

Ron Lehman
Commissioner Representing Employers
Texas Workforce Commission

WorkInTexas.com: An Exciting New Tool for Texas Businesses

WorkInTexas.com gives Texas employers a new, on-line recruiting tool that sorts through hundreds of thousands of Texas workers who are actively seeking employment and makes matches based on the job criteria you set. You will be pleased to learn how highly educated many of these workers are. For example, a recent snapshot of job seekers registered with WorkInTexas.com revealed that of the more than 250,000 workers who have some college, more than 19,000 of them had training beyond the master's degree level. And, more than 92,000 of the jobseekers had attained educational levels beyond their bachelor's degree. The remaining 181,000-plus applicants all had some college education.

In the same snapshot, there were also nearly 15,000 automotive master mechanics, more than 30,000 engineers, and more than 120,000 health care workers.

Access to the resumes of these talented Texans is easy and free. Log on to WorkInTexas.com, register using your Texas unemployment tax identification number, and our state-of-the-art matching system is ready to go to work for you. On par technically with the best national job matching sites, WorkInTexas.com comes with an added advantage: a network of local workforce professionals who are just a telephone call away to help you navigate this system and to craft workforce solutions specifically for you.

WorkInTexas.com will help businesses of any size find qualified employees in Texas and can also save recruiting costs. Features include those you'd expect such as real-time job matches, advanced security applications

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TWC staff login

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RETRIEVE EXISTING HIRE TEXAS OR WORKFORCE CENTER ID

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MEMBER SIGN IN

USER ID

PASSWORD

forgot password? forgot user id? need help? LOGIN

EMPLOYERS: Three good reasons to join WorkInTexas.com.

FREE

1 **TEXAS-SIZED TALENT POOL.** As a part of the Texas Workforce Network, we represent over 15,000* registered candidates - the most extensive source of jobseekers in Texas.

2 **LOWER COST-PER-HIRE.** Email notifications, real-time results and our exclusive job-matching technology means finding the perfect candidate is faster, easier, and more cost-effective than ever before.

3 **POSITIVE FEEDBACK.** WorkInTexas.com's state-of-the-art recruiting tools provide up-to-the-minute reports on all job postings.

MEMBER BENEFITS

- post jobs
- view resumes
- contact job seekers
- email notifications
- online real-time matches
- view job posting hits
- save your searches

NON-MEMBERS

- browse jobseekers
- access recruiting tools
- contact a workforce center
- become a member

HAVE A QUESTION? Click here to contact your local workforce representative.

TECHNICAL REQUIREMENTS: Recommended browsers are Internet Explorer 5.0 and higher and Netscape Navigator 4.6 and higher. Click on Internet Explorer or Netscape to download a free upgrade. Report technical problems.

PRIVACY INFORMATION: Texas Workforce Commission collects personal information entered into electronic forms on this internet site. For more information on your rights to request, review and correct information submitted on this electronic form, please see TWC's Privacy Information.

Bobby

to protect user confidentiality, and personalized communications options. However, WorkInTexas.com also offers the added flexibility of multiple accounts for employers with multiple locations, the ability to save job postings, and a dedicated home page within the system for each company. Employers can even opt to receive an e-mail each time a new resume is completed that matches their criteria.

Even if you aren't currently hiring, take a moment to browse the site. WorkInTexas.com is free, has the largest database of workers in Texas, and is backed by people who are just a telephone call away. We hope you'll try it today.

From the Dais – Summer 2004

Dear Texas Employer,

Several years ago, I began formulating the idea of developing partnerships between industry associations or industry sectors, the Employer Commissioner's Office, and the workforce system. As the Commissioner Representing Employers, it is my view that our organizations not only share common interests, but that together we can establish priorities and develop strategies that will add value to the businesses that we all represent. To that end, my office has worked hard to establish close working relationships with various industry associations, as well as business organizations such as the Texas Association of Business and the National Federation of Independent Business.

Now, I am pleased to announce the creation of another new and very significant partnership between the Employer Commissioner's Office here at the Texas Workforce Commission and the Society for Human Resource Management– Texas State Council (SHRM-TSC). This is one of the organizations I have long wanted to partner with since most members of SHRM routinely deal with workforce issues in support of Texas employers. I believe that this partnership will help to accelerate the ongoing development of a world class, employer-driven workforce system here in Texas.



It is clear that as local workforce boards around the state focus on enhanced performance and results by providing increased services to business, creating strong linkages with economic development, and increasing investment in employer-driven training, the input of SHRM-TSC can be invaluable.

