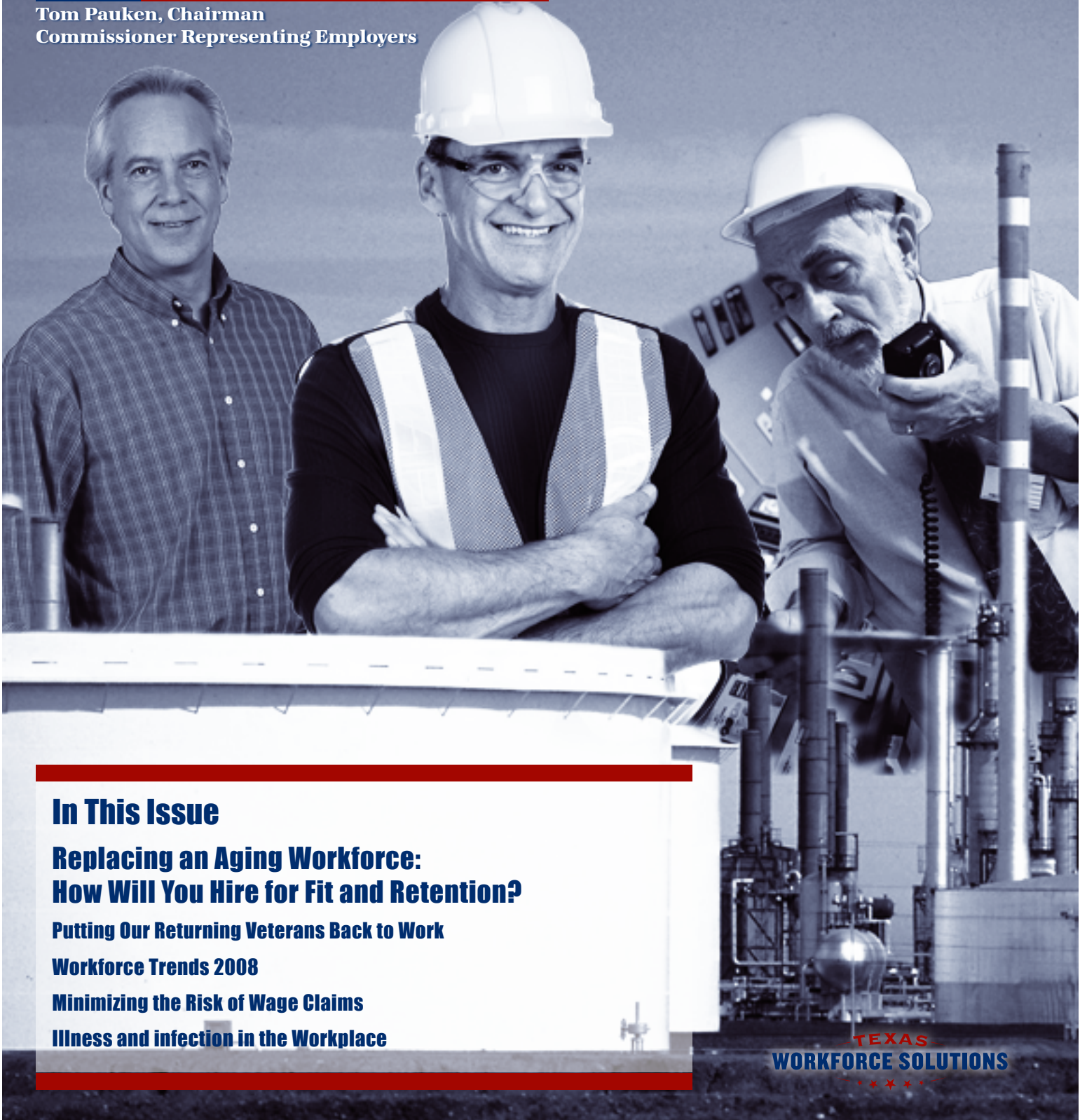


# Texas Business Today

SUMMER 2008

Tom Pauken, Chairman  
Commissioner Representing Employers



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TEXAS  
WORKFORCE SOLUTIONS



# Chairman's Corner – Summer 2008

Dear Texas Employer,

My name is Tom Pauken, Chairman of the Texas Workforce Commission and the Commissioner Representing Employers. I am proud to be the business representative on the Commission, having been a Vice President of a venture capital company for a number of years, and also having been a small business owner myself.

I know what it is to meet a payroll and how important it is to find and retain good employees. I appreciate your hard work in trying to run a company successfully, serve your customers, grow your business, and at the same time stay in compliance with seemingly countless statutes and regulations from dozens of government agencies. Your ability to create private sector jobs in Texas is vital to keeping Texas the best state in the country in which to do business.


As the taxpayers who finance the Unemployment Insurance (UI) program, you have a direct interest in how the Commission does its job of administering the system. In fact, your taxes pay 100% of the costs of the UI system, and I intend to do my part to ensure that the agency considers your interests in any action that impacts employers.

During my years in the private sector, I saw firsthand the importance of paying close attention to employer-employee issues. When problems arise, it is important to engage in "preventive medicine" to resolve disputes prior to their reaching the litigation stage. That means preparing sound policies, consistently following them, and generally trying to do the right thing. While that is no guarantee that you (as the employer) can avoid the filing of questionable claims, I still believe that is the wisest course of action to take as an employer. It is in your interest that you pay close attention to the rules and statutes relating to employment law in order to minimize legal disputes.

This issue of Texas Business Today is designed to address the employment law issues that come up most frequently for employers, as well as new issues that are emerging in employment law. Hopefully, it will be of benefit to you.

I also want you to know that my office stands ready to help you at any time on questions you might have on employer-employee relations. We have a toll free number and knowledgeable lawyers on staff to answer your questions and guide you through the UI process. Our number is 1-800-832-9394.

As Chairman of the Texas Workforce Commission, I am committed to treating your tax dollars with the same respect and fiscal responsibility that I would exercise in running a business or in handling our family's financial affairs.

I look forward to working with you in helping Texas become an even better state in which to do business than it already is. 

