

Texas

Business

Today

SUMMER/FALL 2006

Ron Lehman, Commissioner Representing Employers

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FAQs: What Texas Employers Are Asking

The Employer Commissioner’s Office receives thousands of inquiry calls each month on the toll-free hotline (1-800-832-9394) regarding a variety of employment-related questions. Here are some of the most frequently asked and answered questions that arise.

1. QUESTION:

As an employer, can you tell me what the laws are regarding lunch breaks and regular breaks for employees who work a six- or eight-hour day? Do I have to give employees a lunch break? How many minutes long does it have to be? If not, am I required to give them breaks during their shift?

ANSWER:

Breaks are a common source of confusion for employers. The Federal Fair Labor Standards Act does not require employers to give rest or lunch breaks during the workday; however, if they are given, certain rules apply. Rest or coffee breaks, defined as 20 minutes or less, are compensable hours worked.

Meal breaks, on the other hand, are not compensable if they are at least 30 minutes in length and the employee is “completely relieved from duty for the purpose of eating a regular meal.”

2. QUESTION:

As an employer, do I have to pay for holidays?

ANSWER:

Under the Texas Payday Law, holiday pay is an optional benefit, on the use of which an employer can impose any conditions it deems appropriate, and it is enforceable only if promised in a written policy or agreement. A written policy is enforced according to its terms, so it is very important to have any written policy state exactly what the employer wants to

occur. For example, “An employee who works on a scheduled holiday will be paid for the time worked, but will not receive additional holiday pay for the day. Instead, the employee will receive a day off, which the employee may use in lieu of a vacation day in the future at a time that is mutually convenient for both the company and the employee.”

It is really up to an employer to design its optional benefit policies any way it sees fit. The main idea is to express the terms of the benefits as clearly as possible, since in the event of a dispute, the written policy will usually control the outcome of the case.

3. QUESTION:

Do I have to pay an employee who missed work due to jury duty?

ANSWER:

That depends on the type of employee we’re talking about,

1) Hourly employees: whether the employees are classified as part-time or full-time, the law requires payment only for the time an hourly employee actually works. If an hourly employee is on jury duty, they’re not working and are not required to be paid by law. However, time not worked can be covered by available paid leave according to the company’s own written policy.

2) Exempt salaried employees (employees paid a weekly, biweekly, semi-monthly, or monthly salary, whose duties qualify them for an overtime exemption):

a) If less than a full workweek is missed due to jury duty, federal law (the FLSA) would not allow a pro rata docking of the salary for time not worked; the employee would have to receive the agreed-upon salary for the entire workweek. Available paid leave may not be used to cover such an absence.

b) If a full workweek was missed due to jury duty, federal law (the FLSA) would allow a pro rata docking of the salary for time not worked. And, since that

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would involve a pay deduction, it would need to be authorized by the employee in writing for purposes of the Texas Payday Law. Available paid leave can be applied to the extent provided by the company's own policy.

4. QUESTION:

Can you tell me what is considered full-time vs. part-time employment?

I had the understanding that the employer defined how many hours applied to each category. Yet, I am faced with a situation in which I have been told that 30 hours or less is defined as part-time. If so, defined by whom?

In the absence of a written policy, is it 30 hours?

ANSWER:

There is no federal or state law defining full-time vs. part-time employment. A part-time employee can work however many hours the company determines they should work each week. Most companies define full-time employees as those who are regularly scheduled for a set number of hours each week (40, 37.5, 45, or a similar amount), and part-time status is for anyone who is regularly scheduled to work less than that amount of time each week.

5. QUESTION:

I have an employee who just gave us her two weeks notice. What do I do? Can I ask her to leave earlier?

ANSWER:

If an employee gives you two weeks or less notice of their intent to quit, you can accept their resignation immediately and it remains a voluntary quit. You could reply, "I accept your resignation effective today." You don't have to keep them around for the remainder of the two weeks and/or pay them for those two weeks since they did not work. Once you have accepted their resignation, the Texas Payday Law states that you will need to issue their final paycheck by the following scheduled payday. This will depend on how you pay your employees (weekly, bi-weekly, monthly, etc.). HOWEVER, if the employee comes and says they want to quit three months from now, if you let them go at that time, it would be considered a termination.