The goals of this new partnership include:

- Enhancing the benefits that all employers receive from the Texas Workforce System, and the capabilities of organizations such as SHRM;
- Strengthening the role of Texas' businesses as customers, co-designers, beneficiaries, and advocates of the Texas Workforce System;
- Providing Texas employers with workforce related information and services and how to use those services effectively;
- Jointly identifying training needs and solutions by industry sectors, and for current, transitional and future workers;
- Recruiting senior business leaders, including the HR professional talent, for membership on local workforce development boards;
- Organizing formal "Thought Leadership" forums to identify emerging workforce challenges and to assist Texas businesses to be prepared to respond effectively.

I am excited about the possibilities and challenges this partnership will allow us to address together.

Texas Workforce Commission Plan for Overpayment and Fraud Reduction Moves Forward

As I have often stated in earlier columns in this newsletter, unemployment insurance (UI) benefits are for workers who are out of work through no fault of their own while they make an active search for their next job and accept suitable work if it is offered to them. Unfortunately, according to audit results recently released by the federal Department of Labor, nationally, the Unemployment Insurance (UI) system erroneously pays billions of dollars to claimants who do not qualify to receive benefits for various reasons. In 2002, these overpayments amounted to \$3.7 Billion, or nine percent of the total \$41 Billion paid to claimants nationwide.

In Texas alone, employers pay over \$43 Million every year for unrecoverable overpayments that arise when decisions that are initially made in favor of UI claimants are later reversed. Those claimants can collect benefits for weeks, or even months, pending the outcome of employers' appeals. By the time a hearing officer reverses the decision, the benefits have long been spent.

From the Dais ... cont.

Although my office has aggressively pursued this issue for a number of years, and TWC works hard to collect those overpayments from the claimants, we want to improve our ability to prevent the overpayments from being created in the first place. While the TWC has made strides towards combating fraud and overpayments, more remains to be done.

To that end, the recently created TWC Program Integrity Division's mission is to address fraud in all agency programs to assure that funds are used only for clients that are eligible for services. They are working to establish standard operating procedures for investigations and to find new and improved ways for the TWC to be a better steward of your taxpayer dollars.

Further, we are also aggressively seeking to increase prosecutions of UI benefits fraud in two ways:

- First, by seeking prosecutions for serious cases under felony statutes.
- Second, by working harder to provide local district and county attorneys more prosecutable cases. In fact, since September 2003, the TWC has referred 187 cases to local prosecutors. We highlight these prosecutions on the agency's website (www.texasworkforce.org), where we have listed 31 convictions since that time.

And, last November, the Commission adopted a new rule requiring claimants to make three work search contacts weekly and clarified specifically what constitutes a productive work search for suitable work. I believe that these additional requirements and clarifications, along with other agency improvements, will result in getting people back to work sooner.

Employer-Driven System through Measures that Matter to Employers

In June 2003, the agency adopted what I call the "Measures that Matter to Employers." This was a major shift in the focus of the entire workforce network to answer perhaps the most critical question of workforce system success: To what degree is the workforce system serving the needs of Texas businesses and employers?

The five new measures are:

- Job openings filled (the number of job openings filled for all service levels);
- Market share (the number of employers listing job orders with the workforce system);

- Employer sustainability (the number of employers that are repeat customers listing jobs);
- Initial UI claimants placed in jobs; and
- Initial UI claimants placed in jobs within 10 weeks.

Texas is the first state to adopt measures of this type, and has been asked to take the lead in helping other states understand the significance and implementation of this approach.

I recognize that there are other measures that may need to be adopted to supercede these measures as our workforce system continues to evolve. However, I remain committed to continued improvement of the workforce system to speed the process of transitioning Texans off of UI benefits and back to work, and I believe that we are taking concrete steps to do so.

I also encourage you to take advantage of our newest online resource to help us get Texans working, WorkInTexas.com (see cover story). For employers across the state, finding a qualified employee will now be faster, easier, and less costly. This comprehensive online employment resource can help any business – from the smallest mom and pop operation to large corporations – find qualified workers in Texas.

As always, it is a privilege to represent you here at the agency.

Sincerely,

Ron Lehman
Commissioner Representing Employers

Business Briefs – Summer 2004

New Help for Small Businesses from the SBA

According to the US. Small Business Administration, small firms create about 75% of all new jobs in the country; nationwide, about 57 million Americans work for small businesses. Here in Texas, approximately 94% of all businesses have fewer than 20 employees. Now, the SBA is looking for new ways to help them in this sometimes challenging economy.

