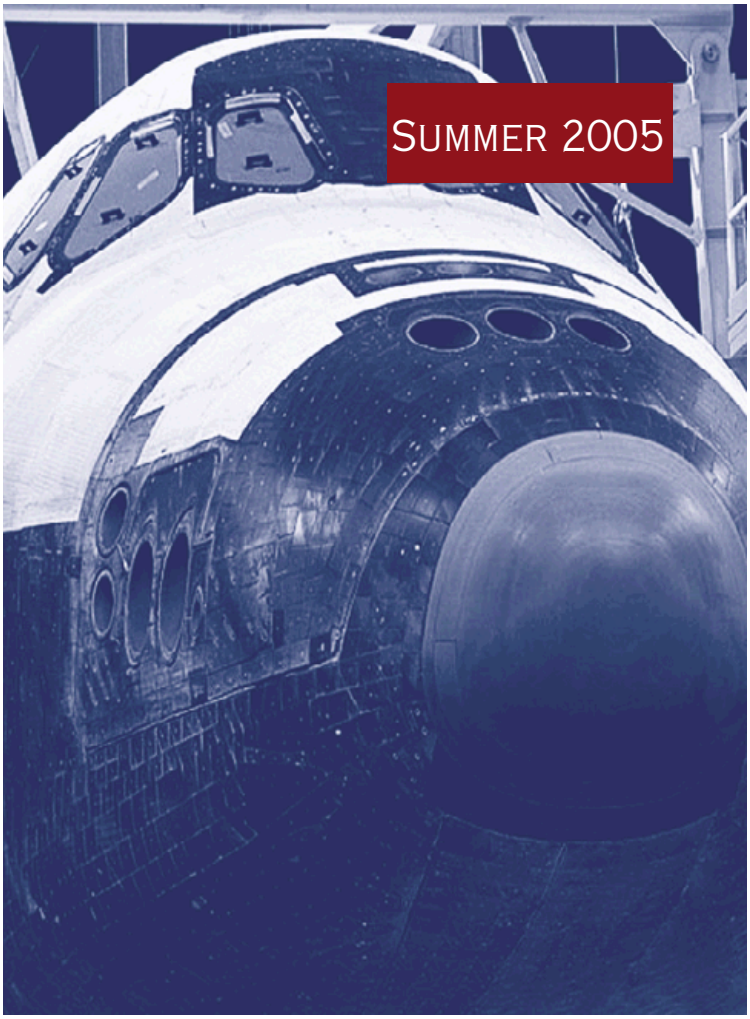
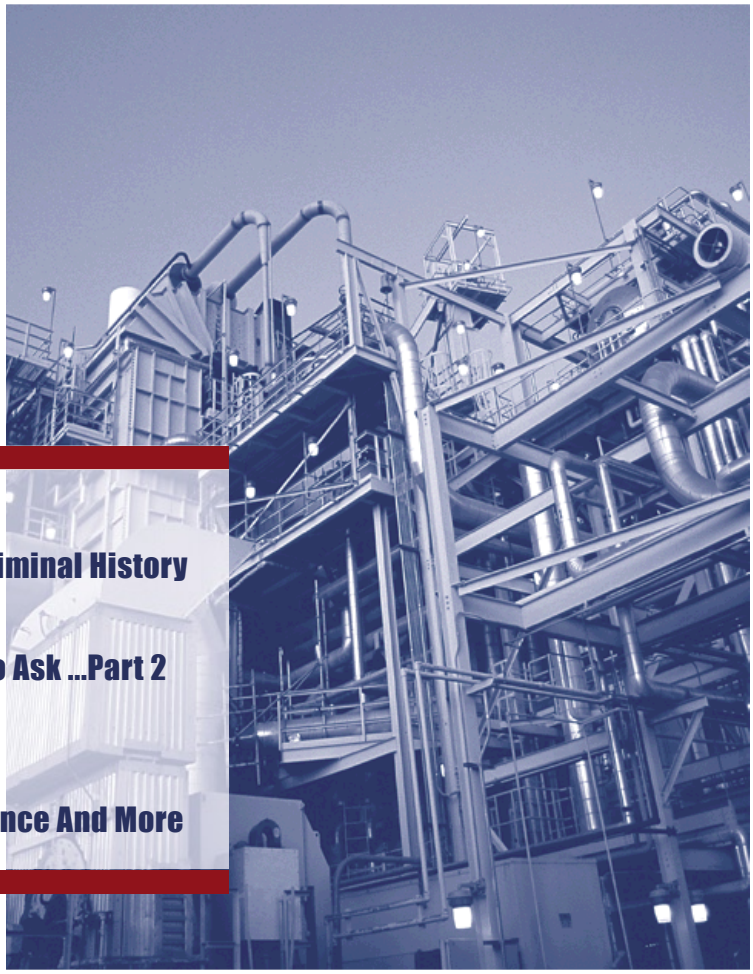
Texas Business Today

Ron Lehman, Commissioner Representing Employers

SUMMER 2005





In This Issue

From the Dais - Summer 2005

Dear Texas Employers,

The 79th Regular Session of the Texas Legislature recently ended, and though many labor and employment bills may have been filed, only a handful made it to Governor Perry's desk for signature. Here is an overview of the bills that will be impacting Texas employers, and unless otherwise noted, all laws will become effective on September 1, 2005.

Unemployment Insurance: Benefits and Taxes

House Bill 481 –
UNEMPLOYMENT BENEFITS FOR DISABLED

House Bill 481 allows certain disabled individuals to receive unemployment benefits even though they are not able to work full-time. To be eligible, these workers must receive Social Security Disability Insurance, have worked part-time in their base period, be unable to work full-time, and be seeking work consistent with their disability. Employers may be able to have their accounts protected if the employee cannot perform the work as a result of the disability. This bill took effect 6/17/05.