6. QUESTION:

What is the maximum weekly unemployment benefit amount that a highly-compensated person may receive? Surely, there must be a ceiling to unemployment benefits.

ANSWER:

There is a ceiling. For initial claims filed between October 1, 2005 and September 30, 2006, no claimant may draw more than \$350 per week for 26 weeks,

regardless of the individual's prior income. The floor (\$55 per week) and the ceiling for weekly unemployment insurance benefits are set by the Commission each year according to the statutory formula found in the Texas Unemployment Compensation Act § 207.002(b, c).

7. QUESTION:

We offer our employees vacation time.

We tried to cover all the bases in our company handbook; however, we didn't cover what happens to any accrued but unused vacation leave (forfeit or paid) if an employee voluntarily leaves the company or is terminated.

ANSWER:

According to the Texas Payday Law, payment of accrued but unused vacation leave to an employee who is separating from the company is required only if it is promised in a written policy or agreement. Many employers have very different written policies for employees who leave under good terms after giving two weeks' notice (i.e., in that case, workers are paid accrued but unused days) than for employees who are fired for work-related misconduct or violation of company policy (i.e., in that case, workers will not be paid for accrued but unused days).

8. QUESTION:

We pay our employees on the 1st and the 15th of each month, which works fine for the salaried employees. However, we've got one hourly employee who believes that she is entitled to overtime pay when the pay period consists of more than 80 hours in a two-week pay period. My understanding is that overtime is calculated based on seven-day workweeks, and that any hours worked beyond 40 during each seven-day workweek must be paid at time and one half.

ANSWER:

Your interpretation of the overtime rules is correct. Pursuant to federal Department of Labor regulations, overtime is computed on a workweek-to-workweek basis, with each seven-day workweek standing alone. Basically, you break the pay period down into workweeks and then determine whether during any of the workweeks involved, the hours actually worked exceeded 40. If no single workweek had more than 40 hours of work, then there is no overtime issue. Put another way, it's not the total hours for the entire pay period that determines whether overtime is owed, but rather, the actual hours worked during each of the seven-day workweeks involved. 🇹🇽

By Juan Vicente Garcia

From the Dais – Summer/Fall 2006

Dear Texas Employer,

When I have spoken to countless employer groups around the state in the past several years, the theme of my remarks has often been my optimism for the future of doing business in Texas. We've got low unemployment, a trained and re-trainable workforce, dependable transportation routes, abundant natural resources, a diverse economic base, tort reform to halt lawsuit abuse, and a high quality of life. Consider this: if Texas became a nation today, it would become the world's eighth-largest economy overnight. Texas recently surpassed California as the largest exporter in the nation, and it's the gateway to trade with Latin America, with 75% of America's commerce with Mexico traveling through the Lone Star State.

Texas is the headquarters for 45 Fortune 500 Companies, is home to 14 of the 100 Fastest Growing Businesses in America (source: Fortune Small Business Magazine), and has maintained healthy bond ratings despite challenging economic times across America.

Apparently, we're doing something right, and there are others who are taking notice. Recently, Site Selection Magazine, which focuses on business expansion and relocation, awarded the Lone Star State its highest award, the Governor's Cup, for the second consecutive year. This award recognizes the state with the most job creation announcements in the preceding year. Not only did we win this prestigious award for the second straight year, this is the seventh time that we have been ranked first in the nation overall.

It's important to recognize that this favorable business climate didn't happen by accident. While the work is ongoing and challenges remain, we have made some impressive strides. One of the most important factors is the developing synergy between workforce and economic development during the last decade in ways previously unimaginable. In the past, economic developers and workforce professionals were often on separate paths that seldom, if ever, crossed. Now, we're seeing early and frequent communication and interaction between these two groups with impressive results.