According to SBA Administrator Hector Barreto, “Last year, (the SBA) loaned \$17 billion and trained two million small business owners.” He recently launched a new web site, www.business.gov, that contains information a business owner needs to understand federal regulations, access government services, or even apply for money, training and assistance. “Any kind of form or information a small business needs will now be in one place,” according to Barreto.

There are also more opportunities for small businesses to compete in international markets and to work with government buyers (the SBA helped set up thousands of such meetings in 2003). To learn more, visit www.sba.gov. In other SBA news –

SBA Raises Size Standard

The SBA recently increased the small business size standard for businesses that specialize in facilities support services, meaning that more small businesses will qualify for SBA loans and other assistance, as well as government contracting programs. The annual loan revenue increased from \$6 million to \$30 million in November 2003. For more information online, visit www.sba.gov.

Summer Youth Hiring Tips

Every year, Texas employers hire thousands of teenage workers for a wide variety of part and full-time positions. It’s important for employers, workers and their parents to be aware of the state and federal laws, and the safety regulations affecting child labor issues.

State and federal child labor laws are intended to ensure that children are not employed in an occupation or manner that is detrimental to their safety, health or well being. For purposes of these laws, any individual under 18 years of age is defined as a “child.”

Youths age 16 and 17 may perform any job not declared hazardous by the U.S. Department of Labor (DOL) for

unlimited hours. Youths age 14 and 15 may work outside school hours in various non-manufacturing, nonmining, nonhazardous jobs under the following conditions: no more than three hours on a school day, 18 hours during a school week, eight hours on a non-school day, or 40 hours during a non-school week. They also may not begin work before 7 AM nor work after 7 PM, except from June 1st through Labor Day, when evening hours are extended until 9 PM.

Most working teens are employed by retail establishments, restaurants, supermarkets and stores. Others work on farms or in summer camps and amusement parks. Generally, according to federal law, teens may not work at jobs that involve:

- Driving a motor vehicle and being an outside helper on a motor vehicle (absolutely prohibited for youths under 17, subject to certain conditions for youths age 17)
- Roofing operations
- Excavating operations
- Power-driven wood-working machines
- Power-driven bakery machines
- Power-driven paper-products machines
- Power-driven hoisting equipment
- Power-driven metal-forming, punching and shearing machines
- Power-driven circular saws, band saws and guillotine shears
- Meat packing or processing machines (including power-driven meat slicing)
- Manufacturing brick, tile and related products
- Wrecking, demolition and ship-breaking operations
- Logging and sawmilling
- Exposure to radioactive substances and ionizing radiation
- Manufacturing or storing explosives

There are some exemptions for apprentices and student learner programs under specified standards for some of the hazardous occupations listed above. For more information, visit <http://youthrules.dol.gov/jobs.htm>.

For additional information on prohibited or restricted jobs, or to get other details on child labor laws:

- Call TWC’s Labor Law Department at 1-800-832-9243 or (512)-837-9559, or visit www.texasworkforce.org;
- Call the U.S. Department of Labor at (866)-487-2366, or visit www.dol.gov/esa/welcome.html.

Legal Briefs – Summer 2004

Electronic Devices and Workplace

Privacy Rights

The increasing use of digital and other electronic devices in the workplace has led to more discussion about employees' privacy rights than ever before. Employers and employees alike have been forced to confront the areas where technology and privacy rights meet and sometimes clash. This article will highlight some of the issues that have arisen on this subject and explore the legal realities with which employers must be familiar before developing and enforcing policies on electronic devices and privacy rights. The focus here is on small electronic devices that are not computers. Next issue, we will cover in detail the issue of computers, e-mail, and Internet usage by employees.

General Issues

Many of the legal issues dealing with workplace privacy and use of electronic devices by employees involve a few fundamental principles that are important to understand. Under general principles of property and employment law, employers have:

1. a right to control who comes onto their property and what items those people may bring with them;
2. a right to control what is done with equipment and facilities they own by people who are entrusted with their use;
3. a duty to provide a safe and harassment-free work environment for their employees; and
4. a right to expect their employees to devote their full attention to work duties while on the clock.

These principles are based in many ways on age-old legal doctrines, but show up in any discussion of even the newest technologies.

Tape Recorders

The general rule under Texas law is that as long as one party to a conversation knows that it is being tape-recorded, it is legal to record the conversation. That does not mean, though, that an employer must allow employees to carry tape recorders around and record conversations they have with coworkers and supervisors. Texas law notwithstanding, an employer has the right to prohibit or restrict the use of tape recorders by employees. Some reasonable policy alternatives might be:

1. Prohibit the possession or use of tape recorders in the workplace unless authorized by designated management.

2. Allow use of tape recorders where all parties to the conversation have prior notice of the recording and have consented to it.
3. Provide that any unauthorized publication or distribution of the recorded voice of another employee is a disciplinary offense.