House Bill 1745 -
THREE DAY GRACE PERIOD FOR TEMPORARY HELP FIRMS

House Bill 1745 provides a three-day grace period for temporary help firms to find new work for their workers upon the conclusion of each assignment. TWC will void the unemployment insurance claims of workers who file claims during this three-day period.

House Bill 1939 –
NOTICE TO EMPLOYEES OF STAFF LEASING COMPANIES

Current law provides that if a staff leasing services company gives written notice to its workers to contact it for reassignment upon conclusion of an assignment, and yet a worker files a claim for unemployment benefits before calling in his availability, TWC will disqualify that worker for having voluntarily quit. House Bill 1939 requires that the notice regarding reassignment be given to the worker at the time the worker's assignment ends, otherwise the notice will not be effective to disqualify the worker from receiving unemployment benefits.

House Bill 3250 –
STATE UNEMPLOYMENT TAX REFORM

House Bill 3250 prohibits employers from shifting workers from tax account to tax account solely to reduce their company's unemployment taxes. It also imposes criminal and civil liabilities on employers who knowingly engage in these practices as well as on the tax advisors who recommend them.

Senate Bill 1342 -
UNEMPLOYMENT BENEFITS FOR SPOUSES OF MILITARY PERSONNEL

Senate Bill 1342 allows unemployment benefits to a worker whose spouse is a member of the armed forces and who quits to move as a result of the spouse's permanent change of station of 120 days or more, or as a result of the spouse's tour of duty of one year or longer. TWC should protect the account of an employer who lost the employee for this reason. This bill took effect on May 9, 2005.

House Bill 2273 -
UNEMPLOYMENT BENEFITS CAPPING AND ROUNDING; FEES FOR REPRESENTING CLAIMANTS

House Bill 2273 caps increases on the maximum and minimum weekly benefit amounts to control large jumps in benefit outlays from year to year, and rounds down weekly benefit amounts, which will result in savings for the unemployment compensation fund. The bill also removes from the law the requirement that the Texas Workforce Commission approve counsel and agent fees.

Wage Legislation

Senate Bill 1408 –
COMMISSION REVIEW OF PAY DAY WAGE CLAIMS

Currently, hearing officers have the final administrative authority over wage claims filed under the Texas Pay Day Law. Senate Bill 1408 gives the Commission the authority to hear appeals from those decisions.

Employer Workforce Training

House Bill 2421 –
FUNDING FOR THE SKILLS DEVELOPMENT AND ENTERPRISE FUNDS

House Bill 2421 provides $41.5 million for the Enterprise Fund and $20.5 million for the Skills Development Fund through a new Enterprise and Training Investment Assessment. The assessment is a 0.1% diversion from the unemployment insurance tax, with a floor test in October of each year to recoup the dollars for the Unemployment Insurance Trust Fund if necessary to avoid or reduce a deficit tax. This bill took effect 6/18/05.

General Employment Legislation and Other Bills of Interest

House Bill 7 –
WORKER'S COMPENSATION REFORM

Though House Bill 7 did provide some changes to the Texas workers' compensation system, the law remains the same in that it does not require employers to participate in the workers' compensation system. Additionally, employers will continue to be required to post notice to employees regarding whether or not the employer carries workers' compensation insurance. Under House Bill 7, a Division of Workers' Compensation is created within the Department of Insurance, which is administered by the Commissioner of Workers' Compensation, who is appointed by the Governor. The bill also creates an Office of Injured Employee Counsel that is led by the Injured Employee Public Counsel, who is also appointed by the Governor. The Counsel provides assistance to individual injured employees through the Division's ombudsman program, and in rulemaking, acts as an advocate for injured employees as a class. The bill strengthens insurance carriers' ability to request second opinions, and gives greater weight to those opinions, as well as provides for the formation of workers' compensation health care networks. The bill also enhances the Division's Return to Work Program and creates a pilot program for small businesses. The pilot program may reimburse eligible employers up to $2,500 for expenses necessary to modify workplaces for an injured employee's return to work.

House Bill 982 -
WARNING SIGN ABOUT IDENTITY THEFT FOR RESTAURANT OR BAR OWNERS

In an effort to address credit card skimming in restaurants and bars, House Bill 982 requires bars and restaurants that accept credit cards to post a sign warning wait staff of criminal penalties for this illegal activity. The sign must be displayed in a prominent place on the premises of the restaurant or bar, and the letters must be at least 1/2 inch high and state "UNDER SECTION 32.51, PENAL CODE, IT IS A STATE JAIL FELONY (PUNISHABLE BY CONFINEMENT IN A STATE JAIL FOR NOT MORE THAN TWO YEARS) TO OBTAIN, POSSESS, TRANSFER, OR USE A CUSTOMER'S DEBIT CARD OR CREDIT CARD NUMBER WITHOUT THE CUSTOMER'S CONSENT." Failure to post the sign can subject the owners to a misdemeanor with a fine no greater than $25, however, the charge would be dropped if the owner demonstrates that a sign was posted within 48 hours of the citation.

Senate Bill 1525 -
SAFE PATIENT HANDLING AND MOVING PRACTICES

Senate Bill 1525 requires residential care facilities to adopt detailed procedures for safe handling of patients by employees to prevent or reduce the risk of injury to employees. This bill will be effective 1/1/06.

House Bill 2677 -
WORK SEPARATIONS INVOLVING LAW ENFORCEMENT PERSONNEL

House Bill 2677 establishes detailed requirements for reporting work separations of and obtaining background information relating to law enforcement personnel.

House Bills 304, 2866 and 2892 –
COLLECTIVE BARGAINING

These bills cover collective bargaining between local governments and employee associations representing their employees.