And, Texas has centralized its economic development efforts, placing its economic development office under the control of the Governor's office. Rather than searching out a confusing hodge-podge of entities when seeking to relocate or expand in Texas, corporate CEOs now deal directly with the Office of the Governor when negotiating future prospects.

Further, as experts readily agree, "the number one site selection criterion is the availability of a skilled workforce" (source: Business Xpansion Journal). It is a fundamental truth that economic development and growth depend on the availability of a highly skilled, flexible workforce. To create a system where business needs for skilled workers could be more effectively met, to provide worker training that was more likely to lead to advancement or employment, and to ensure that scarce public resources would be used more effectively and efficiently, the Texas Workforce Commission (TWC) and its partners in Texas Workforce Solutions at the 28 local workforce development boards around the state have worked to address each community's need for a skilled workforce and promising jobs.

Many Texas employers have come to recognize and value close collaboration with the Texas workforce system for solutions ranging from employee recruitment to skills-specific training programs. TWC and Texas Workforce Solutions offer tools for employers and job seekers alike. Among the many successful efforts are WorkInTexas.com, TWC's powerful online job-matching system, and Skills Development Fund grants, which provide businesses with opportunities to team with educational institutions to create employer-specific skills training programs that not only enhance workforce skills, but support job creation.

And, that healthy business climate and continued job creation have led to a steady decline in new unemployment insurance claims being filed in Texas, meaning there has also been a reduction in unemployment benefits paid as Texans get back to work more quickly. Based on current projections, the unemployment insurance trust fund balance will be \$336 million above the federally-mandated ceiling on October 1, 2006.

To find your local workforce development board, turn to page 14 of this issue for contact information.

All in all, Texas is a great place to do business. As always, thank you for being a Texas employer - it is an honor to represent you here at the TWC. I look forward to cheering your successes in the future. 🇹🇽

Sincerely,



Ron Lehman

Commissioner Representing Employers

Drug Testing In The Workplace

Under Texas and federal laws, there is almost no limitation at all on the right of private employers to adopt drug and alcohol testing policies for their workers.

Government employers are not so free, due mainly to court decisions holding that testing employees without showing some kind of compelling justification violates government employees' rights to be safe from unreasonable searches and seizures. Drug testing is not for everyone. A company should do it only after careful consideration of many factors, including applicable statutes and regulations, contract or insurance requirements, and combating some perceived problem with substance abuse among the workers. Drug testing, for example, may be mandated for some types of employees, as is the case with workers subject to U.S. Department of Transportation mandatory testing guidelines. Some federal contracts and grants may require employers to adopt drug-free workplace policies and possibly even to provide for drug-testing of employees. Other employers may be under no legal obligation to do testing, but feel it is needed due to reports that some employees may be unsafe due to being under the influence of drugs or alcohol. Regardless of the reason for testing, it is essential to carefully draft the policy and consider the various legal issues.

What is a good, basic drug testing policy?

Most policies start out by emphasizing in positive terms the need for safety in the workplace and adherence to job requirements and work quality, and go on to cite goals such as improving safety and productivity. The policy should address certain questions:

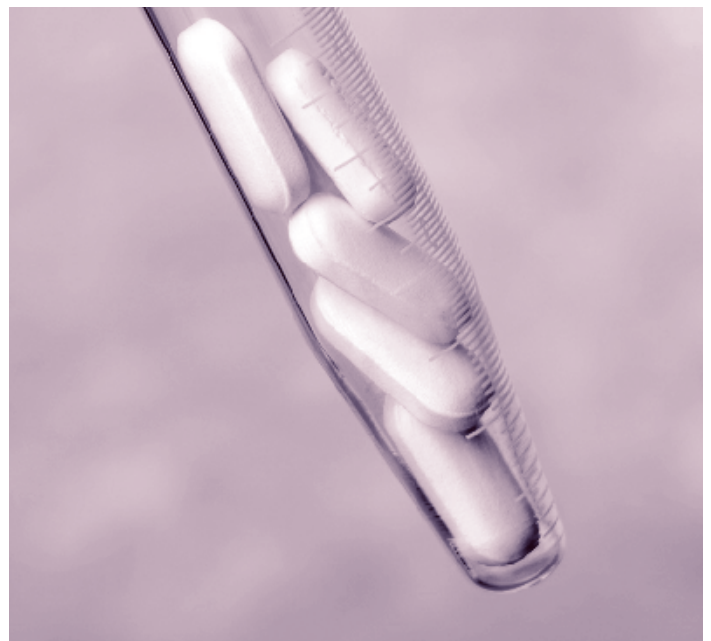
- What will be considered a violation? (necessary)
- Which employees will be covered? (necessary)
- What disciplinary measures will result from violations? (necessary)
- Will the company allow rehabilitation? (optional - not required by any Texas or federal law)