Remember that employees may be carrying miniature tape recorders around with them and recording your conversations with them. It goes without saying that employers should be careful in what they say to and around employees.

Cell Phones

Contrary to what some may believe, there is no "right" to have a cell phone at work. Aside from loud and obnoxious call alert sounds, ordinary cell phones have caused complaints from some employees who felt spied upon when a coworker left a phone with an open line near them so that the conversation could be overheard by people using another phone. Employers can prohibit or restrict the use of cell phones by employees with policies of the following kinds:



1. Prohibit possession or use of cell phones on company premises or while on duty unless there is a job-related need for such use.

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2. Allow cell phones, but with ringers set to “vibrate” or “meeting” mode.
3. Prohibit personal calls while on company time, or else limit personal calls to emergencies.

This does not even get into the area of employees using company cell phones for personal use (prohibiting such use and charging employees for expenses related to such calls are subjects for a future article in TBT).

Personal Radios and Music Systems

More employers allow personal radios and CD / MP3 music players than any other kind of electronic device in the workplace. Still, the potential for abuse and misuse exists. For example, some employees may have their sound turned up enough to where it interferes with coworkers or customers. Some employees may be distracted from their own work while listening to songs or talk radio. Small devices like that are sometimes misplaced by their owners or stolen by others, leading to hard feelings, physical altercations, and other types of workplace disputes. Some companies have reported catching their employees in the act of using company computers to download pirated music files from the Internet and loading the illegal files onto their personal music players, not only wasting productive work time, but also potentially subjecting the company to legal action from the holders of the music copyrights. There have even been workers' compensation claims from employees who allege that their hearing problems were caused by a noisy work environment, rather than the loud tunes the company allowed them to listen to during work.

The thing for employers to remember is that employees do not have an inherent right to listen to radio programs or music while at work. That is completely up to an employer to decide whether to allow and to what extent. Employers should also keep in mind the rights of other employees to not be disturbed while they are trying to concentrate on work. Any policy on personal radios and music systems that allows such use should address the issue of where and when such systems may be used, what should happen if coworkers complain or if the workflow is disturbed in any way, whether the music should be audible at all beyond an employee's headset or cubicle, and whether company computers and Internet access should ever be involved in accessing music or radio content for personal listening by employees.

Cameras and Camera Phones

With the spread of digital technology, more and more employees have digital cameras, digital movie recorders, and cell phones with built-in digital cameras and movie cameras. In only a few seconds, the privacy rights of one of your employees could be violated by a coworker who takes their picture in an awkward or private moment and posts the images on a Web site or uses your company e-mail system to send the images to multiple buddies around the world. In the same amount of time, your confidential company records can be photographed by a disgruntled or bribed employee and conveyed to competitors, news media, government officials, or attorneys on the outside. The word “worried” does not even begin to describe how many feel about the impact that digital images can have in the workplace.

Cell phones with built-in cameras are particularly in the news. More and more reports are appearing of people being arrested for violation of a relatively new law prohibiting “improper photography” (Texas Penal Code Section 21.15). Armed with camera phones, some people are taking surreptitious and privacy-invasive photographs of others and sending them with the Internet-enabled phones. The cameras in the phones are so small and non-obvious that most people do not even notice that their pictures are being taken.

An Austin-area restaurant was forced to close after female patrons returning from the restroom complained about what appeared to be a camera lens and wires leading from a potted plant into a closet inside the restroom. The manager unlocked the closet and found a live video camera inside. Some employees resigned soon thereafter, while others were laid off when the business closed. After the ensuing investigation, improper photography charges were filed against those suspected of responsibility, and civil lawsuits are sure to follow.

A gym in Central Texas had to close after it was discovered that one of the people in charge had installed a video camera in the women's locker room and restroom area. A suspect was charged with improper photography and will be the subject of civil lawsuits for invasion of privacy and intentional infliction of emotional distress as well. Unfortunately, as in the case of the restaurant above, some employees experienced a job loss.

As a result of these and several other reports in the news, many companies are considering a complete ban on cam-

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era phones in the workplace. Any company planning on implementing such a ban should adopt a clear written policy to let employees know exactly what is and is not allowed. An example of such a policy would be the following:

Personal Electronic Equipment

The Company prohibits the use or possession in the workplace of any type of camera phone, cell phone camera, digital camera, video camera, or other form of image-recording device without the express permission of the Company and of each person whose image is recorded with such a device. Employees with such devices should leave them at home unless expressly permitted by the Company to do otherwise. This provision does not apply to designated Company personnel who must use such devices in connection with their positions of employment.