House Bill 639 -
PUBLIC COMPLAINTS AGAINST LAW ENFORCEMENT OFFICERS

House Bill 639 restricts the power of lo state government agencies to take disc action against law enforcement or firefigh sonnel based upon public complaints.

Senate Bill 387 –
SCHOOL DISTRICT JOB POSTINGS

Senate Bill 387 establishes strict requi for job postings within school districts. took effect 6/17/05.

Senate Bill 863 -
PROMOTIONAL EXAMS FOR ACTIVE DUTY MILITARY

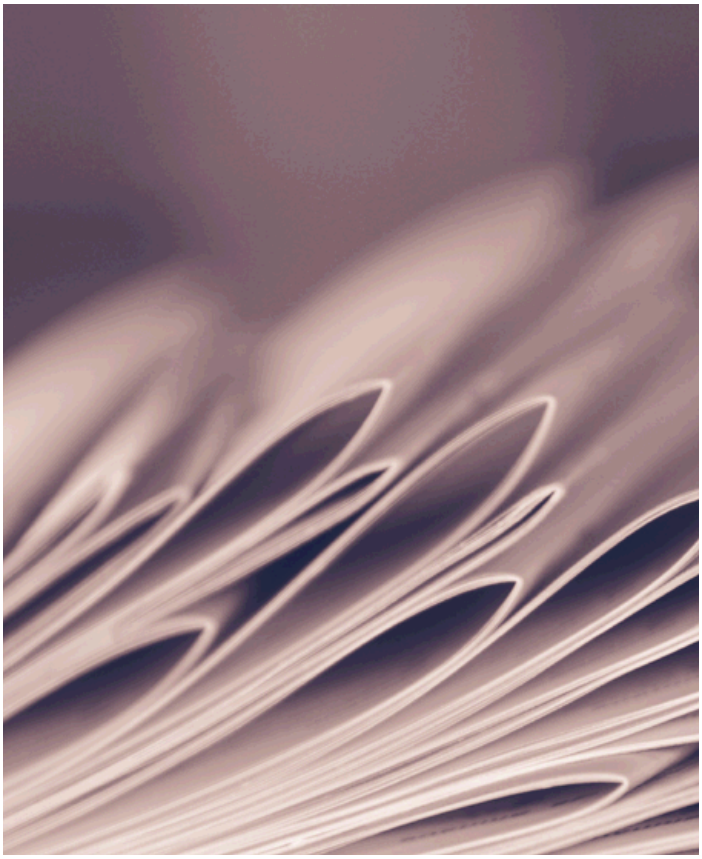
Senate Bill 863 allows for military pe on active duty extra rights with respect to tional exams for law enforcement and fir positions. This bill took effect 6/17/05.

To read the full text of these and other bills that were passed or to learn how to contact your legislators, visit the Texas Legislature online at www.capitol.state.tx.us.

As always, it is a privilege to represent you here at the Texas Workforce Commission, and I wish you every success in the future.

Sincerely,

Ron Lehman
Commissioner Representing Employers

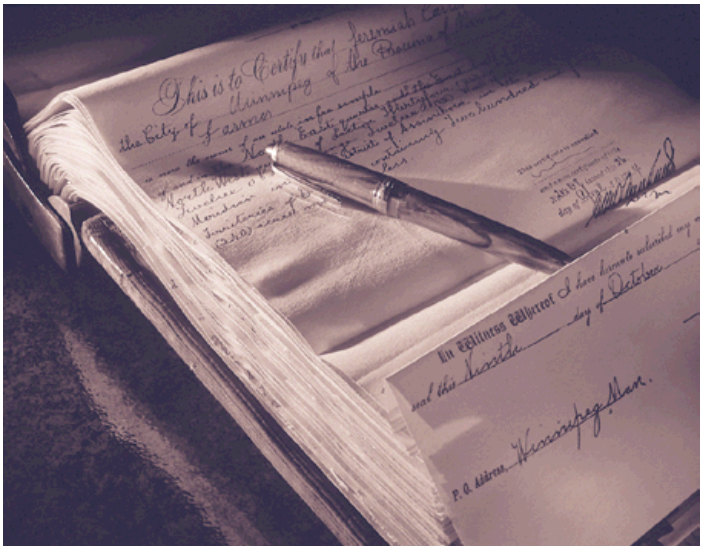


The Federal Fair Labor Standards Act: Everything You Wanted to Know, But Were Afraid to Ask... Part 2

In the Fall 2004 issue of Texas Business Today (available online at www.texasworkforce.org), we started a back to basics recap of Fair Labor Standards Act (FLSA) issues. We have provided you with five additional issues to round out our back to basics recap. For additional information about the United States Department of Labor's (DOL) changes to the overtime regulations, see the Summer 2004 issue of Texas Business Today.

1.) How do I know if any of my employees fall under the FLSA white-collar exemptions?

Many employers assume that if they pay an employee a salary and give the employee some type of "responsibility," such as "office equipment acquisitions" (a.k.a. ordering office supplies) or "opening the business" (a.k.a. provided keys to open the front door), that the employee is automatically exempt under one of the white-collar exemptions found under Section 213(a)(1) of the Fair Labor Standards Act. Unfortunately, it is not that easy. So, how do you know if an employee falls under a FLSA white-collar exemption? You have to do your homework and compare the exemption to the job duties and responsibilities of the employee. Luckily, DOL provides a free tool available online to help employers with this decision, and you can access this tool at www.dol.gov/elaws/overtime.htm. Remember, there is a two-prong test for the following white-collar exemption categories: executive, administrative, and professional. First, the employee must make a minimum salary of $455 per week, and second, all of the job duties of the white-collar category must apply to the employee.



2.) If an employee is paid a salary, do I have to pay overtime?

This continues to be a mistaken assumption. Merely paying a salary does not insulate you from overtime obligations. Remember that it is the employer's burden to prove to DOL or a court that a FLSA overtime exemption applies to the employee.