For an example of such a policy, see the drug testing policy section of "The A to Z of Personnel Policies" in the book *Especially for Texas Employers* (online at www.texasworkforce.org/news/efte/tocmain.html).

Like any policy, a drug and alcohol policy should be given in writing to all employees. Employees should sign a written acknowledgment that they have received a copy of the policy. Employers usually make signing such a policy a condition of being hired. While it is common for such a policy to be part of an overall policy manual, it is probably best to have each employee sign a separate form consenting specifically to the search and testing policy.

What if an employee refuses to sign the policy?

It would be legal to fire the employee for refusing to sign an acknowledgment of the policy, but that should not be done until and unless the employee has been warned, preferably in writing and witnessed by others, that discharge can result from refusal to sign. An alternative to such a hard-line approach would be to hold a mandatory staff meeting, publish an agenda for the meeting showing as one of the items "distribution of new drug-testing policy", have all employees sign an attendance roster or else face discipline for an unexcused absence, discuss and distribute the policy in front of witnesses, have employees sign an acknowledgment of receipt, have a witness sign "employee refused to sign" on the acknowledgment form if an employee refuses to sign, and note in the minutes of the meeting that the policy was distributed to everyone in attendance. In such a case, an employee would look pretty ridiculous trying to claim that they were not given a copy of the policy or that they were unaware of what the policy required.



Can a company test some, but not all, employees?

It is legal to test some, but not all, employees, but an employer must be careful. The policy should cover all employees in specific job categories. For example, the company could make all workers who operate machinery or vehicles subject to drug testing, but not require testing of clerical staff. Some employers test only those employees whose jobs are inherently risky. Some companies would not even do drug testing were it not for certain laws, such as the DOT drug testing regulations for long-haul truck drivers, oil and gas pipeline workers, and so on. Some contracts specify that workers coming into a client's facility will be subject to drug testing. If that happens, the contractor does not also have to test its other employees who do not go onto that client's premises. The main thing is to decide who will be covered, and then to enforce the policy in an even-handed way.

What about discipline for employees who test positive?

Most companies notify employees that testing positive for drugs or alcohol will result in immediate termination. Some companies allow a chance for rehabilitation and a return to work under probationary conditions, but this type of second chance is not required under Texas or federal law. If a worker is allowed to return to work after a positive test result, it is generally under a "last chance" agreement providing for monthly random tests, a year's probation, and immediate termination for any subsequent positive test result.

How about searches?

Many companies incorporate a search policy into their drug testing policies. After all, a drug test is a type of search. For an example of such a provision, see the book *Especially for Texas Employers*.

What if an employee refuses to cooperate?

An employer should never physically force an employee to submit to a search, due to the risk of civil and criminal complaints involving assault, battery, false imprisonment, invasion of privacy, and intentional infliction of emotional distress. However, employers may provide in the policy that employees who refuse to submit to a reasonable search under the policy, or who refuse to undergo a drug test, will be subject to immediate termination. In case of such refusal, termination should not occur until the employee has been reminded of the policy and of the risk of termination for non-compliance.

Under what circumstances should testing take place?