Sincerely,



Tom Pauken, Chairman  
Commissioner Representing Employers

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# Replacing an Aging Workforce: How Will You Hire for Fit and Retention?

Managers in today's workforce not only have to deal with the normal, everyday hiring and retention issues, but also face the daunting challenge of replacing 78 million baby-boomers who will become eligible to retire during the coming decade. Anne Fisher, a senior writer for *Fortune Magazine*, writes, "Every seven seconds, someone in the U.S. will turn 60. By the end of the decade it is estimated that 40% of the workforce will have retired or be eligible to do so." (*Fortune Magazine*, "How to Plug Your Company's Brain Drain," July 19, 2006)

Ms. Fisher goes on to say that recent surveys show an alarming statistic: "Seventy percent to 80% of executives at big companies are concerned about the coming brain drain, but fewer than 20% have begun to do anything about it...many seem to be counting mainly on enticing older workers to stay longer than they have to, or to 'consult' after they retire."

Dr. Theresa Welbourne of the American Management Association (AMA) observed that most employers are not yet facing labor shortages and, as a result, have not begun to focus their thinking on the problems and/or opportunities associated with the aging American workforce. At the same time the older generation is retiring, there are fewer new/younger workers to replace them. Dr. Welbourne says, "Critical shortages of qualified workers are expected. It's time to determine your organization's readiness to cope with the realities of both an aging workforce and a shrinking, youthful labor pool."

In a Leadership Pulse Study conducted by the AMA, one respondent summarized the impending crisis stating, "As older employees leave, their talent, knowledge, deep relationships, and extensive, on-the-job training exits with them. These are elements that simply cannot be replaced through the hiring of recent college graduates... The 'graying' of the workforce has many seen and unseen consequences that will take a heavy toll on corporations and industries that fail to recognize and understand it."

This is a multi-faceted issue that will have a tremendous impact upon American businesses and industries and the state of the American economy. We, at the Texas Workforce Commission, are concerned over the impact to the Texas economy and our employers of the loss of that experienced workforce in the coming years. Chairman Tom Pauken, the Commissioner Representing Employers, has addressed this issue, and will continue to do so in presentations and speeches to audiences around the state. We at TWC will work hard to establish

collaborative efforts between our educational institutions, Work Source Centers, and employers to better prepare our youth for entry into the labor market with skills that are needed to meet business and industry demands. This, of course, is not a short term objective. But, the sooner we can implement programs that address these issues, the closer we will be to resolution.

So...what can you, the Texas employer, do now to fill the knowledge and leadership gaps, and find the "good fit" employees? And, more importantly, how do you retain them?

Leadership IQ, a global leadership training and research firm, conducted a three-year study involving 5,247 hiring managers from 312 public, private, business, and healthcare organizations on the subject of why new hires fail (see "Why New Hires Fail," at [www.leadershipiq.com](http://www.leadershipiq.com)). The results and recommendations from the study provide good insight into how a reliable assessment program can find that "good fit" employee who possesses not only the skills needed, but also the work ethic and personality that fit well into a company's cultural environment and improves employee retention.

During the study period, over 20,000 employees were hired by the participating hiring managers. The study found that 46% of newly-hired employees failed within 18 months, while only 19% achieved success. Surprisingly, the results revealed that failures were not due to lack of technical skills. Instead, poor interpersonal skills dominated the list. The study showed that:

- 26% could not accept feedback
- 23% were unable to understand and manage emotions
- 17% lacked the necessary motivation to excel
- 15% possessed the wrong temperament for the job
- 11% lacked the technical skills.

The managers involved in the survey admitted that these flaws were overlooked during the interview process. According to Mark Murphy, CEO of Leadership IQ, "...coachability, emotional intelligence, motivation and temperament are much more predictive of a new hire's success or failure." He goes on to say that if managers would focus more on these issues rather than the more common, easier to assess, technical skills, fewer hiring failures would occur. The bottom line: "Do technical skills really matter if the employee isn't open to improving, alienates their coworkers, lacks drive, and

has the wrong personality for the job?”

Adrienne Hedger, in an article published in the March 17, 2008, issue of *Workforce Management* says, “A robust screening program can help companies avoid risk, reduce costs, and hire the right person.” Such a screening process involves background checks, assessment tools, job previews and more. Properly managing the process is essential in making the right hire.

In the article, Ms. Hedger identifies several challenges in the screening process:

**1 Deciding when to conduct the background check.**

In the past, companies have made the job offer before conducting the background check. This is changing, because companies are realizing that waiting too long can result in rescinding an offer after time and money have been wasted in the process. Some companies have implemented a “tiered” approach, where a fast, basic background check is run either before or after the first interview to determine if the candidate should be elevated to the next level. More in-depth screening can be performed in the succeeding levels, and may include credit reports, past employment verification and more. Since a drug test is the most costly, it is usually run at the last stage.

**2 Managing the background check process.**

To improve accuracy, many are turning to technology. Instead of handwritten applications, which require someone to key in the information creating the potential for human error, on-line applications are now being used. Software for these on-line applications can identify errors that might otherwise be overlooked and return an error message before the application is submitted by the applicant. This can save an enormous amount of manual entry time by a second party and reduce the amount of time wasted in tracking down the applicant to correct the data. Many companies, who find the background check process to be too overwhelming, are choosing to outsource the operation to companies that embrace web-based technology. A good and reliable vendor can reduce the complexity and provide simple and updated reports for their clients, making the HR manager’s job of assessing applicants more efficient and accurate.

**3 Interpreting the background check data.**


This is another reason for outsourcing. Most reputable vendors have staff that can interpret criminal reports and can summarize the information in an understandable and relevant manner. They can also determine the quality of the data and provide the context for making a proper decision.

