years.
- HB 1 – maintains the funding for the Skills Development Fund at $25 million for the next biennium.

From the Dais cont.

This Fund links businesses, community and technical colleges or unions, by financing customized job training for new or existing jobs in local businesses. The Fund successfully merges business needs and local job training opportunities into a winning formula for putting real people to work in real jobs. Hundreds of Texas employers along with thousands of trained and retrained employees have already benefited, and it is gratifying to see this continued level of legislative support.

There are a number of other bills that passed that may have an impact on your day-to-day business operations. They fall into several categories shown below, including changes to the unemployment insurance system, employee wages, and business legal liability.

Unemployment Insurance: Benefits and Taxes

SB 280 – amends the Texas Unemployment Compensation Act to allow an employee to quit a job on the advice of a law enforcement officer, a licensed medical practitioner or a licensed counselor because of domestic violence or stalking and still receive unemployment insurance benefits; the last employing unit would be protected from chargeback. Status: effective September 1, 2003.

HB 1819 – provides for chargeback protection for employers if their employees separate from employment as the result of any event that is declared a disaster by the Governor under Section 418.014, Government Code (inspired by the 2001 collapse of the South Padre Island bridge). Status: effective immediately.

HB 1221 – relieves from chargeback liability any employer who separates employees as a result of the employer being called up for active military duty. Status: effective immediately.

SB 1071 – provides that an employer who elects to make a voluntary contribution for the recomputation of that employer's experience tax rate must do so as prescribed by rules adopted by the Texas Workforce Commission. Status: effective September 1, 2003.

HB 1820 – amends the Labor Code to exclude from the definition of "employment" services performed by non-resident aliens in the U.S. under an H2-A visa if the service is not considered employment under the Federal Unemployment Tax Act. (Until now, Texas employers were required to report these workers' wages and pay unemployment taxes on those wages even though these workers must return to their native country when their work is completed and are ineligible to receive unemployment insurance benefits). Status: effective September 1, 2003.

Employee Wages: Policies and Procedures

HB 804 – amends Texas minimum wage law to preempt any city ordinance setting a minimum wage. Status: effective September 1, 2003.

HB 3308 – amends the Texas Payday Law to allow employers to pay wages by direct deposit for workers that maintain bank accounts. Status: effective immediately.

HB 826 – requires employers to turn over abandoned wage payments to the State Comptroller of Public Accounts. Status: effective September 1, 2003.

Business Legal Liability

HB 705 – provides a defense against a claim of negligent hiring for employers whose employees enter another's home for purposes of repairs or delivery of goods if the employer obtained a criminal record from the Texas Department of Public Safety. Status: effective September 1, 2003.

HB 2933 – replaces the Texas Commission on Human Rights as an independent state agency with the newly-created Human Rights Division of the Texas Workforce Commission. Status: effective September 1, 2003.

SB 374 – limits the liability of employers utilizing staff leasing companies to those items for which they have contracted to pay. Status: effective September 1, 2003.

In addition to these state statutory changes, I strongly encourage you to become familiar with the U.S. Department of Labor's proposed changes to the regulations governing the payment of wages and overtime under the Fair Labor Standards Act (see cover story). This is one of the most sweeping reforms in this area in many years, and could affect virtually every Texas employer in the near future.

As always, it is a privilege to serve as your advocate at the Texas Workforce Commission.

Sincerely,

Ron Lehman
Commissioner Representing Employers

Business Briefs – Summer 2003

Restaurant Owners: Get the Credit You Deserve!

If you are one of the more than 46,200 Texas employers in the food and beverage industry, you may be entitled to a credit for the social security and Medicare taxes you pay on your employees' tip income. This credit is available under Internal Revenue Code (IRC) section 45B, "Credit For Portion of Employer Social Security Paid With Respect to Employee Cash Tips." To qualify for the credit, you must meet two requirements:

1. You had employees who received tips from customers for providing, delivering or serving food or beverages for consumption; and
2. You paid or incurred employer social security and Medicare taxes on those tips.