Employees should not bring personal computers to the workplace or connect them to Company electronic systems unless expressly permitted to do so by the Company. Any employee bringing a personal computing device or personal imaging device onto Company premises thereby gives permission to the Company to inspect the device at any time with personnel of the Company's choosing and to analyze any files, other data, or data storage media that may be within, connectable to, or accessible by the device in question. Employees who do not wish such inspections to be done on their personal computers or imaging devices should not bring such items to work at all.

Violation of this policy, or failure to permit an inspection of any device covered by this policy, shall result in disciplinary action, up to and possibly including immediate termination of employment. In addition, the employee may face both civil and criminal liability from the Company, from law enforcement, or from individuals whose rights are harmed by the violation.

Searches

Preventing employees from bringing unauthorized electronic devices with them into the workplace may necessarily involve searches of one kind or another. Texas law permits various kinds of searches, the main limitations being that employees should know in advance that searches may occur, that employees should not be physically touched during the search process, and that employers should not physically compel employees to submit to a search.

The following things are a few examples of what employers may legally do under a search policy:

1. Use electronic security gates or "wands" to detect the presence of personal electronic devices.
2. Require employees to allow physical searches of briefcases, purses, backpacks, shopping bags, lunch containers, toolboxes, and other containers, brought into company buildings or onto company premises, in which such devices may be found.
3. Require employees to pass their belongings through a security machine for imaging and analysis.
4. Require employees to empty the contents of their pockets onto a surface for inspection.
5. Physically search any areas of the company used or accessed by employees, including offices, office furniture, appliances, computers, lockers, shelves, cabinets, and any other storage area in or on company premises.

Naturally, some employees object to the idea of so many things being subject to searches by the company. Such concerns are understandable, but in the end analysis, it is up to the company to determine how to manage its premises and who may bring what into company facilities. If employees are concerned about certain things being found, they should not bring them to work at all. Of course, common sense, courtesy, and respect for individual dignity are essential ingredients in any search procedure. If a person is being searched, the personnel doing the search should use the utmost in courtesy and discretion in conducting the search and displaying or announcing items that are found. It should go without saying that the results of searches should not become a matter for gossip around the workplace. In particular, any search that turns up items relating to a person's medical condition, bodily functions, or intimate details should be done in such a way that no one unconnected with the search ever sees or becomes aware of such facts.

The keys to having an enforceable search policy are making it clear in the policy what areas or items are subject to searches; that searches may occur at any time, with or without the employee's presence; and that there is no expectation of privacy in any areas subject to the search policy. An example of such a policy may be found in the book *Especially for Texas Employers* at the following link: http://www.twc.state.tx.us/news/efte/searches_2.html

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

DOL Issues Final Federal Wage & Hour Exemption Regulations

On April 23, 2004, the U.S. Department of Labor (DOL) issued the final changes to the federal wage and hour regulations under the Fair Labor Standards Act (FLSA). The final regulations change the existing definitions of executive, administrative, and professional exemptions. The new regulations become effective and will be enforced by DOL beginning August 23, 2004.

The final regulations make three important changes:

- 1.) Modification of the salary basis test. Under the new salary basis test, an employee in an exempt position must be paid a salary of \$455 per week, which is equivalent to an annual salary of \$23,660.00 per year.
- 2.) Change the duties tests for the executive, administrative, professional, and outside sales exemptions.
- 3.) Provides for an exemption for highly-compensated workers that earn total annual compensation of \$100,000 or more.

Changes to the Salary Basis Test

The final regulations establish a single standard test that replaces DOL's system of two tests, formerly known as the long test and the short test. The new standard test requires an employee in an exempt position to be paid a salary of not less than \$455 per week, equivalent to an annual salary of \$23,660.00. Exempt computer employees may be paid at least \$455 on a salary basis *or* on an hourly basis at a rate not less than \$27.63 an hour. However, DOL has excluded from the salary requirement outside sales employees, teachers, and employees practicing law or medicine.

According to DOL, exempt employees paid on a "salary basis" are employees that regularly receive a predetermined amount of compensation each pay period on a weekly, or less frequent basis. The salary, as a predetermined amount, cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to some limited exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. However, an exempt employee need not be paid for any workweek in which they perform no work.