**4 Identifying the candidate who best fits the job.**

As discussed earlier, a candidate may possess all the technical skills required for the job, but if personality, values, work preferences, etc. do not match the company culture, then this candidate may not be the best fit for the job. Of course, in order to accurately assess the cultural fit of an applicant, the company must define and openly communicate the culture. Soliciting current employees’ opinions is a good and recommended way of defining a company’s culture, and, as an added value, creates employee ownership and a beginning for aligning the company with the defined culture. An idea gaining popularity is inviting the candidates to meet with their potential teammates, especially if the job requires frequent collaboration. Joann McMillan, Chief Operating Officer of Bigby Havis, a hiring consulting firm of organizational psychologists (and licensed by the State of Texas), says, “You want the assessment and pre-screen to deliver the highest quality candidate. In some cases, it makes sense for the team to help own that decision.”

Another idea that many companies are employing in the “proper fit” screening process is what’s called a job “test drive.” Ms. Hedger cites a program at a high tech wafer fabrication facility, where potential candidates are given the opportunity to wear the protective suit and equipment required in the work environment for which they are applying. Some found the garb to be too claustrophobic and opted out before being hired, benefiting both the applicant and the company. Joann McMillan says, “If a candidate isn’t a good fit for the particular environment, it’s in the company’s and the candidate’s best interest to know this before they make an offer.”

Before deciding upon a screening method for your business, it is important to understand that the assessment tools and procedures may be subject to professional and legal standards. To help employers design a legally valid, non-discriminatory and effective assessment program, the Department of Labor publishes an employer guide entitled, “Testing and Assessment: An Employer’s Guide to Good Practices.” The guide conveys the essential concepts of employment testing in easy-to-understand terms for managers and HR professionals. The guide is free and can be downloaded from the Internet at: <http://www.onetcenter.org/guides.html#empTestAsse>.

Whether concerned about replacement of retirees or filling vacancies in an expanding organization, the proper screening and assessment of job candidates is the key to successful hiring and retention. As Joann McMillan says, “The people you bring on today are the future of your organization...A good screening process will deliver results over the long term.” 

# Putting Our Returning Veterans Back to Work

Texas is a patriotic state with a proud history and long tradition of supporting Texas veterans dating back to the early days of the Republic of Texas. Even in its infancy, Texas awarded land grants to veterans who served or saw action at the Siege of Bexar, the Goliad Campaigns of 1835 and 1836, the Battle of the Alamo, and the Battle of San Jacinto, among others.

At the Texas Workforce Commission (TWC) we are continuing this tradition by responding to the needs of veterans returning from Iraq and Afghanistan as they resume civilian life in Texas. TWC recently approved \$2.25 million to fund the Texas Veterans Leadership Program (TVLP), a comprehensive program to assist returning veterans.

According to a recent report of the RAND National Defense Research Institute, in 2006 alone 175,000 active duty military personnel and 100,000 reservists entered the civilian work force – many after service in Iraq and Afghanistan. They often face considerable obstacles in the labor market, which many are entering for the first time. Indeed, the unemployment rate for young veterans has consistently exceeded the rate for young non-veterans and in the last few years has ranged from two to three times the rate for nonveterans in general.

Worse, on March 25, the *Wall Street Journal* reported that a Veterans Affairs Department study found that many veterans have simply dropped entirely out of the labor force. The percentage of veterans not in the labor force increased from 10% in 2000 to 23% in 2005, and young veterans who do find employment often end up in low-paying jobs, with half earning less than \$25,000 per year.

The Texas Workforce Commission recognizes the sacrifices made by the men and women serving in Iraq and Afghanistan and the difficulties many face as they make the transition to civilian life. As Commission Chairman, one of my top priorities is serving these veterans and educating employers on the benefits of hiring them.

On April 17, 2008, with support from Governor Rick Perry, we approved a comprehensive program to assist veterans returning from Iraq and Afghanistan as they resume civilian life in Texas. The Texas Veterans Leadership Program is modeled on the successful Vietnam Veterans Leadership Program that we established during the Reagan administration in which successful Vietnam veterans helped our fellow veterans who were unemployed or underemployed or who had lingering

problems associated with their Vietnam experience. This initiative will be led by returning veterans who served in Iraq or Afghanistan.

The Texas Veterans Leadership Program will have twenty-eight Veterans Resources and Referral Specialists overseen by a state director. They will provide critical resource and referral services to help veterans of Iraq and Afghanistan with employment and training services. These local project directors will be stationed in workforce centers in each Local Workforce Development Board area while working closely with workforce center staff and the local staff of the Texas Veterans Commission. The needs of the returning veterans from Iraq and/or Afghanistan will vary, and the local directors will respond appropriately. The state director of our returning veterans initiative is Jason Doran, who was awarded the Silver Star for bravery in Iraq, and who is the author of “I Am My Brother’s Keeper.”

Veterans Resources and Referral specialists will:

- Seek out returning veterans from Iraq and/or Afghanistan in need of services
- Assist them in attaining skills, solving problems that prevent employment, and finding employment
- Develop working relationships with local business, labor, veteran and other community leaders who want to help our returning veterans make a successful transition to civilian life.
- Encourage local and state governmental entities to hire returning veterans along with providing necessary support in other areas where our returning veterans need assistance.
- Develop a volunteer chain of veterans who are familiar with the obstacles returning veterans face and the means for overcoming them

TVLP recognizes the importance of reaching veterans *as soon as possible* after they return from Iraq and Afghanistan and *quickly* getting them into training or employment.




In addition, TVLP is developing a comprehensive media campaign to reach Iraq and Afghanistan veterans who may be unaware of the services available to them and assure them that they can find gainful employment after military service. The campaign will also highlight the value these veterans bring to the civilian labor force. It will emphasize:

- The experience that military careers have provided veterans
- The value that veterans bring to the communities in which they reside.

Above all, TVLP will work to ensure that veterans are welcomed back to Texas in the right way in appreciation of their answering their country's call.

TWC is mindful of the role of other agencies in assisting returning veterans and will rely heavily on their expertise. We look forward to a strong collaborative partnership with all agencies in order to provide the services needed by our returning veterans.

According to the Census Bureau, only California has more veterans than Texas.

What should Texas do with a resource like this? Put it to work. We would appreciate the strong involvement of our business community in putting that experience of our Texas veterans of Iraq and Afghanistan back to work in Texas by hiring our returning veterans. 