The credit applies only to tips received by food and beverage employees; it is not applicable to other tipped employees. The credit is available without regard to whether your employees reported the tips to you pursuant to IRC section 6053(a). You can claim or elect not to claim the credit anytime within three years from the due date of your return on either your original return or an amended return.

The credit equals the social security and Medicare taxes you paid on the tips received by the employees. However, no credit is given for tips used to meet the federal minimum wage rate of $5.15 per hour. For example, if you paid the employee $3.75 per hour and applied tips of $1.40 per hour to reach the minimum wage, then the $1.40 in tips cannot be used toward the credit. However if you paid each employee an amount equal to or more than the minimum wage without including tips, then you can compute the credit on all reported tips.

Treatment of IRC 45B Credit

The credit is part of the general business tax credit and is claimed on Form 8846, "Credit for Employer Social Security and Medicare Taxes on Certain Employee Tips." Since it is an income tax credit, claimed on an income tax return, you may use it to offset any regular income tax liability, **but not employment tax liabilities**. A credit is a dollar for dollar reduction of your regular tax liability, while an expense deduction only reduces your taxable income. Therefore, credits are usually more beneficial. You cannot claim both the credit AND the expense deduction. If you claim the credit, you must reduce your social security and Medicare tax deduction accordingly. You and your accountant should evaluate whether the credit or the expense deduction is more beneficial to you on an annual basis.

The IRC 45B credit is not refundable, meaning that the negative amount is not sent to you as a tax refund if the credit reduces your regular income tax below zero (to a negative amount). However, it is subject to carry back and carry forward provisions of the IRS Code, as are other components of the business tax credit. (See IRC section 39 for further details). Credits arising in tax years beginning after December 31, 1997 may be carried back one year and forward 20 years. Credits arising in tax years beginning before 1998 may be carried back three years and forward 15 years.

Texas restaurant employers have some 141,000 employees serving food and drinks. Initial estimates of the value of this tax credit to these employers range from $50 million to $75 million per year on a statewide basis. And, this tax credit is fundamentally different from the federal earned income credit, or "EIC", which is a tax credit for individual employees, and helps employers only indirectly by cutting turnover costs (interviewing, hiring and retraining) and helping a business retain better workers. The EIC also has the greatest value for low and modest wage workers and their employers, with the advantages for employers decreasing as the worker's wages increase.

In contrast, the 45B tax credit for restaurant employers is a tax credit taken directly by the *employer* and not the individual worker. Most importantly, the 45B tax credit continues to increase in value to the employer as the worker's wage increases. For example, a hypothetical food server at a five-star restaurant may earn as much as $50,000 annually, for which the restaurant employer would normally incur FICA liability of approximately $3,800. By taking the 45B tax credit, this hypothetical restaurant employer would save approximately $3,000 per year. For the average food server in Texas, who earns approximately $14,000 annually, the 45B tax credit would still be worth about $500 to their restaurant employer every year.

Restaurant employers in Texas can only stand to gain by learning more about this valuable tax credit and taking what is rightfully theirs. For additional information, visit one of these helpful websites:

- www.irs.gov/businesses/small/industries/article/0,,id=98463,00.html
- www.restaurant.org/legal/law_fica.cfm
- www.irs.gov/pub/irs-tege/112700mem.pdf

Free Online Services for Texas Employers

The Texas Workforce Commission (TWC) offers a wide range of convenient, secure online solutions for the employers of Texas through its website at www.texasworkforce.org.