A typical policy will provide maximum flexibility for the employer. A company is allowed to do both random and "for cause" testing. Both circumstances should be spelled out to let employees know under what circumstances they can be called upon to submit to a test. For example, a "random" test might involve periodically testing all covered employees twice a year at intervals specified by the company. The company might send two employees each week for testing, but any given employee would only be sent twice in a year. "For cause" circumstances might include such things as reasonable suspicion by a supervisor that an employee may be in violation of the policy, reports from any witnesses, bizarre, unsafe, or threatening behavior on the employee's part, or involvement in a work-related accident ("involvement" means either being hurt or causing or contributing to the accident). Other things could be included as well; the term "for cause" is up to the employer to define. Terms used in the policy should be either readily understandable, i.e., with plain and unmistakable meanings, or else should be carefully defined. It is extremely important that the policy be understood by everyone who might be affected by it: company officials, lower-level supervisors, employees, the employer's insurance company, and government agencies, including courts, who might have to decide cases arising out of a drug test.

Regarding workers' compensation laws

Former Section 411.091 of the Texas Workers' Compensation Act (repealed in 2005) required any employer that is covered under a workers' compensation policy and that has 15 or more employees to have a drug-free workplace policy and to distribute the policy to all employees. Although the law did not require such companies to provide for drug testing, TWCC rules 169.1 and 169.2 state that if drug testing is done, the policy should be given in writing to all employees and should specify what penalties may be imposed in case of positive drug test results. While the statutory basis for those two rules may be in doubt, the intent behind the rules remains a good practice, i.e., any important policy should be in writing and should be specific as to requirements and penalties.

Clarity is essential

It should be very clear what is prohibited under the policy. While "use, possession, sale, or transfer" may be easy to understand, the concept of how the drug or alcohol test will reveal a violation is not so straightforward. It is very important to define exactly what will be considered as a violation in this

regard. Some employers are concerned only if the test shows drug or alcohol levels above a certain “cut-off” point. Other employers take a more hard-line or “zero tolerance” approach, stating that the policy is violated if a test detects any amount of prohibited substances in an employee’s system. Whatever the employer regards as important, it should be clearly spelled out.

Find a good drug-testing lab prior to enforcing the policy

No company should begin drug testing until it has found and engaged a reliable drug-testing lab that will be willing to cooperate with the employer in the event that a lawsuit or claim arises from the test. No lab should be used unless it agrees in writing to routinely provide the company with copies of the test results, showing which tests were performed, what substances were found, and in what amounts (either specific concentrations or an indication of what the cut-off levels for a positive result were). It should also furnish a copy of the complete chain of custody of the urine, hair, or blood sample showing who handled the sample at various times in the testing process. Employers that fail to present those types of documentation in response to an unemployment claim will lose the UI claim.

What type of testing should be done?

Initial tests or screens vary, but in order to have the best chance of protecting the company against an unemployment claim, the employer should always have the lab confirm the initial positive result with a confirmation test using the GC/MS method (gas chromatography/mass spectrometry). The GC/MS test is more expensive than the initial screen, but TWC expects to see the results of both tests before it will disqualify a claimant from UI benefits.

What about confidentiality?

Test results should be considered absolutely confidential. Negligent release of test results could result in legal action over issues such as invasion of privacy, intentional infliction of emotional distress, and defamation. Due to the federal law (ADA), it is necessary to maintain such records in a separate, confidential medical file. As a practical matter, the HIPAA privacy rule can make it difficult for employers to obtain specific drug test results from the testing lab. For that reason and others, employers should have employees sign a properly-worded consent form allowing the testing lab to release such results to the employer, and allowing both the testing lab and the employer to release the results to TWC and to any other agency or court dealing with a claim or lawsuit arising from the test.

Does it violate other confidentiality laws to release the test results to TWC?

No. Many employers misunderstand the laws in this regard. Even highly-regulated and otherwise restrictive DOT testing procedures allow employers to release the results to courts, government agencies, or arbitrators dealing with claims arising from the drug test, and drug testing labs are required to release the results to employers upon request in such situations (see DOT regulation 49 C.F.R. 40.323). There is simply no substitute for the specific drug test results in an unemployment claim. Employers with lingering doubts on this issue should call the employer commissioner’s office at TWC at 1-800-832-9394.

What special concerns are there in DOT drug testing cases?