Tom Pauken, Chairman  
Commissioner Representing Employers

## *Business Briefs – Summer 2008*

### **WorkInTexas.com Teams with JobCentral to Enhance Opportunities for Texans**

WorkInTexas.com just got bigger and better than ever. Through a partnership with JobCentral.com, a national job-search clearinghouse, WorkInTexas.com has boosted the number of employer-posted openings available to Texas job seekers to more than 125,000, a jump of over 25%. JobCentral.com is operated by Direct Employers Association, a nonprofit consortium owned and managed by 375 Fortune 500 companies, increasing the number of professional-level positions on WorkInTexas.com as well.

Many of these new job listings are from some of America's top companies. Bell Helicopter, Chevron, ConocoPhillips, Continental Airlines, RadioShack and Rolls-Royce are just some of the Fortune 500 companies that list with JobCentral.

The Texas Workforce Commission (TWC) and the state's 28 local workforce development boards developed WorkInTexas.com to provide a comprehensive online employment resource, matching employers of all sizes and types with qualified candidates. More than 255,000 Texas employers are currently registered to post jobs on WorkInTexas.com, and 1.2 million Texans have found jobs since the Web site launched in June 2004.

WorkInTexas.com provides many services to Texas employers and job seekers alike, including real-time job matching, job posting, resume customization, labor pool and job-availability research, job-skill assessment tests and more – all online, free of charge and available 24 hours a day, seven days a week.

### **Employment Details Coming Soon to Online Texas Sex Offender Registry**

Places of employment and job titles will be added to the online Texas sex offender registry in the next few months. Maintained by the Texas Department of Public Safety, the Web site currently provides every offender's name, date of birth, home address, a photo and a physical description. It also provides the victim's gender, age, and the crime committed.

This additional information is being made available after a ruling by State Attorney General Greg Abbott that both employment location and status of registered sex offenders are public information.

While some praise the availability of this additional information as one more tool to fight crime, others are troubled that publicizing employment information could damage offenders who have completed their sentences and are attempting to succeed in society. Whichever view one subscribes to, it is clear that the need to do thorough criminal background checks just became more critical for Texas employers.

For further information, please visit the DPS Web site at [www.dps.state.tx.us](http://www.dps.state.tx.us).

### **Heads Up: Be on the Lookout for Bogus Fair and Accurate Credit Reporting Act (FACTA) Audit Notifications**

The TWC recently learned of Audit Notifications being sent to Texas employers, purporting to be from the Texas Workforce Commission FACTA Compliance

Office in San Antonio, Texas. It notifies the employer that they have been chosen for a compliance audit under FACTA, and that someone from TWC will be contacting the employer within 30 days to arrange the compliance audit. **THIS IS A BOGUS NOTIFICATION.** The TWC has no such office or authority. Do NOT provide sensitive information to anyone professing to be performing such an audit.

FACTA is enforced by the Federal Trade Commission, not the TWC, and was passed in an effort to help fight what has become the fastest growing crime in the U.S.: identity theft. The law applies to any business, regardless of size, that collects personal information or consumer reports about customers or employees to make decisions within their business including names, credit card numbers, birthdates, home addresses and more. Among other things, it requires businesses to leave off all but the final five digits of a credit card number on electronically printed store receipts as of December 1, 2006. Employers must also destroy all information obtained from any consumer credit report before discarding it.

FACTA also creates serious new responsibilities and potential liabilities for businesses nationwide. Simply put, if data aiding an identity theft originates from a security breach at your company (including a bogus "audit"), you could be sued, fined or become a defendant in a class-action lawsuit by affected employees or customers whose personal information has somehow gotten out.

If you receive one of these bogus notifications, please contact the TWC Office of Investigations at (512) 463-2794, or contact the Employer Commissioner's hotline at 1-800-832-9394.

For additional information on the FACTA itself and what the law requires, you may visit the agency's website at [www.texasworkforce.org](http://www.texasworkforce.org), click on "Businesses and Employers," and under "Publications," look for the Winter 2007 issue of "Texas Business Today." FACTA is the cover story. Additional information is also available at the FTC's website at [www.ftc.gov](http://www.ftc.gov), or call toll free 1-877-FTC-HELP.

### **U.S. Citizenship and Immigration Services (USCIS) Revises Employment Eligibility Verification Form (I-9)**

The USCIS, a part of the Department of Homeland Security, recently announced that a revised Employment Eligibility Verification Form (I-9) is now available for use. All employers are required to complete a Form I-9 for each employee hired in the United States, citizens and non-citizens alike.

One of the keys to the revision is the removal of five documents from List A for proof of both identity and employment eligibility. They are:

- Certificate of U.S. Citizenship (Form N-560 or N-570);
- Certificate of Naturalization (Form N-550 or N570);
- Alien Registration Receipt Card (Form I-151);
- Unexpired Reentry Permit (Form I-327) and
- Unexpired Refugee Travel Document (Form I-571).


The forms were removed because they lack sufficient features to help deter counterfeiting, fraud, and tampering.

Additionally, the most recent version of the Employment Authorization Document (Form I-766) was added to List A of the List of Acceptable Documents on the revised form. The revised list of acceptable documents now includes:

- A U.S. passport (unexpired or expired);
- A Permanent Resident Card (Form I-551);
- An unexpired foreign passport with a temporary I-551 stamp;
- An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A or I-688B) and
- An unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer.

Additionally, employers may now sign and retain Forms I-9 electronically.

While the Spanish version of Form I-9 is available on the USCIS Web site provided below, it may be filled out by employers and employees in Puerto Rico only. Spanish-speaking employers and employees in the 50 states and other U.S. territories may print this for their reference, but may only complete the form in English to meet USCIS employment eligibility verification requirements.

Employers should begin using the revised Form I-9 immediately. The Form I-9 with a revision date of June 5, 2007 is the only version that is valid for use. Both the revised form and the "Handbook for Employers, Instructions for Completing the Form I-9" are available online at <http://www.uscis.gov/files/form/I-9/pdf>. To order forms, you may call USCIS toll-free at 1-800-870-3676. For forms and information on immigration laws, regulations, and procedures, you may call the National Customer Service Center at 1-800-375-5283. 