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One of the many online solutions TWC offers allows employers ready access to their tax account information by registering for Employer Tax Information Online. Registering for these services provides free access to the following:

- **C3 Internet Filing** – This service allows employers to file their quarterly tax report over the Internet. It is available to employers who wish to file a "no wages" report or who have 100 or fewer employees to report for the current calendar quarter.
- **QuickFile –** This wage-reporting program allows employers and authorized payroll providers to file Employer's Quarterly Reports over the Internet. This program can be used by employers with any number of employees and payroll providers with any number of accounts/clients. QuickFile allows users to upload payroll data and is designed to transfer wage data that is organized in the Interstate Conference of Employment Security Agencies format.
- **TWC Payment Online** – This free electronic payment service enables employers to submit quarterly tax payments to TWC by using the Automated ClearingHouse debit. Employers who file their quarterly tax and wage reports electronically no longer have to mail in their remittance to complete their quarterly filing and payment process.
- **Domestic Employer's Annual Report** – This service allows domestic-only employers to report quarterly wages and pay State Unemployment Insurance contributions over the Internet.
- Other available services include account data review, account information updates, federal identification number submissions, account closures, and statement and tax rate notice requests.
- Employers may now respond to unemployment claims via the Internet, in addition to the options of telephone, mail or fax.

The Wage Information Network (WIN) on TWC's web site is a helpful additional online solution for employers seeking occupational wage information. Wage and employment estimates are available for occupations and industries; this information can be sorted by Metropolitan Statistical Areas, workforce development areas or statewide. The WIN system utilizes the Occupational Employment Statistics wage survey. Each year, more than 27,000 Texas employers are contacted for this survey which is overseen by the U.S. Bureau of Labor Statistics.

More information on all of TWC's online solutions for employers may be found by visiting www.texasworkforce.org, contacting your local Texas Workforce Center, or calling the employer commissioner's office toll free at 1-800-832-9394.

Shared Work Helps Employers Save Money and Retain Workers

The Texas Workforce Network strives to give employers viable alternatives to averting mass layoffs, especially in this challenging economic climate. One successful alternative is Shared Work.

The service is designed to help both employers and workers during a slowdown in business. Shared Work helps to distribute the effects of an economic downturn more evenly throughout the workforce. Under this plan, the employer reduces the work hours of employees, rather than laying off part of the workforce. Shared Work allows for the payment of unemployment benefits to employees to partially compensate for wages lost as a result of reduced hours. According to Robert Puls, West Central Texas Workforce Development Board business services coordinator, "Shared Work is beneficial for employers to help keep costs down…If we can help a business weather the storm and maintain its core employees, it will reduce the cost of training when the company is ready to hire more employees."

More than 1,200 employers have used this service since 1986. If an employer is interested in it, a dislocated worker field specialist will attend meetings with local management groups, employees and union representatives to explain the details. For additional information about Shared Work, visit www.texasworkforce.org/ui/bnfts/sharedwork.html.

The New National Medical Support Notice (NMSN)

The new federal NMSN is a medical support order that puts an employer on notice that the employee identified on the document is obligated by a court or administrative child support order to provide health care coverage for the child(ren) identified in it. The NMSN replaces any notice or order previously served on an employer. Texas began utilizing the NMSN on July 1, 2003. It is a standardized form developed so that all states and employers will have one easily recognized document that provides the information needed for employers to enroll children in health insurance coverage (if it is available) as ordered by a court. The NMSN includes full instructions for both employers and plan administrators, as well as information regarding the laws of the issuing state.

For more information, please visit the Office of the Texas Attorney General's website at, www.oag.state.tx.us, click on "Child Support" and then on "Employers." You may also

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call, toll free, 1-800-850-6442 for more details.

Starting A Business? Here's Some Help!

The Texas Economic Development Office of Small Business Assistance provides very useful information at its website, including "Four Steps to Starting a Business." The topics covered include choosing a legal structure for the business (i.e., sole proprietorship, corporation, etc.), business tax responsibilities, necessary business licenses and permits by business type, and business employer requirements. Visit the agency's website at www.txed.state.tx.us, or contact them toll free at 1-800-888-0511.