3.) Must an employer pay an independent contractor overtime?

No, an employer is not required to pay an independent contractor overtime under the FLSA because an independent contractor is not an employee, and is not protected under the FLSA. Independent contractors hold themselves out to the public as a business, have direction and control over their work, provide their own tools, and take on the risk of profit and loss. In contrast, an employee is under the direction and control of the employer, is paid on an hourly or salary basis, thus does not undertake traditional business risk, and the employer provides the tools needed for the employee to perform the work, such as phones, computers, faxes, or other equipment. If you are in a business relationship with an individual that you believe is not your employee, but payment of overtime is raised as an issue, then consider it a red flag. Mistakenly treating individuals as independent contractors when they are really your employees under the law can result in your business owing back pay for unpaid overtime and potentially liable for penalties and interest on unpaid state unemployment and federal taxes. For more information about this issue, review our lead article in the Fall 2004 issue of Texas Business Today, "Contract Labor" and the Law , (available online at www.texasworkforce.org).

4.) I am a private employer and use "comp" time or flex time to manage overtime. Is that ok?

No, a private employer cannot use "comp" time arrangements to avoid paying overtime for FLSA non-exempt employees. Private employers, including non-profit businesses, cannot average out hours worked over multiple workweeks. Simply, if the FLSA non-exempt employee works more than 40 hours in the workweek, the overtime must be paid at time and a half. A typical scenario faced by employers is when they try to flex the work schedule over a period of workweeks. For instance, your FLSA non-exempt employee needs to take time off next week, so you let him work extra hours this week to make up for it. He works 44 hours this week, and then works 36 hours the next. The potential liability is when the employer does not pay the overtime rate for the 4 hours worked in the first week. Though the employer thinks this is flexing the work schedule, it is actually creating a potential trap for the employer for overtime pay liability. Though it is fine to flex hours within a workweek, such as allowing someone to work 40 hours in 3 days rather than the typical 5 days, beware of extending the flextime over multiple weeks without considering the overtime liability impact.

5.) What if the employee agrees in writing to accept "comp" time in lieu of payment of overtime?

Unfortunately, it is not that easy. The FLSA does not allow the employee to waive away his or her right to minimum wage or overtime. Even if the employer has a statement from the employee in writing that the employee waives his right to overtime, the document is unenforceable by law. If overtime is worked, it must be paid.

Job Applicants and Their Criminal Backgrounds

When Asking Job Applicants About their Criminal History, Be Sure To Get the Whole Story!

Employers naturally want to ensure that the people they hire are who they say they are and can do what they say they can do. They also want to avoid legal problems that can arise down the road, such as a negligent hiring lawsuit, if one of their employees turns out to pose a risk to co-workers or the public. Thus, in addition to the basic identity verification process that includes the I-9 employment authorization, the W-4 tax withholding form, and new hire documentation, almost every employer these days also tries to learn whether a prospective new hire has the type of criminal background that would make it unwise to hire a particular person for a particular job. Texas employers enjoy great flexibility in checking the criminal background of job applicants, but there is an art to conducting the check in the right way.

Convictions vs. Deferred Adjudication: What's the Difference?

Texas employers may ask potential job applicants about their criminal convictions. (Avoid asking about arrests, since the Equal Employment Opportunity Commission (EEOC) and many courts consider that to have a disparate impact on minorities). However, only asking about prior convictions often doesn't go far enough to give you all the information you need to have. Here in Texas, under the law of deferred adjudication, if the individual given such a sentence successfully satisfies the terms of their probation, no final conviction is entered on their record, meaning the person can legally claim never to have been "convicted" of that offense. But, they cannot claim never to have pled guilty or no contest to the charge (in order to receive deferred adjudication, they would have to plead one or the other).

Many employers make the mistake of firing employees for dishonesty when they later learn the worker received deferred adjudication but indicated on their job application that they had never been convicted. Should such a termination lead to a claim for unemployment insurance benefits, chances are very good the employer would lose because the Texas Workforce Commission would find that the claimant technically answered the question accurately.

How Should You Ask Job Applicants About Their Criminal History?

To avoid losing an unemployment claim on a technicality, be sure to include a question on your job applications such as: "Have you ever

been convicted, or pled guilty or no contest to, a felony offense? If so, please explain. Important: For purposes of employment with XYZ Company, "convictions" include sentenced to confinement, paid fine, time served, placed on probation (including deferred adjudication) and court-ordered restitution."

Your job application should also contain a statement, such as, "I (fill in the name of job applicant) agree to immediately notify XYZ Company if I am convicted of, receive deferred adjudication in, or otherwise plead guilty or no contest to a felony, or any crime involving dishonesty or a breach of trust, while my application is pending or during my period of employment, if hired."

Deferred Adjudication and Unemployment Claims: A Recent Case

In a recent unemployment insurance benefits case before the agency, an employer terminated the claimant's employment because it believed he had violated their policy requiring the reporting of any criminal conviction involving a felony offense. The requirement, as contained in the job application the claimant signed, read as follows:

"I agree to immediately notify (XYZ Company) if I am convicted of a felony, or any crime involving dishonesty or a breach of trust while my application is pending or during my period of employment, if hired."

The problem arose after the employer obtained a report that a court had sentenced the claimant to deferred adjudication on a charge of aggravated sexual assault of a child. The employer confirmed that information by viewing the database of sex offenders on the Texas Department of Public Safety Web site; the claimant's name and picture were on the Web site. Finally, the employer also confirmed that the claimant was a registered sex offender by hiring an outside background check firm.

In this case, the agency awarded the claimant unemployment benefits, basing its ruling on a purely technical interpretation of the concept of deferred adjudication, namely that no final conviction is entered against a defendant if they satisfy the terms of the sentence. Because no final conviction was entered, the claimant technically did not fail to report a "conviction" for a felony.