# Workforce Trends – Summer 2008

## New Survey: HR Execs say Keeping Talent The Top Priority as Boomers Near Retirement

According to *Ernst & Young LLP's 2007 Aging U.S. Workforce Survey: Challenges and Responses – An Ongoing Review*, more than two-thirds of the responding human resource executives at Fortune 1000 companies (68%) indicated that retaining their key employees and maintaining “intellectual capacity” are their top concerns stemming from the impending retirement of millions of baby boomers.

Other results: 62% of the respondents fear that the retirements will create a talent shortage, the same number that expressed that concern in the 2006 survey. In the newest survey, however, 68% of the HR execs said that keeping key employees is the most serious human capital issue, up from only 38% in 2006. Seventy percent of the respondents to the 2007 survey indicated that senior and mid-management would be the groups hardest hit by the talent gap, up from 48% who responded in 2006.

The baby boomer generation – all 78 million of them – is the largest segment of today’s American workforce, so companies would be wise to prepare to lose a significant number of workers (see cover story). The Bureau of Labor Statistics estimates that approximately 43% of the entire U.S. workforce will be eligible to retire in the next 10 years, and trends show that the majority of the boomers will retire by 2030.

## Hiring People with Disabilities: It Just Makes Business Sense

As employers will be facing an increasingly tight labor market (see above) in coming years, they may want to consider hiring overlooked population segments, including workers with disabilities. According to Alexis Herman, former United States Secretary of Labor, “Only one-third of disabled Americans are employed, even though more than two-thirds of unemployed people with disabilities say they would like to work.”

A group of business leaders, the U.S. Business Leadership Network (USBLN) ([www.usbln.org](http://www.usbln.org)), is striving to have a major positive impact in this area. With members representing over 5000 employers, they are able to not only share best practices, but to look for innovative ways to recruit and retain workers with disabilities.

One of USBLN’s major initiatives is its Annual Career Fair, which is held in conjunction with its Annual Conference. This event provides an opportunity

to meet with high school and college students about their career choices. According to Career Opportunities for Students with Disabilities ([www.cosdonline.org](http://www.cosdonline.org)), approximately 45% of college graduates with disabilities are underemployed or unemployed. USBLN wants to fix this disconnect.

In addition to connecting disabled youth to businesses, the USBLN makes the business case for hiring disabled individuals. Not only have surveys shown that people with disabilities tend to have lower absenteeism rates, which is always helpful to a company’s bottom line, hiring the disabled creates a more diverse workforce to meet 21st century workplace challenges. It can also attract customers who see a company’s commitment to their community.

According to Katherine McCary, the president of USBLN, and an executive on loan from SunTrust Bank, “Hiring people with disabilities requires CEO commitment; when CEOs get disability as a diversity case, they often get the business case.”

As worker shortages may loom in the not too distant future, many predict that business leaders will find that hiring persons with disabilities is not only





a socially responsible thing to do, there can also be a positive return on investment these workers can bring to the table.

### Entrepreneurs: The Early Years

While there is widespread consensus that new companies are crucial to economic growth, until now, very little hard data has been available to support the development of policies that encourage entrepreneurial businesses. In mid-March 2008, the Ewing Marion Kauffman Foundation issued a report aiming to fill that gap. The biggest longitudinal study of new businesses ever conducted, the Kauffman Firm Survey (KFS) tracks almost 5,000 businesses established in 2004, and follows them through their early years in operation.

Information is being collected annually from these same firms, focusing on the issues of employee benefits, debt and equity financing, business innovations, and results such as sales and profits. Some of the highlights of the study include:

- Almost 60% of the companies did not have employees during their first year of operation. Slightly less than 75% of the businesses had one employee, while about 25% of them had two or more employees. Less than four percent of the businesses had over 10 employees.
- Thirty-seven percent of the businesses did not have any revenue during their first year of operation. Approximately 55% of the businesses in the study experienced a loss during their first year, while about 45% experienced a profit during that same time.
- Almost 44% of the new companies had no debt financing in their first year of operation. Many of the businesses were started with very little debt financing: 17% of the companies began with \$5,000 or less, while approximately 11% began with \$100,000 or more.
- During the first year, approximately 80% of the businesses had some positive equity investment in their company. About one third invested between \$10,001 and \$100,000 the first year, while almost 10% invested \$100,000 into their business. Approximately 25% of the businesses invested less than \$5,000.
- Only 10% of the businesses in the study used external sources of equity during their first year in operation. Parents were the most frequent source of external equity (3.4%), with spouses supplying equity to 1.6% of the businesses. Business owners themselves provided the vast majority of equity invested.
- Just over 30% of the businesses in the study were owned by women, while almost 70% were owned by men. Anglo Americans owned over 81% of the businesses, while African Americans owned 9% and Hispanics owned 6.6% of the companies. Five

percent of the businesses were owned by Native Americans, Pacific Islanders and individuals of other racial groups, and Asians owned 4%.

- Business survival rates vary by owner demographics, with slightly less than 9% of the total number of businesses closing in 2005. Eighty-eight percent of the African American owned businesses survived, while 92% of the Anglo American-owned businesses and 91% of Asian-owned companies survived. Businesses owned by women had an 89% survival rate, about three percentage points below businesses owned by men.

According to the principal investigator on the study, Alicia Robb, as more years are added to the study, “Many important topics can be investigated, including the determinants of business growth and survival, as well as the role that financial and human capital play in business outcomes.”

To access a copy of the “Kauffman Firm Survey: Results from the Baseline and First Follow-Up Surveys, March 2008,” you may visit that organization’s Web site at <http://www.kauffman.org>. 



# Minimizing the Risk of Wage Claims

Anyone who has ever had to prepare a paycheck knows how complicated it can be to figure out the requirements of various federal and Texas laws regarding how to properly pay employees. The risk of a wage claim under the Fair Labor Standards Act or the Texas Payday Law makes compliance with the laws all the more important. This article will offer some tips and best practices for avoiding most claims, and for minimizing the risk of claims that are filed.