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SOME PRACTICAL SOLUTIONS TO SOME COMMON EMPLOYER QUESTIONS: MEDICAL & DISABILITY ISSUES (Part 1)

Thousands of employers call the Employer Commissioner's toll-free hotline every month with questions about labor and employment law. Here are a few common questions about employee health issues, and some answers we hope will help you.

I. Can I require employees to present a doctor's note for every absence due to illness? What if an employee is absent to care for a sick child?

ANSWER: Your decision should be based on "common sense" and reduced to a written policy for all of your employees. "Doctor's note" means different things to different people. You do not really need to know why the employee saw the doctor or the doctor's diagnosis. You may require the employee to present proof that the employee was treated by a doctor and was unable to work during the absence. You may also require the employee to present proof that a doctor has certified that the employee's child was treated and could not be left in the care of someone other than the child's parent, your employee.

Some employers do not require any documentation of absence due to illness unless it extends past three days, but many others require documentation for any absence due to illness no matter how brief. Only you can decide on a policy that will work best for your business needs. You may choose to require more frequent medical documentation as a part of disciplinary action if a person is frequently ill without any apparent reason. Set a standard that is reasonable for your business, distribute it to everyone, and apply it consistently based on the facts of each situation.

No law expressly prohibits you from imposing a rigid policy in this area, but every smart employer knows that rigid policies can cause high turnover, low morale, and discontent in your workforce. Some laws, such as the Americans with Disabilities Act (ADA), limit the extent to which you can inquire about medical information. The Family Medical Leave Act (FMLA) requires private employers with fifty or more employees to grant up to twelve weeks of unpaid leave to an eligible employee for a serious health condition of the employee or a family member, or other specified events such as the birth or adoption of a child.

Other laws, such as the Texas Workers' Compensation Act, may impose significant restrictions on what you do with an employee's health information that you may receive. In addition, an employer, may inadvertently become a "covered entity" under the Health Insurance Portability and Accountability Act (HIPAA) by merely receiving protected health information, or "PHI."

Adopt a written policy for verification of extended or multiple illnesses. Specify a time period that works for you (e.g., for any absence due to illness, for any absence greater than two days due to illness, etc.). If you wish, include a requirement that the worker shall present a certification from a doctor that the worker is able to return to work, with or without restrictions. Your policy should not require your employees to authorize a treating doctor to release any information beyond that needed to determine fitness for duty. This can reduce the chance that you may receive protected health information under HIPAA.

HIPAA privacy restrictions apply to all health care providers, health care insurers, and to some employers, mostly the self-insured. As a result, you may find some doctors reluctant to release any written verification that an employee or an employee's child was treated. Many entities covered by HIPAA are exercising due caution at this time, as HIPAA took effect only this past April, and there remains substantial confusion on precisely what HIPAA requires.

II. My employee has been on approved leave for six months due to illness. We have continued to pay his group health insurance premium. How long do we have to do this?

ANSWER: You are not required to continue insurance coverage for an employee on leave without pay, unless you promised to do so in your company policy. Although not

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required, some employers have employment policies that provide for continuation of the company's share with the employee paying his own share during leave without pay, or as part of a severance policy on separation from employment. Other employers pay the employee's share but require a written pay deduction authorization from the employee for repayment upon the employee's return to work. If the worker does not return to work in these circumstances, the employer may be at risk of not recovering the premiums paid on behalf of the employee during the leave.

In contrast, during paid leave you continue the salary and other benefits, including health insurance, and you may continue to deduct the employee's share of the premiums from the salary. Your employment policies should address these issues, including time limits.

If you have been paying an employee's health insurance premiums, the employee may rely on the coverage, so provide notice at every opportunity on the subject of terminating coverage. Include information in your policy handbook to set out the conditions under which coverage will terminate, and provide individual notice on termination of coverage to any employee who goes on extended leave. Also, consider guiding employees to other government social service assistance.

If you have disability insurance, provide information about the coverage, including information on termination of coverage. Disability coverage usually requires a "wait period" but then replaces a portion of wages and may provide some medical benefits. Consider the option of continuing to pay the disability premiums if the employee signs a wage deduction authorization with respect to future wages, but remember the risks of such an arrangement discussed above.