However, that technical approach fails to recognize the disturbing reality of the underlying problem: in order to receive the lenient sentence of deferred adjudication, the claimant had to appear before the court, and under oath, plead guilty or no contest to the charge, and the judge had to make a finding that the evidence substantiated a finding of guilt before imposing the sentence. We are talking about a person who swore before a judge that he was guilty of having sexually assaulted a child, i.e., that he was guilty of a felony offense, and about a situation in which a judge looked at the evidence in the case and found that the claimant's guilty plea was genuine and based on fact.

Most employers would conclude that the claimant violated the plain and clear spirit of the policy requiring reporting of felony convictions. It is obvious that the employer wanted to be apprised of such problems so that it would have a chance to make its own assessment of the situation. At the very least, a reasonable employee would have let the employer know of the outcome of the case. The claimant should have known that the information about being a registered sex offender on the Web-based DPS database would come to light. In view of the claimant's concealment of the outcome of the felony proceeding, it is no wonder that, as the claimant himself testified, the general manager "lost faith" in him.

A Word to the Wise

Employers will have a much better chance of defending themselves in future cases of this type if they modify the language of their application regarding the duty to report criminal history problems as described above. Such careful wording is sometimes necessary, especially when employers are faced with Commission decisions that illustrate an unfortunate reluctance to hold people accountable for their own criminal behavior.

Summer 2005 – Business Briefs

Immigration Law Update: Electronic Completion and Storage of I-9's

The Immigration Reform and Control Act requires all U.S. employers to verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986. Employers are required to complete Employment Eligibility verification forms (Form I-9) for all employees, including U.S. citizens. (For a full discussion, see the Fall 2003/Winter 2004 issue of Texas Business Today available online at www.texasworkforce.org).

Now, employers will be able go "paper free" when keeping their I-9 records. On October 30, 2004, President Bush signed a new law, "Improvements to Employment Verification System," which became effective on April 30, 2005 and allows employers to electronically complete and store I-9 forms. The new law also permits using electronic or handwritten signatures when completing I-9 forms. Under prior law, employers were required to retain I-9's on paper, microfiche or microfilm, either for three years after the date of hire or for one year after employment ended, whichever was later. Finding sufficient storage space to accommodate paper copies of I-9 forms was a serious document management challenge for many businesses.

Because the federal government has not yet issued any technical guidance regarding the actual implementation of the new law, a number of questions remain unanswered about the types of practices that will be found to be acceptable. However, it's not too early to begin evaluating whether electronic storage of I-9's would offer advantages for your business.

Electronic Signatures

Probably the most significant result of this new law will be the permitted use of "electronic signatures" on the I-9 forms. Common examples of electronic signatures include digitized images of a handwritten signature attached to an electronic document; a name typed by the sender at the end of an e-mail message; a digital signature (created by using public key cryptography); a secret PIN or code (such as those used with credit and ATM cards) to identify the sender; or a "handle" or code that the sender of a message uses to identify themselves.

Unfortunately, the new law does not define or specify "electronic signature," leaving open to interpretation which of these forms will satisfy the new statute and which will fail to meet the eventual federal guidelines for electronic signatures. Only time will tell with certainty.

Electronic Versions

The new law also allows for storing I-9's by "electronic version;" however, what is considered to be an "electronic version" is not defined in the statute, either. In the coming months, employers and HR professionals can expect to be inundated with software product offerings that guarantee simplification of I-9 procedures, and assert that legal compliance and the elimination of stacks of paperwork are just a few mouse clicks away. A word of caution: you would be well advised to proceed cautiously and slowly; at this point, any such guarantees are still premature.

Until the federal government publishes its technical guidance and the best product offerings are sorted out, the best way to proceed may be a simple, internal system that meets the needs and capabilities of a particular employer. The two most straightforward methods are: (1) using an electronic "fillable" form (a sample of which can be found at http://uscis.gov/graphics/formsfee/forms/I-9.htm); or (2) converting paper I-9's to electronic format by scanning and using a PDF format.

It is clear that for the time being, employers should WAIT before they throw out any I-9 records. The law did not go into effect until the end of April 2005, 180 days after the President signed the bill into law, and a final rule from the U.S. Citizenship and Immigration Service (USCIS) has not yet been published. While employers can certainly proceed with caution to begin creating their electronic I-9 records, do not destroy your paper files until the regulation becomes available.

Further, it would be very unwise to discard or destroy any I-9 documents that may relate to pending litigation, audits or investigations. You may wish to consult competent legal counsel should any such circumstances exist in your company. Employers would be also wise to carefully cross-check any new electronic versions of their I-9's against the original documents to verify accuracy.

Stay Tuned

To monitor the progress of the federal U.S. Citizenship and Immigration Service's proposed draft regulations on this matter, visit www.uscis.gov.

Conclusion

Once the parameters are known, converting to an electronic I-9 file system may give employers an excellent opportunity to evaluate and upgrade their I-9 practices. An e-storage filing system may allow for enhanced uniformity and quality control, and greater centralization of a company's I-9 practices. Businesses with a nationwide presence and numerous branch offices often face the difficult challenge of training their staff to properly complete the I-9 form. Results are often variable, an especially troublesome concern for companies with high turnover rates among HR staff responsible for preparing the form. Using a web-based I-9 application may dramatically mitigate these problems: any HR staff member or new hire can be guided through the process, resulting in a properly completed form.

This may also be an excellent opportunity for employers to complete a valuable "self-audit" of their I-9's. By identifying and correcting errors, employers can assess their needs for further training, create improved electronic tracking of expiration dates, and improve their overall I-9 compliance.

If Money Doesn't Buy Employee Loyalty – or Happiness, What Does?