## “Best Evidence” Rule

In wage claims, one of the most important things to keep in mind is the so-called “best evidence rule.” It is most often relevant in claims involving allegations of breach of a wage agreement or failure to pay for all hours worked. Under that rule, whoever has the best evidence of a wage agreement, or of hours worked, or of some other aspect of a wage claim, will prevail on that point. Thus, an employer should always strive to have the best evidence when it comes to wage and hour

matters. The good news is that strict compliance with wage and hour regulations usually has the beneficial side effect of helping the employer have the best evidence for use in defending against a claim.

## Wage Agreements

It is difficult indeed to think of a situation in which it would not be a good idea to have a clear, written wage agreement with each employee. With such an agreement, as long as the conditions in the agreement themselves meet wage and hour law standards, all that an employer needs to do in order to not fear losing a wage claim over an alleged breach of a wage agreement is to follow the agreement. Set out each condition for earning pay. Be as specific as possible as to amounts, payment method, and payment intervals. Written agreements are even more important if there is more than one component to the compensation, such as hourly wage plus commission, or salary plus bonus. Whatever the specifics, outline them carefully and specifically and follow them exactly as time goes on. Changes to written agreements should always be in writing and signed by the employee.

## Recording Working Time

Proper recordkeeping is not only mandatory under the FLSA, it is essential if an employer is to have the best evidence of hours worked. Become familiar with the requirements of Part 516 of the U.S. Department of Labor’s wage and hour regulations (Title 29 of the Code of Federal Regulations). An employer that has sloppy or incomplete records of time worked can literally find itself at the mercy of an employee who claims to have worked extra time for which he or she was not paid. There is no need for such a thing to happen. Adopt a reliable timekeeping system – there are many available that involve varying degrees of technology and expense – learn it, apply it, and insist that employees use it consistently and properly. Failure of an employee to use the employer’s system properly is usually not a workable reason to avoid paying for time that the employee claims, if there is some evidence of the work being done and no particular reason to disbelieve the claimant, but such failure can legitimately result in appropriate corrective action for failure to follow known work rules.

Disputes over time records should be worked out one-on-one with the employee if possible. Changes should be initialed by the employee. Avoid any appearance of coercion, since that can destroy the value of a disputed time record. Employees should sign their time records, even digitally if necessary. Include a



statement above the signature line to the effect that the employee agrees that the record shows all time that he or she worked. The statement could be something like this: “The above record is a full and complete record of all time that I worked during the pay period shown. I certify that I did not work any time that is not shown on the above record.”

### Enforce Your Work Schedules

A frequent problem involves employees who work through scheduled breaks, or show up early and start working, or stay late and continue working past their normal ending times. Employers sometimes think it is permissible to not pay employees for such unauthorized or unneeded work time. Unfortunately, that is not how DOL or TWC would view the matter in a wage claim situation. Under longstanding wage and hour regulations relating to hours worked, employers must count as hours worked any time that they either know or should know the employee is working. DOL’s stance on that is particularly blunt: employers may not simply sit back and accept the benefit of employees’ work time without paying for it, and if an employer knows or should know that an employee is working without authorization, the only solution is to use the employer’s power to enforce its rules. Put another way, employees working unauthorized or unneeded time is not a pay matter – it is a disciplinary matter. The company has to pay for such work time, but does not have to be happy about it; the employer may administer appropriate corrective action to ensure that such a problem does not happen again. Handle such problems as what they are: rule violations.

### Get Written Authorization for Wage Deductions

Under the Texas Payday Law, there are three categories of legal deductions from wages:


- deductions ordered by a court (garnishments for child support, alimony, and federal bankruptcy orders are the most common);
- deductions required or specifically authorized by a statute (such as payroll taxes, IRS tax levies, guaranteed student loan wage attachments, and administrative fees for certain garnishments or wage attachments); and
- deductions made for an otherwise lawful purpose and authorized by the employee in writing.

Notice that written authorization is only required for deductions in that third category. As it turns out, most problems under the Texas Payday Law have something to do with failure to get written authorization for such deductions. Every employer should have every employee sign a standard wage deduction authorization agreement covering the most com-

mon reasons why deductions might need to occur. There is an example of such an agreement in the book *Especially for Texas Employers* on the TWC Web site at [http://www.twc.state.tx.us/news/efte/wage\\_deduction\\_authorization\\_agreement.html](http://www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html).

### Make a Clean Break with Departing Employees

One of the most frustrating situations for employers is that of a wage claim from an employee who the company thought was gone. We have seen several cases in which an employer believed that a former employee had either quit or was discharged, only to receive a wage claim notice claiming that after the work separation, the employee continued to work and earn wages that were never paid. Employers often lose such cases if they cannot document that the employee received clear notice that he or she was no longer on the payroll. For this reason, it is generally a good precaution to issue employees a formal notice of work separation listing the ending date of employment, clearly explaining that the employee is no longer an employee and is no longer on the payroll after that date, and letting the employee know when the company will issue the final paycheck. Give the separation notice to the employee in a manner that is documentable and verifiable, because if the employee decides later to claim that no one told him or her that they were no longer on the payroll, and that they were performing some kind of vague and usually unverifiable “duties” for the company, the employer may find itself unable to effectively counter such a claim.

The federal and Texas wage and hour laws are very technical and generally employee-oriented, so it is no wonder that many employers have problems complying with all of the requirements. However, getting pay-related agreements in writing, and sticking to written policies and agreements, should help an employer avoid the majority of wage claim situations that might arise. 

William T. Simmons  
Legal Counsel to Chairman Tom Pauken  
Commissioner Representing Employers

# Workforce Round Up From Around the State

## Skills Development Fund Grants Boost Employer Competitiveness

A highly skilled workforce is the key to a strong Texas economy. As global competition increases, many Texas businesses are finding the need for more high-skilled workers to remain viable in the marketplace. And, a well-trained workforce can be the pivotal factor in attracting and keeping businesses in Texas.