Finally, the employee may be eligible for FMLA leave, which is discussed in greater detail below.

III. My employee is always coughing at work. I am concerned that the employee may be contagious. She works very closely with two other people. What can I do?

ANSWER: As the employer, you are under a duty to act reasonably to provide a safe work environment. A cough may or may not spread an infection, but a cough that continues for more than three to five days requires medical evaluation to diagnose. The cough could be a symptom of a low-grade infection, a complication of respiratory allergies, or even an indication of tuberculosis, bronchitis, or pneumonia.

You can require the employee to take sick leave and seek medical treatment. You may also impose a suspension until the employee presents a statement from a doctor to certify that the employee is non-infectious and can return to work. The doctor's statement does not need to disclose any protected health information. Always approach an employee in this situation in a businesslike manner seeking only to determine an answer to the question of whether the employee has the current ability to perform the tasks of the job. An employee is free to reveal protected health information voluntarily, but a doctor is restricted under HIPAA from disclosing any protected health information with anyone but the patient and certain other specific entities.

IV. I have an employee who is pregnant. Do I have to provide maternity leave, does the maternity leave have to be paid, and do I have to hold the job open?

ANSWER: Review your written policies. Do your policies promise paid or unpaid leave for maternity or any other any medical disability? Do you guarantee that the person can return to work? Ask yourself if the pregnancy or a recent childbirth creates a temporary disability that prevents the employee from carrying out the essential functions of the job. Treat the temporary disability that results from the pregnancy or other medical condition the same as you would any other temporary disability. If you have never faced this situation, sit down now and decide what will work for you when something like this does arise. Write a policy, and distribute it to your employees.

You are not required to allow the pregnant employee more time off than any other person under your policies. Pregnancy is not an injury or a disability. Most pregnant women can work full time during their entire pregnancy, and the recovery time after childbirth will vary depending upon individual circumstances. Only a doctor can certify if the employee is able to work; the employee's ability to perform the essential functions of the job should be the only subject of your concern.

The Pregnancy Discrimination Act (PDA) covers employers with fifteen or more employees and protects employees from discrimination on the basis of pregnancy, childbirth or related medical conditions. Symptoms such as morning sickness, severe heartburn, or backache at different stages of the pregnancy may cause short-term inability to work. More serious complications can develop, such as hypertension or temporary diabetes, that may endanger the health of the mother or the baby. Although these conditions may require restricted activity or bed rest, remember that pregnancy is not a disability.

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, an employer may use any procedure used to screen other employees' ability to work. For

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example, if an employer requires employees to submit a doctor's statement to certify the inability to work before granting leave or paying sick benefits, the employer may likewise require employees affected by pregnancy-related conditions to submit such statements.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing modified tasks, alternative assignments, disability leave or leave without pay.

If an employee has been absent from work as a result of a pregnancy-related condition and recovers before childbirth, the employer may not require her to remain on leave until the baby is born. An employer may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth. Employers must hold open a job for a pregnancy related absence the same length of time jobs are held open for other employees on sick or disability leave.

The Pregnancy Discrimination Act does not require paid leave, guarantee job protection for pregnant employees, or mandate any preferential treatment for pregnant applicants or employees. However, the employee may be entitled to twelve weeks of unpaid leave under the Family and Medical Leave Act (FMLA).

FMLA applies if:

(1) The business is a "covered employer," which includes: (a) any public employer; (b) any public or private school entity; or (2) any private employer that has had 50 or more employees in each of 20 weeks in the current or preceding calendar year, with the employees stationed within 75 miles of each other; and,

(2) The employee is eligible for leave, which requires that the employee has (1) worked at least 1,250 hours for the company in the year preceding the leave, and (2) worked for at least twelve months. Some part-time employees will not be eligible even if they have worked for 12 months; and,

(3) the pregnancy, childbirth, or recovery period is a "serious medical condition" as defined in the FMLA, or

(4) a foster child or newly adopted child has been placed with and is a new member of an employee's family.