Changes to the Duties Tests for the "White Collar" Exemptions: Executive, Administrative, and Professional Exemptions

The Executive Exemption

Under the executive exemption in the final regulations, the employee's position would have to involve all of the following duties:

- 1.) primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- 2.) who customarily and regularly directs the work of two or more other employees; and
- 3.) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Based on the new regulations, it appears that fewer positions are eligible for the executive exemption. It is important for employers with employees currently falling under the executive exemption to reevaluate those employees to determine whether those employees would continue to fall under the exemption after August 23, 2004.

The Administrative Exemption

In the proposed regulations, DOL conceded that this test was the most difficult to apply of all of the duties tests. Unfortunately, Texas employers have been aware of this difficulty for years. The final regulations attempt to clarify the types of employees that would fall under the administrative exemption.

Under the administrative exemption in the final regulations, the employee's position would have to involve all of the following duties:

- 1.) primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

DOL Issues ... cont.

- 2.) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

According to DOL, for an employee to meet the “directly related to management or general business operations” requirement, the employee must perform work directly related to assisting with the running or servicing of the business. This does not include and must be distinguished from employees working on a manufacturing production line or selling products in retail or service establishments. Also, employees could qualify for the administrative exemption if the primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Examples of this are employees acting as advisors or consultants to their employer’s clients or customers, such as tax experts or financial consultants.

The employee’s primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance. According to DOL, exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Whether the employee’s duties entail this should be examined in comparison to the employee’s particular employment situation. What employers need to understand is that this duty implies that the employee has authority to make independent choices that are free from immediate direction or supervision. In contrast, DOL emphasizes that use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources generally would not constitute “exercise of discretion and independent judgment.”

Regarding “matters of significance,” DOL points out that this term refers to the level of importance or consequence of the work performed. However, DOL emphasizes that an employee does not exercise discretion and independent judgment with respect to matters of significance simply because the employer could experience financial losses if the employee fails to perform the job.

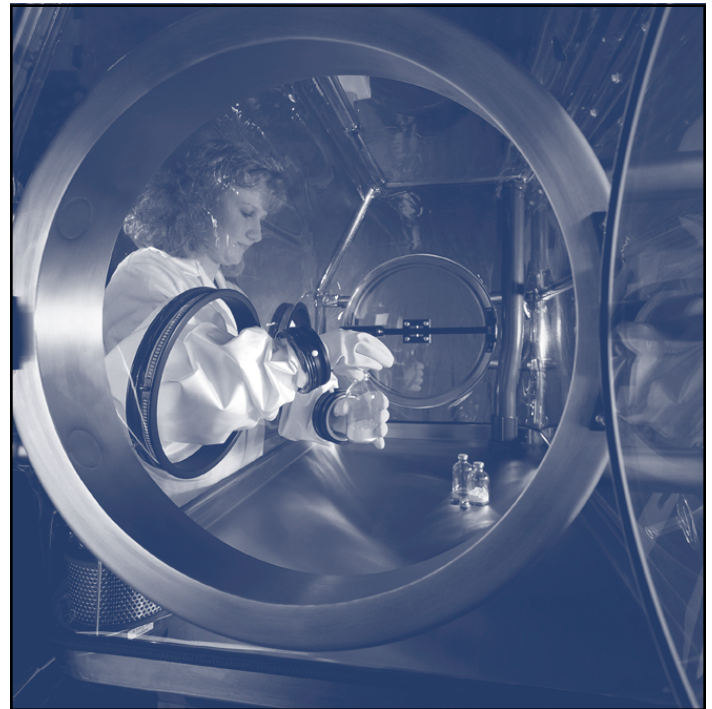
Some examples of the types of work that meet the administrative exemption include tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations;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

relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

The Professional Exemption

Under the professional exemption in the final regulations, the employee’s position would have to involve all of the following duties:

- 1.) primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- 2.) The advanced knowledge must be in a field of science or learning; and
- 3.) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.



According to DOL, an employee that falls under the professional exemption is the type of employee that generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level. Also, the professional employee’s knowledge must be based in the fields of science or learning, which include law,

DOL Issues ... cont.

medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

For the learned professional exemption, DOL regulations have restricted the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.

DOL maintains that the best evidence to show in meeting this requirement is having an appropriate academic degree. However, under the regulations, DOL uses the term "customarily." This suggests that this exemption could be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. DOL emphasizes that the exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

More Exemptions: Computer Employees and Outside Sales Representatives

Computer Employees Exemption

The new regulatory subpart called "Computer Employees" consolidates the regulations on exemptions for computer professionals. To qualify for the computer employee exemption, the following tests must be met:

- 1.) The employee must be compensated *either* on a salary or fee basis at a rate not less than \$455 per week *or*, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- 2.) The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the following primary duties:
 - a.) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

- b.) the 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;
- c.) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- d.) a combination of the aforementioned duties, the performance of which requires the same level of skills.