According to the national Survey of Human Resource Trends recently published by the Society for Human Resources, a lack of recognition and praise is cited as the leading reason employees leave a company. Surprising to many, 79% of all employees surveyed named "lack of appreciation" as one of the top reasons they would leave a job.

Why is this information important? Because a growing number of workers are seeking greener pastures. For example, in January 2005, 1.9% of the entire U.S. workforce – that's 2.5 million employees – quit their jobs according to the Bureau of Labor Statistics, up from 1.6% a year earlier.

According to MeChelle Callen, SPHR, director of human resource development at Wishard Health Services in Indianapolis, "It's really not all about the money." When employees are asked to name what they most value about their favorite job, "money seldom makes the top three reasons," she said. "But feeling appreciated almost always tops the list."

For employers, this is very valuable insight. Recognition makes employees feel valued, reinforces the behaviors you want to encourage and fosters teamwork. Further, providing recognition increases retention of valued employees and has a direct impact on the bottom line.

According to Callen, there are many inexpensive recognition opportunities for employers, noting that "it's the thought that counts," more than the value of a gift item. Sometimes it can be as simple as a friendly "good morning" or "thank you" for a job well done, or asking employees for their input. If employees work in branch offices, a simple e-mail card or letter can let them know that just because they're out of sight, their efforts are still appreciated and important.

Developing News: Congress Modifies Federal Communications Commission Ruling on Unsolicited Faxes

On June 28, 2005, Congress approved legislation that allows businesses to send out unsolicited faxes in certain situations while protecting the rights of consumers to stop receiving them. The measure, passed by the House on a voice vote, is headed to President Bush for his signature, and reinstates a 1992 Federal Communications Commission (FCC) ruling that allows businesses and associations to send unsolicited faxes to those with whom they have an "established business relationship." Those sending faxes would have to alert recipients of their right to opt out of future faxes and senders would have to abide by such requests.

If signed into law, this legislation would eliminate a new FCC ruling, first drafted in 2003,that required businesses and organizations to obtain prior written approval before sending a commercial fax. That rule was to have gone into effect on July 1, 2005, but the FCC announced in late June that it would further delay its new "junk fax" rule until January 9, 2006 "in light of the ongoing developments in Congress." The FCC also said that the delay would give the agency more time to respond to petitions to reconsider the rule.

Representative Fred Upton, a chief sponsor of the bill in the House, said that the proposed new FCC rules would impose an "enormous financial and manpower burden on small businesses." However, he stressed that the new law would not overturn the 1991 law prohibiting unsolicited ads from unfamiliar firms promoting vacation packages, investment opportunities, or mortgage refinancing. We'll provide more details in future issues.

Summer 2005 – Legal Briefs

What Texas Employers Need to Know About Recent Age Discrimination Case

Some Historical Background

Congress enacted the federal Age Discrimination in Employment Act (ADEA) in 1967 to protect workers aged 40 and older from age discrimination in all aspects of the employment relationship: hiring, job assignments, pay, training, promotions and firing are all covered. In the 38 years since its passage, the ADEA has evolved significantly as a result of both judicial interpretation and legislative amendments. The most recent judicial interpretation came on March 30, 2005 when the United States Supreme Court decided the case of Smith v. City of Jackson, Mississippi (Smith), 2005 WL 711605.

The Facts

In an effort to raise the starting salaries for police officers up to the average paid in nearby communities, the City of Jackson, Mississippi revamped its pay plan. Under the new compensation structure, employees with less than five years of service got proportionately larger pay raises than more senior employees. And, most of the employees older than 40 had more than five years of service. Thirty officers and dispatchers who were all at least 40 years old sued the city, challenging the pay system under the ADEA.

The United States Supreme Court Ruling

The Court ruled that workers over 40 years old could sue under the ADEA when an employer's action has a "disparate impact" on the protected age group and the employer's action was not "reasonable."

Disparate impact discrimination claims involve allegations that a "facially neutral" employment practice or policy (in other words, it doesn't specifically mention a particular protected class such as individuals over the age of 40) has a disproportionately negative effect on the members of a protected class. These claims let employees prevail without providing any evidence that the employer intended to discriminate against older workers. This more subtle form of age discrimination involves employment practices or policies that on the surface are age-neutral – age is not specifically mentioned – but in fact, impact older workers more harshly.

The Court also held, however, that unlike Title VII of the Civil Rights Act (which prohibits discrimination, including disparate impact discrimination, based on race, sex, color, religion and national origin), the language of the ADEA significantly narrowed its coverage by allowing any otherwise prohibited conduct if the conduct was "based on reasonable factors other than age." The Court went on to hold that under the ADEA, it is not enough for an employee to "point to a generalized policy that leads to" disparate impact. Rather, an employee must identify "the specific employment practices" that are responsible for the disparity.

The Court ruled that the plaintiffs in the Smith case failed to meet their burden, holding that the City's decision to give larger pay increases to less senior employees for the purpose of bringing those employees' pay in line with local market conditions was a decision based on a reasonable factor other than age. The Court went on to state that while there may have been other reasonable methods the City could have used to achieve its goals, including ways that did not have a disparate pact on workers over 40, the ADEA does not include the kind of business-necessity test that applies in Title VII cases. (That more burdensome test mandates that the employer has no other way to achieve its goals that would not result in a disparate impact on members of a protected class).

Now What?

Age discrimination claims have risen as the American workforce continues to age; such claims also frequently arise in the context of a workforce reduction or layoff. The bad news: the Court's decision could serve to further encourage these types of claims. The good news: the Court's ruling makes it more difficult for employees to prevail on disparate impact discrimination claims under the ADEA than on such claims under Title VII.