FMLA leave does not have to be continuous and uninterrupted. It can be intermittent, occasional, or for partial days. You can require an employee to use sick leave before FMLA leave is used. In the case of FMLA leave for pregnancy, the employer can require a medical examination if it would do so for any other temporarily-disabled employee, with the focus on whether the employee could continue to perform her job functions, with or without any modifications.

Even if the employer in this hypothetical example has no disability leave policies, it can apply its sick leave or no-fault absenteeism policies in the same way that it would to any other employee. Any kind of leave offered can be paid or unpaid. Only if the employer is subject to the FMLA must it protect the pregnant worker's position (unless its other policies or contracts mandate job protection), and then only for the required twelve weeks. Source: Smith v. Alderman-Cave Feeds, U.S. District for the N. District of Texas, No 1:01 CV125C (2002). See also Stout v. Baxter Healthcare Corp., 282 F 3d 856, 860 (2002). Also visit the US Department of Labor's website at www.dol.gov for more details.

V. Our employee has had diabetes for several years. Recently he requested to occasionally report to work fifteen minutes late without being penalized and without prior arrangement. He eats breakfast at the same restaurant every day, and he says that he needs to eat at specific times to regulate his blood sugar levels. Some days the service at the restaurant is just slow. His supervisor suggested that he could eat breakfast at home or get take-out at the restaurant and eat at his workstation. The employee agreed and managed to get to work on time. Six months later, we fired the employee for insubordination. He has sued us, alleging that we violated his rights under the Americans With Disabilities Act by firing him in retaliation for his request to accommodate his disability. What do we do?

ANSWER: Are you a political subdivision (state, county, or city governmental agency), or are you a private employer with fifteen or more employees? If so, you are covered by the Americans with Disabilities Act (ADA), and the court will have to determine whether the employee has a "disability." In general, while diabetes is a recognized impairment under ADA, it may not be a qualifying disability. The employee must show how diabetes substantially limits him in a major life activity. Examples of major life activities include things like sleeping, eating, walking, or working.

Even if he can prove that his diabetes is a disability, he must then prove that the requested accommodation was necessary, and that the employer's alternate offered accommodation was unreasonable. If he is successful, then the employer must prove that the requested accommodation, although necessary, was "unduly burdensome" as

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defined by the ADA. The employee must also show that he was fired for requesting an accommodation and that the employer's alleged reason for discharge (insubordination) was merely a pretext. A disability does not exempt an employee from an employer's usual workplace policies, but you should carefully assess each request for accommodation an employee may make and any later decision to discharge an employee who has previously requested an accommodation.

The employee in this example may have difficulty proving that his diabetes interfered with his ability either to eat or to work. Also, the passage of six months between the request for accommodation and the date of discharge, and the employee's proven ability to arrive at work on time under the employer's alternate accommodation are factors favorable to the employer on the accommodation issue. Source: Lawson v. CSX Transportation Inc., 245 F. 3d 916 (2001)(judgment for employer affirmed).

CONCLUSION

Employers face difficult questions every day on employee health issues, and the questions above are only a few of the more common examples. Future issues of *Texas Business Today* will cover other common questions that arise in this area.