According to DOL, the computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, such as engineers, drafters and others skilled in computer-aided design software, but who are not primarily

DOL Issues ... cont.

engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

Outside Sales Exemption

In the final regulations, DOL eliminated the 20 percent limitation on the outside sales employees, which required that these employees spend no more than twenty percent of hours working on non-exempt tasks. Instead, DOL replaces this limitation with the general primary duties test so that this exemption would be in line with the other exemptions. For an employee to qualify under the outside sales exemption, all of the following tests must be met:

- 1.) The employee's primary duty must be making sales (as defined in the FLSA), or 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
- 2.) The employee must be customarily and regularly engaged away from the employer's place or places of business.

Employers should also be aware that the salary requirement of \$455 per week does not apply to the outside sales exemption.

Highly Compensated Employees

The final regulations include a provision for a new salary level referred to as "highly compensated employees." This new classification includes employees who earn at least \$100,000 per year performing office or non-manual work. At this salary level, an employee qualifies under an executive, administrative, or professional exemption if the employee has one identifiable duty under one of the three exemptions.

According to DOL, a highly compensated employee is deemed exempt if:

- 1.) The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- 2.) The employee's primary duty includes performing office or non-manual work; and

- 3.) The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

For example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements of the executive employee exemption.

New Exemption for Business Owners

The executive exemption under the final regulations now extends to any employee who: 1.) owns a bona fide 20-percent equity interest in the enterprise in which the employee is employed, and 2.) is actively engaged in the management of the business. What is notable about this is that the executive exemption applies even if the employee met none of the salary requirements in the regulations.

New Rule for Disciplinary Suspensions

Though the final regulations continue to generally prohibit docking the salary of an exempt employee for partial-day deductions, the regulations do set out a new exception regarding disciplinary suspensions. Under the final regulations, "deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules." The suspension must be set out in written policy and applicable to all employees. Some examples of when employers would use this type of suspension would be in the case of sexual harassment or workplace violence. For Texas employers, this new provision sets out new opportunities that had not existed before.

The final regulations continue to contain the pay docking exception for exempt employees that violate safety rules. Under that provision, "deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance." DOL specifies that "safety rules of major significance" addresses those rules that relate to the "prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines."

What Must Be Done Now?

Under the final regulations, some employees that were once exempt are now entitled to overtime. It is very important for employers to reassess those employees believed to be

DOL Issues ... cont.

exempt. The one significant factor that changes whether an employee continues to be exempt is if the employee is paid a minimum salary of \$455 per week. This alone will cause some workers who are currently exempt to be entitled to overtime pay when the new regulations become effective. 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 employers to be in compliance with the regulations by August 23, 2004. There is no amnesty period for compliance, so it is very important for employers to take action now. Also, you must be prepared for one of your employees to assert that you owe substantial back overtime. Remember that the employee, even if exempt, has no right to be free from the duty to maintain time records. If you lose a dispute with DOL on the classification of one or more workers, you can control your exposure for paying back overtime by presenting records of actual hours worked. Without records, you may pay the back overtime based on the worker's claim of 1,500 overtime hours worked each year. You can substantially limit your potential liability if you can produce records that prove that the employee worked, for example, only fifteen hours of overtime each year. 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 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;
- 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

DOL Issues ... cont.

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

The final regulations on the overtime exemptions have been issued by DOL and are effective August 23, 2004. According to DOL, the final regulations have strengthened overtime rights for 6.7 million American workers and have

provided overtime rights to an additional 1.3 million low-wage workers who were denied overtime under the prior regulations. Employers must understand that workers are aware and sensitive to these changes, and that overtime litigation is the fastest growing area of employment and labor law. Employers should take action now to reassess their exempt employees to determine if there is overtime liability for their business under the new regulations.

You may obtain a copy of the final regulations at DOL's website (<http://www.dol.gov/>). Also, the Businesses and Employers page at the TWC website (<http://www.twc.state.tx.us/customers/bemp/bemp.html>) will continue to provide you with the most up-to-date information. In addition, follow future issues of *Texas Business Today* for the latest developments in wage and hour law.