The Texas Workforce Commission (TWC) administers the Skills Development Fund, which provides state funds to directly respond to the workforce needs of Texas employers. When a single business or consortium of businesses identifies training needs, a Skills grant can fund the development and implementation of targeted training through a community college or other training provider. This program not only supports the growth of Texas business, but it also helps Texas workers acquire new skills or upgrade existing skills to advance their careers. Businesses, large or small, can partner with a training provider to develop customized training curricula and fill existing skills gaps.

Business participation is a major reason for the Skills Development Fund's success. A business identifies a training need, and then partners with a training provider to develop a project to satisfy that need. The college then provides assessment services, develops a customized curriculum, facilitates training and administers the grant. Businesses also support the project with industry-related technical assistance and provide career opportunities as well as wage gains for workers, in many cases. Skills grants have never been one-size-fits-all, which ensures that Texas employers have the opportunity to successfully tailor grants to their needs and business plans.



Our Skills Development Fund grants serve multiple purposes. Workers get the specialized training they need to fill new and existing jobs, and businesses benefit from a more high skilled workforce. Due to the support of Governor Rick Perry and the Legislature, TWC makes these grants available each year, thereby helping hundreds of Texas employers get a more skilled workforce.

In fiscal year 2007, Skills Development Fund grants helped to fill or upgrade 20,831 jobs, which paid an average hourly wage of \$19.04. These grants assisted 281 Texas employers with their customized training needs. The Texas Legislature has approved \$50 million to the Skills Development Fund for the 2008-2009 biennium.

## Applying for Skills Development Funds

To be considered for a Skills Development Fund grant, businesses and trade unions must partner with an eligible applicant. Eligible applicants include public community or technical colleges, the Texas Engineering Extension Service, or a community-based organization working in partnership with one of these institutions. For more detailed information, please visit the agency's Web site at <http://www.twc.state.tx.us/svcs/funds/sdfintro.html>.

Eligible businesses range from large employers in need of nurses or manufacturers, to small businesses looking for customer service representatives. When awarding grants, TWC ensures that wages are equal to, or greater than, prevailing area wages at the end of training.

The Skills fund strives to support job growth opportunities and job retention throughout the state. TWC continues to provide rigorous oversight of the Skills program, with special attention given to quality and accountability. For example:

## \$1.7 Million Awarded to Victoria College for Petrochemical Industry Job Training from TWC Skills Development Fund

Victoria College recently partnered with a 10-member petrochemical manufacturing consortium to provide job training using a \$1,694,829 Skills Development Fund grant from the Texas Workforce Commission (TWC).

This grant is being used to custom train workers for 945 new or upgraded jobs. Upon completion of training, workers will fill positions such as electrical engineers, financial analysts, laboratory technicians and human resources specialists. They will receive an average hourly wage of \$27.56. The petrochemical consortium includes ALCOA, AWA, Atlantic Point Comfort Operations, Union Carbide Corporation, Fluor Operations & Maintenance, Formosa Plastics Corp., INEOS Nitriles, Invista-S.a.r.l., Kelly Services, LyondelBasell, Seadrift Coke L.P. and Testengeer, Inc.

**Don't Leave Money On the Table: TWC Identifies \$188 Million in Federal Tax Credits for Texas Employers**

Texas employers continue to have the opportunity to save hundreds of millions of dollars with the reauthorization of the Work Opportunity Tax Credit (WOTC) through August 31, 2011. In fiscal 2007, the Texas Workforce Commission (TWC) assisted businesses by identifying \$188 million in potential tax savings, which are available to employers that hire job seekers from qualified targeted populations.

Not only can the Work Opportunity Tax Credit help employers' bottom line, but it can also help boost Texas' economy by providing jobs for our state's workers. Because employers file with TWC for the credit throughout the year, this valuable credit represents one of the easiest ways for qualifying businesses to realize federal tax savings.

WOTC is a credit of up to \$2,400 per qualifying employee. It is designed to encourage employers to hire new employees from the targeted groups of job seekers who may face barriers to employment, including:

- Temporary Assistance for Needy Families (TANF) recipients
- Veterans
- Ex-offenders
- Designated community residents
- Vocational rehabilitation referrals
- Summer youth
- Food stamp recipients
- Supplemental Security Income benefits recipients
- Qualified Long-term Family Assistance recipients

Employers who hire qualified disabled U.S. military veterans may receive up to \$4,800 in tax credits under a new subgroup that includes disabled vets who are entitled to compensation for military service-related disabilities.

Although nearly \$188 million in qualified tax savings for fiscal 2007 is significant, only 2.3% of Texas' more than 400,000 employers took advantage of WOTC. Millions in tax credits are still available. To help em-

ployers recognize WOTC-qualified job applicants, TWC mails conditional certifications to job seekers, who then can take the forms to job interviews. They can show the prospective employer that they have the opportunity for potential tax savings if the job seeker is hired.

Employers can submit applications for the credit year-round to TWC's WOTC Unit for certification. Application forms must be mailed to the unit within 28 days of a qualifying worker's employment start date.

For additional information about WOTC, forms and TWC's WOTC Employer packet, please visit [www.texasworkforce.org](http://www.texasworkforce.org), or call the WOTC Unit at 1-800-695-6879. Information is also available to [www.irs.gov](http://www.irs.gov).

**TWC Co-Sponsors 2008 Texas Science and Engineering Fair**

TWC continued its commitment to the success of tomorrow's workforce by renewing its annual co-sponsorship of the ExxonMobil Texas Science and Engineering Fair. Outstanding Texas students competed in the fair hosted by the University of Texas -San Antonio .

"The Texas Workforce Commission has supported the Texas Science and Engineering Fair for seven years because employers increasingly have expressed a critical need for technologically advanced workers who have strong math and science backgrounds," said Chairman Tom Pauken, the Commissioner Representing Employers. "By supporting today's students, TWC recognizes the importance of encouraging the study of science and engineering, the foundation of many of tomorrow's high-demand, high-skill jobs."