For more in-depth information on the laws discussed in the scenarios above, and other similar laws relating to disability or health issues, visit the following websites:

United States Department of Labor, (FMLA, HIPAA) - www.dol.gov
United States Health and Human Services Department-(HIPAA)- www.hhs.gov
United States Equal Employment Opportunity Commission-(ADA) www.eeoc.gov
Texas Commission on Human Rights-(TCHRA)-www.tchr.state.tx.us
Texas Workforce Commission- (Drug Free Workplace Act and other laws discussed in this article)-www.texasworkforce.org (Business & Employers link)
Texas Workers' Compensation Commission (workers' comp) - www.twcc.state.tx.us
Texas Dept. of Insurance-(COBRA, HIPAA)-www.tdi.state.tx.us
Texas Commission on Alcohol and Drug Abuse (substance abuse)- www.tcada.state.tx.us
Occupational Safety and Health Administration (OSHA-industry-specific laws and hazardous occupations)-www.osha.gov

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Employers Should Avoid Unauthorized Health Care Plans

By JOSE MONTEMAYOR,
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Rising health care costs have made employers vulnerable to sales pitches for unlicensed health care plans that offer low-cost premiums but inevitably drop out of sight when claims start piling up.

Far too many otherwise astute business people have been deceived by sales pitches for these fraudulent insurance products. However, it's easy to avoid getting ripped off if you maintain a healthy skepticism and know where to find information.

Over the past 2-1/2 years, the Texas Department of Insurance has acted to shut down a dozen unlicensed health care plans. Their victims include families whose credit suffers from unpaid medical bills, employers who wasted millions on worthless coverage, and health care providers who haven't been paid for services rendered. A number of other suspect plans are under investigation.

Selling insurance without a license or other authorization from TDI isn't just a "technical violation." It's a red flag that signals criminal intent and, in fact, it's a third-degree felony in Texas. Federal agencies also have prosecuted unauthorized insurers for such crimes as mail fraud and wire fraud.

Employers who want to learn if a particular health plan is licensed in Texas can call the Texas Department of Insurance's Consumer Help Line at **1-800-252-3439** or visit TDI's Web site at **www.tdi.state.tx.us** and click on "Look Up Company." Our Web site has company profiles for all insurers licensed or otherwise eligible to sell insurance in Texas.

Fraudulent health insurers typically claim – falsely – that they are employer-sponsored plans exempted from state licensing requirements by the federal Employment Retirement Income Security Act (ERISA) of 1974. Or they may claim to be union plans, also exempted by ERISA from state licensing laws. However, the sham unions cited to bolster this claim do not engage in legitimate collective bargaining and exist only to market fraudulent health plans. Virtually all legitimate multiple employer benefit plans are licensed by TDI or are covered by licensed insurance companies.

The U. S. Department of Labor's Pension and Welfare Benefits Administration can confirm whether a purported ERISA plan has made the filings required of such plans.

Some unauthorized insurers have recruited licensed agents to sell their health plans. However, the fact that an agent is licensed is no guarantee that a plan he or she is selling is legitimate, and TDI has taken disciplinary action against more than 50 agents this year for selling unauthorized health plans. It's important to remember that genuine ERISA plans don't need to be sold because they originate with employers and legitimate labor unions. An agent shouldn't be in the picture at all.

Employers can protect themselves and their employees from fraudulent health plans by following these tips:

- Be skeptical if you're offered coverage that boasts unusually low premium rates and/or minimal underwriting.
- Make sure the plan is insured by a licensed insurance company. Ask for the insurer's name and check the benefits booklet to see if it names a licensed insurer. You can verify claims that an insurance company is backing the plan by contacting the company. The company profiles on TDI's Web site include phone numbers and addresses.
- Contact TDI's Fraud Unit, 1-888-327-8818, if an agent offers you a union plan or claims a health plan does not need a license because the coverage isn't insurance or is exempted by ERISA from state regulation. The *Texas Insurance Code* provides immunity from civil suits when a person, acting without malice, fraudulent intent or bad faith, reports suspected insurance fraud to TDI.
- Be wary if salespeople and promotional literature seem deliberately to avoid the word "insurance" or other insurance terms, or if they claim that the plan is not insurance, and, therefore, is exempt from regulation.
- Don't be misled by an insurance company name or logo on plan materials. The insurer may simply provide administrative services or "stop loss" coverage that pays only when claims exceed a certain amount.

IN THIS ISSUE

Texas Business Today

Texas Business Today is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

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