Should Your Company Offer an Employer Assisted Housing Benefit? Build Loyalty with an Employee Benefit that's "Close to Home"

An Employer Assisted Housing (EAH) benefit is a leading edge, cost neutral benefit that can help you recruit and retain valuable employees by helping them purchase a home. In today's competitive marketplace for talent, employers that want to offer a benefit that their workers will value highly may want to seriously consider helping them reach their goal of home ownership by offering an EAH benefit.

It should come as no surprise that of all the "wealth-building" investments a worker can make today, most Americans see buying a home as a safe and potentially lucrative investment and much more desirable than even a 401(k). (Source: 2002 National Housing Survey). The financial motivation for buying a home is one of the many reasons that home ownership is still regarded by many as "the American dream."

Why should you be interested in EAH as a business owner? Consider this: employers who offer this benefit gain an edge



over their competition in *Recruitment* (being the most attractive employer bidding for talent), *Retention* (providing a financial incentive for employees to remain with the company), *Recognition* (being recognized as a "best" employer), *Revitalization* (supporting, strengthening, or

Should Your Company Offer ... cont.

rebuilding the community where your business is located by encouraging home ownership), *Reduced Commuting* (encouraging employees to live closer to their place of employment), *Relationships* (providing better customer service with consistent staffing), and *Return* (saving money by reducing turnover).

An EAH benefit is easily customized to meet the specific needs and limitations of individual employers, and as part of Fannie Mae's American Dream Commitment to expand homeownership nationwide, the company will provide technical assistance in designing an individualized EAH benefit at no charge to your company. EAH benefits can take various forms. They often consist of a grant (upfront or delayed matched savings), a loan (forgivable, repayable, interest-bearing, interest-free), homebuyer education, shared equity, or some combination of several benefits.

The most typical form of EAH is a "vesting" EAH such as an interest-free loan where the loan principal is forgiven over a period of years, thereby encouraging employee retention. Some employers choose to get started with a no or low-cost EAH benefit like on-site home buyer education provided by a local non-profit housing counseling agency. This can provide important assistance to employees who lack the knowledge or confidence to pursue homeownership on their own. Whatever form an EAH takes, employees tend to feel increased loyalty to an employer that has helped them buy a home.



An employer can also structure the EAH based on the profile of their workforce or the needs of their community. It can be structured for companies with hourly workers making minimum wage, businesses with highly compensated professional staff, or anything in between. EAH can be made available to all employees or limited to specific segments of the employee population, such as non-management staff or first time homebuyers. EAH can also be designed so that employees reap the economic value only after a specified tenure.

Several Texas employers — such as the City of El Paso, the El Paso Independent School District, Harris County and Columbia Hospital — have already made the decision to help their employees purchase a home as part of their employee benefits offerings. These employers all took advantage of Fannie Mae's free technical assistance that includes: consulting services; an employer's manual filled with implementation templates and documents; a cost-benefit calculator to determine the amount that can be offered to result in positive return; and, if desired, lender and community partner referrals. Employers find that when they offer EAH benefits they receive significant recognition in their community as leaders in corporate and social responsibility.

If you're interested, what's your next step? For more information on EAH, just contact Fannie Mae's local partnership office in your area or call Mark Vanderlinden at (972) 773-7642. Soon you will be offering an employee benefit that's "close to home!"

Why Hiring Veterans Makes Good Business Sense

Attention Texas Employers: Are you looking for a pool of qualified, disciplined, highly skilled and highly trainable workers? Workers such as engineers, computer programmers, project managers, system administrators or supervisors? Then it's time for you to discover the hidden talent pool of transitioning military personnel. This year alone, some 200,000 military personnel will be returning to the civilian labor force.

Most military personnel have received extensive training and often have far more hands-on experience than their civilian counterparts. For example, many of these potential workers have highly technical skills and experience in radio, radar and communications, electronic equipment repair, aircraft maintenance, plant maintenance, vehicle repair, and general construction.

In addition to having highly technical skills, this potential pool of seasoned workers is also highly trainable because most of their military experience involves preparing for missions that have honed their aptitude for learning new technology and other skills. Former military personnel are hard workers who are accustomed to stressful, remote working conditions and average pay. And, as an added plus, there are no relocation expenses for these workers because the federal government provides former military personnel with relocation benefits.

If you want more information about this potential pool of workers, you are encouraged to contact the Veterans Representatives at your local workforce centers or the Texas Workforce Commission's State Veterans Services Coordinator, George McEntyre, at (512) 936-0369.

Ron Lehman
Commissioner Representing Employers

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.

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For more information, go to www.texasworkforce.org/events.html

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Texas Business Today

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