A word to the wise: Texas employers should be cautious about using compensation levels as a criterion for layoffs or as a method of determining a grant of benefits. Now that older workers have the ability to challenge more subtle forms of age discrimination, regardless of an employer's intent, this new Court decision is a reminder to employers:

- Have you reviewed your employment policies and practices recently?
- Are they age-neutral?
- Do they provide additional benefits to one age group of workers over another?
- Do they comply with the ADEA and other discrimination statutes?

The job market is already creating jobs faster than the growth in the pool of available workers. This disparity will intensify if the 77 million Baby Boomers who will become eligible to retire in the next decade actually do so. For employers, implementing programs and policies that attract and retain workers aged 40 and over – and do so legally – will become increasingly important. Before any new policies are adopted, they should be evaluated both for the business purposes of the policies (which should be documented), and for their potential impact on older workers.

Quit or discharge? It's an important question!

In an unemployment claim, the question of whether a claimant quit or was fired is very important. It determines who has the burden of proof in the case. The burden of proof in an unemployment claim falls on the party that initiated the work separation. If a claimant quit, he has the burden of proving that he had good cause connected with the work to resign when he did. On the other hand, if the claimant was fired, the employer has the burden of proving: 1) that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge; and 2) that the claimant either knew or should have known she could be fired for such a reason.

Sometimes the circumstances are murky, and it is unclear exactly what happened. Here are some hints as to how TWC will rule:

1) Whoever first brought up the subject of a work separation might be held to be the one who initiated the separation.
2) "Mutual agreement" work separations are usually held to be discharges. See # 1.
3) A resignation under pressure is a form of discharge. If the employee had no effective choice but to leave when they did, it was an involuntary work separation, and the employer's chances in the case will depend upon its ability to prove misconduct.
4) If an employee expresses a vague desire to look for other work, and the employer tells the employee to go ahead and consider that day to be his final workday, that will usually not be considered a resignation, since no definite date has been given for the final day of work.
5) If the encounter starts out as a counseling session or a reprimand, and the employee gets discouraged and says something like "well, maybe I'd better just quit" or "sometimes I think it would be better for everyone concerned if I just resigned", watch out. If you immediately "accept the resignation", it might be considered a discharge. It would be better to remind the employee that all you wanted to do was talk about a problem, not let him go, and ask the employee whether resignation is really what he wants. If he then confirms that he wants to resign, ask him how much notice he is giving. If he gives two weeks' notice or less, and you accept the notice early within the two weeks, it will still be a quit, not a discharge.
6) If you have an employee sign a prepared, fill-in-the-blank resignation form, that will look suspicious. The employee might claim that he was forced to sign it or else was tricked into signing it, which will only hurt your case. Have the employee fill out a resignation letter in his own words, preferably in his own handwriting, if you can persuade the employee to cooperate to that extent.
7) If an employee offers to resign, but you instead convince the employee to stay, and later change your mind and "accept the resignation", you have just discharged the employee! Persuading an employee to stay after they have tendered their resignation amounts to a rejection of the resignation, which means that the offer to resign expires, and the employee's acceptance of your pleas to stay amounts to a rescission of the resignation.
8) If an employee asks to be laid off, be careful - that can be a trap. Do not react like some employers have and fire the employee. Remember, if the employee resigns, they have the burden of proving good work-related cause to quit. It would probably be best to answer any layoff requests with a response to the effect that

the request is denied and a reminder that the employee is still needed, thus placing the ball back in the employee's court. If the employee persists, follow that up with a statement to the effect that if the employee no longer wishes to work there, they need to submit a resignation request in writing, and remind them that in the meantime, they still have a job to do. Do not prepare a resignation letter for the employee to sign -- have the employee prepare their own statement of resignation, and then respond to that statement in writing, attaching a copy of the employee's resignation notice to the response. Be sure that any exit paperwork reflects that the employee resigned.

9) If you are merely counseling an employee about a matter of concern, and the employee starts badgering you with questions and comments like "Are you telling me I'm fired?", "So you're firing me for this?", or "I can't believe you're firing me for this!", watch out. Language like that is often seen in situations where the employee is trying to maneuver the employer into a premature discharge in the hopes that an unemployment claim might turn out favorably for the claimant. The best response is something like this: "No, I am telling you that you need to start paying attention to instructions and following the rules." Make it clear to the employee that you are focused on improving their performance or on getting them to comply with policies. Once again: place the ball back in their court, effectively letting them know that if they want out of the company, they will have to take the initiative themselves.

The amount of notice can be important in an unemployment insurance case. The rule followed by the Commission recognizes that two weeks' notice is standard in most industries. If the employee gives notice of intent to resign by a definite date two weeks or less in the future and you accept the notice early at your convenience, it will be regarded as a resignation, not a discharge. If, on the other hand, the employee gives more than two weeks' notice or indefinite notice (i.e. “I’m leaving when I find that perfect job”) and you accept the notice immediately, it will generally be regarded as a discharge. If more than two weeks' notice is given, but you wait until two weeks or less before the effective date of resignation to accept the notice early, then you would have a good chance of having TWC regard the work separation as a resignation, although not all claim examiners and hearing officers agree. Much would depend upon the individual facts in the case.

Things An Employer Should Never Say in a Resignation Case

In unemployment claims involving a claimant who has arguably resigned, there are some words and phrases an employer should never use in a claim response, appeal letter, or testimony at a hearing. The problem is that many of the claim adjudicators, hearing officers, and legal staff at TWC think less of an employer's case when they see or hear the following because such terms sometimes confuse the issues and obscure the true problems the employer is trying to get across. Put another way, certain terms mean one thing to many employers, but quite another thing entirely to agency employees who rule on cases:

- "We asked for the claimant's resignation."
- "We told the claimant to resign."
- "We wanted the claimant to resign."
- "We were glad the claimant resigned."
- "We were relieved when the claimant resigned."
- "The claimant's resignation saved us the trouble of firing her."
- "She quit, but I would have fired her a dozen times if I'd had the chance!" (these are all direct quotes from actual cases)

An employer that includes such statements in a claim response or in testimony at a hearing needs to be in a position to prove that the claimant was fired for misconduct. Keep in mind that it is best for the case to be regarded as a resignation situation, since the claimant will then have the burden of proving good cause connected with the work for resigning when he did. If the company uses terminology like that in the sentences shown above, it runs the risk that the claim examiner or hearing officer will think that the claimant was really fired, in which case the burden of proof shifts heavily and inexorably toward the employer, and if it cannot prove misconduct on the claimant's part, the case will be unwinnable.