The science fair is officially sanctioned by the Society for Science & the Public, the annual presenter of the International Science and Engineering Fair. The state-wide competition is for Texas high school and middle school students who qualify at regional competitions. The winners from the senior division advanced to the international competition in Atlanta, Georgia in May. Those who ranked in the top 10% of the junior division could apply to attend the Discovery Channel Young Scientist Challenge this fall in Washington, D.C.

Supported by TWC, the Texas Science Careers Consortium (TSCC) is a coalition of science and technology deans from colleges and universities across the state dedicated to addressing issues facing Texas employers and job seekers in these fields. Along with ExxonMobil, fair co-sponsors include TSCC, the Texas Higher Education Coordinating Board, and several major science and engineering industry employers.

Additional information is available online at <http://emtsef.utsa.edu/>. 

# Illness and Infection in the Workplace: What Employers Should Know

Illness and infection in the workplace can have a serious impact on your bottom-line because employee health and attendance directly affect a company's productivity. So, what should you do when your employees head to the office with a cold, the flu, or something more serious like pneumonia or a staph infection?



First of all, a written attendance policy that specifically addresses illness is a step in a healthy direction. Your private employment law attorney can help you prepare policies which best suit your company.

There is also guidance on such policies in the *Especially for Texas Employers* online and printed handbook. Examples of policies are easily found via the following link: [http://www.twc.state.tx.us/news/efte/table\\_of\\_contents-az.html](http://www.twc.state.tx.us/news/efte/table_of_contents-az.html) on the Texas Workforce Commission website, [www.texasworkforce.org](http://www.texasworkforce.org). The most helpful articles on this topic are: Vacation and Sick Leave under the heading "II. Policy Issues" and under "III. Appendix - Sample Policies and Forms" see the first link with the same name and then the sections on Attendance Policy, Limits on Leave Benefits, Medical Absence Warnings, Medical Information Confidentiality Policy, Neutral Absence Control Policy, and Personnel Files Policy.

Other laws which may impact illness and attendance issues include the Americans with Disabilities Act (ADA), the Family Medical Leave Act (FMLA), and the Health Insurance Portability and Availability Act (HIPPA). These laws are also discussed on our website. Go to [www.texasworkforce.org](http://www.texasworkforce.org) and search for the applicable terms or type in the following links:

ADA: <http://www.twc.state.tx.us/crd/facts.html#ada>

FMLA: [http://www.twc.state.tx.us/news/efte/family\\_and\\_medical\\_leave\\_act\\_fmla.html](http://www.twc.state.tx.us/news/efte/family_and_medical_leave_act_fmla.html)

HIPPA: [http://www.twc.state.tx.us/news/efte/hipaa\\_basics.html](http://www.twc.state.tx.us/news/efte/hipaa_basics.html)

While studies show that flu is more prevalent in the winter due to the cold weather in which the virus thrives, colds and other infections occur year-round. Also, workplaces can harbor much more dangerous "super-bugs" such as the much publicized anti-biotic resistant staph infection, Methicillin-Resistant *Staphylococcus Aureus* (MRSA). You are right to be concerned about illnesses that threaten the well being of your employees and, in turn, your business.

What is your best line of defense after you set clear policies? Well, common sense again prevails, as does your mother's wisdom.

The Centers for Disease Control and Prevention (CDC) stresses in its fact sheet on MRSA that the most important step to prevention is hand-washing. This simple step is important for all businesses, not just food establishments or health care environments, because hand-washing prevents the spread of many diseases. Therefore, make sure that all of your employees have access to a clean area with the proper supplies for adequate hand washing and that they use it! Soap, warm water, and individual clean towels are a must. Alcohol-based sanitizer is helpful where no water is available. And, you can post the insightful advice from the CDC in your break room or area where you keep other employee notices. The web link to the CDC posters is: [http://www.cdc.gov/ncidod/dhqp/ar\\_mrsa\\_ca\\_posters.html#Gen](http://www.cdc.gov/ncidod/dhqp/ar_mrsa_ca_posters.html#Gen). and the link to the educational fact sheet is: <http://www.cdc.gov/ncidod/dhqp/pdf/ar/MRSAPatientInfoSheet.pdf> or go to the CDC website at [www.cdc.gov](http://www.cdc.gov) and search for "MRSA educational materials."

Such advice is paramount to maintaining a healthy environment for all. Therefore, this is a useful agenda item to add to your next training or safety meeting. Also, make sure to stress to supervisors, managers, and all employees that cleanliness is important at your workplace.

What should you do with violators or abusers of your healthy workplace policy? As with most issues,

consistent disciplinary action is your best protection. You can ask the employee who has the weekly “Friday flu” to provide a doctor’s note to substantiate the illness. You may enforce hand-washing policies with progressive discipline. Also, you may chose to require a medical release to return to work for a more serious infirmity such as MRSA.

Always make sure to keep all confidential medical information in a file separate from the employee’s personnel file and ask for the affected employee’s written authorization to release it. Importantly, you should always require that those employees with access to this information keep it private and confidential to reduce the exposure of your company to serious violations of HIPAA or the ADA.

With these tips, your business can have a healthier workplace! 🇹🇽



Please join us for an informative, full-day conference to help you avoid costly pitfalls when operating your business and managing your employees. We have assembled our best speakers to discuss state and federal legislation, court cases, workforce development and other matters of ongoing concern to Texas employers.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and

Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Employee Privacy Rights, Handling Employee Medical Issues and Unemployment Insurance: Stay in the Game and Win. To keep costs down, lunch will be on your own. The registration fee is \$85.00 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend.

For more information, go to [www.texasworkforce.org/events.html](http://www.texasworkforce.org/events.html)

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Telephone: 1-800-832-9394 (512) 463-2826  
FAX: (512) 463-3196 Web Site: [www.texasworkforce.org](http://www.texasworkforce.org)  
E-mail: [employerinfo@twc.state.tx.us](mailto:employerinfo@twc.state.tx.us)

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**TEXAS WORKFORCE COMMISSION**  
Tom Pauken, Chairman  
Commissioner Representing Employers  
101 East 15th Street, Room 630  
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