Specific Problem Terminology Oriented Toward Resignations:

Ironically, a lot of employers make unnecessary trouble for themselves in resignation cases by discussing things normally associated with discharges or terminations for cause. Thus, the problematic terms are basically the same in resignation cases as they are for termination cases, the main difference being that in resignation cases, not only can such terminology knock the case into the misconduct arena where the employer

has the burden of proof, but it also tends to make a misconduct argument unwinnable.

For example, explaining that the employee resigned or was asked to resign due to inability to do the work or poor work performance sounds much like the employer is explaining why the claimant was unsuitable as an employee, an assertion usually reserved for discharge cases. Similarly, telling TWC that the claimant resigned due to an "accumulation" of performance problems or rule violations sounds like what an employer would say to prove that an employee was guilty of misconduct. The same goes for discussions of disloyalty and poor attitude. Finally, saying that an employee resigned by "mutual agreement" tells TWC that the work separation was probably not truly voluntary on the employee's part - get ready for a lot of follow-up questions relating to misconduct.

Once again, avoiding misunderstandings caused by using the wrong terminology is essential. Employers must reckon with the reality that claim examiners, hearing officers, and agency legal staff have their own terminology that means very specific things to them. Employers need to watch out for themselves in this area and make sure that they are crystal-clear in explaining how the claimant was at fault in the work separation and how a reasonable employee would not have quit the job for the reason involved.

For some important and illustrative TWC precedent cases in the area of voluntary leaving, see the VL section of TWC's Appeals Policy and Precedent Manual, downloadable at http://www.texasworkforce.org/ui/appl/vl.pdf.

If someone tells you they are looking for other work, or will be interviewing with other companies, be patient! Unless there is a compelling reason to get rid of the person sooner, simply wait for the employee to resign. Remember: the company still has the right to insist that even a soon-to-be former employee turn in good work performance and to hold such an employee to normal work rules and standards. Just let things take their natural course, and assuming the employee resigns to take another job, *your company should not be concerned about a ch*argeback from a UI claim filed by that former employee. For two TWC precedent cases that show why patience and forbearance are so important, see Appeals No. 87-7940-10-051187 and 87-13371-10-073187 (section MC 135.00, Appeals Policy and Precedent Manual; downloadable at http://www.texasworkforce.org/ui/appl/mc.pdf).

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

WorkInTexas.com Celebrates One Year of Success

When the Texas Workforce Commission launched the Web-based job-matching tool, WorkInTexas.com, in June 2004, the powerful search engine immediately began linking employers with new employees. The one-year goal of signing up 50,000 employers was surpassed in less than nine months. Today, there are more than 97,000 employers posting jobs to a receptive audience of almost 591,000 active job seekers. While those numbers are impressive, it's the tangible, positive results that have been most exciting. Since the launch, employers have hired more than 198,000 workers through this system.

The Web site works. The tremendous capacity for detailed job descriptions increases job-search accuracy. Employers can be very specific about their needs, and job seekers can precisely convey their career experiences.

Whether it's a small business trying to find the perfect employee, a large company choosing to relocate to Texas, or a job seeker finding the right position, users are finding success on WorkInTexas.com. 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 join the 97,000-plus employer's who have already posted jobs and give it a try.

Upcoming Texas Business Conferences

Ron Lehman, the Commissioner Representing Employers at the Texas Workforce Commission, invites you to attend an upcoming 2005 Texas Business Conference. In today's complex business environment, anyone who manages workers must learn how to adopt and implement real world strategies to reduce the legal risks that can come with having employees. We have planned an informative, full-day conference that translates the "legalese" of federal and state employment law into easy to understand language that makes sense in the everyday business setting. Participants not only learn about many of today's most challenging employer/employee legal issues, they may be able to save money in the future by avoiding costly pitfalls when operating their business and managing their employees.

A dynamic, experienced group of speakers will be discussing these matters of ongoing concern to you as a Texas employer. Helpful written materials will also be provided for you to take back to use in your workplace. Seminar topics are selected based on what the thousands of employers who call the Commissioner's office each month tell us that they need to know and the input provided by former conference attendees.

The registration fee for all seminars except South Padre will be $85. The registration fee for the two-day South Padre TBC which is scheduled for September 29-30 is $99. Seminar topics include, among others:

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- Texas and Federal Wage and Hour laws
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The upcoming schedule:

Wichita Falls -	September 16, 2005
South Padre -	September 29-30, 2005
Alpine -	October 14, 2005
Del Rio -	November 18, 2005
San Angelo -	December 2, 2005
McAllen -	February 24, 2006
Midland -	May 12, 2006

For additional information, call 1-512-463-6389 or visit the TWC's website at: www.twc.state.tx.us/twcinfo/theforms/theform.html

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For more information, go to **www.texas workforce.org/events.html**

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IRS Publication 15-B - Employer's Tax Guide to Fringe Benefits: www.irs.gov/pub/irs-pdf/p15b.pdf
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TWC Employer Page: www.texasworkforce.org/customers/bemp/bemp.html
State Unemployment Tax: www.texasworkforce.org/customers/bemp/bempsub3.html
Appeals Policy & Precedent Manual: www.texasworkforce.org/ui/appl/app_manual.html
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