U.S. Department of Transportation rules provide for drug testing via urinalysis of safety-sensitive employees in a variety of circumstances and for relieving such employees of duty in the event of a verified positive result or a test refusal. The DOT rules provide detailed procedural safeguards to ensure valid testing, valid results, and confidentiality. The rules are not meant to be a substitute for a good drug and alcohol policy, nor are they a limit on what employers are allowed to do in order to discourage and respond to drug and alcohol use on the job. With regard to how the DOT rules interact with a TWC unemployment claim, current agency precedent cases do not make any allowance for the in-depth safeguards and rigorous standards provided by DOT testing procedures. Unfortunately, while employers with multi-state operations may be able to defend against UI claims in some states using only the bottom-line results from the DOT testing, i.e., proof that a medical review officer confirmed a positive test result, TWC requires much more documentation, as explained in the section below.

Finally, what kind of documentation is needed in a TWC unemployment claim?

A TWC precedent case, Appeal No. 97-003744-10-040997, sets out some fairly clear guidelines regarding the kind of documentation an employer needs to respond to an unemployment claim involving an ex-employee whose termination resulted from failing a drug test. To establish that a claimant’s positive drug test result constitutes misconduct, an employer must present:


1. a policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. evidence to establish that the claimant has con-

3. documentation to establish that the chain of custody of the claimant's sample was maintained;
4. documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. documentation of the test expressed in terms of a positive result above a stated test threshold.

Evidence of these five elements is what TWC states is needed to overcome a claimant's sworn denial of drug use, even in DOT drug testing cases in which a medical review officer has certified the drug test results and that the only reasonable explanation for the positive finding is that the claimant consumed a specific controlled substance. That is why it is so important to have each employee sign a consent form

allowing complete disclosure of all test documentation by both the testing lab and the employer for the purpose of responding to claims and lawsuits.

Summing up

All in all, common sense will help more than anything else. If a company has a clear written policy, ensures that all employees know about it, conducts tests according to the policy, and insists on the testing lab furnishing the appropriate documentation, it will be in a favorable position in any unemployment case or lawsuit arising from the test. 

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Uninsurable Drivers: Policy And Work Separation Issues

Note: This information is meant to make it easier to defend your company against unwarranted unemployment claims from drivers who have been discharged for driving-related problems. As always, in close or questionable situations, it is best to consult a human resources professional or employment law attorney before taking any action against an employee, filing a claim response, or participating in an appeal hearing.

Many employers have drivers on staff. Unemployment claims involving drivers who have been fired for uninsurability present special problems for employers. Keeping a few guidelines in mind can give an employer a much better chance of defending against such a claim:

- proper questions on the job application concerning driving record and background;
- clear policy on insurability as a condition of continued employment as a driver;
- prompt reporting of accidents and violations to the insurance carrier;
- cooperation with insurance carrier regarding records and insurability determinations;
- furnishing appropriate evidence to TWC in case of an unemployment claim; and
- using the driver's license laws to be aware of a driver's record and to properly protest an unemployment claim.

Job Application Questions Relating to Driving Record and Background

Employers are allowed to ask for any information necessary to checking an applicant's driving record, driving experience, and background. That would include the driver's license number. However, remember that many professional drivers are licensed in more than one state. Ask applicants to list all driver's licenses they hold and to give the numbers and expiration dates of all licenses. You will need those numbers to check the driving records in those other states. Have the applicants give written consent for you to get their motor vehicle records, and be ready to follow any particular requirements of other states in that regard. An alternative is to have the applicants get certified copies of their motor vehicle records for you; it is certainly your right to make that a condition of processing their applications for employment.

A company should also ask the applicants to list any accidents or motor vehicle law violations they have had within a specified period of time in the past. If an applicant's information differs from what the official motor vehicle records indicate, ask the applicant to explain. If there are any questionable accidents or tickets listed on the motor vehicle records, be sure to ask for specifics.

Concerning background checks, be careful. The federal law known as the Fair Credit Reporting Act (FCRA) contains strict requirements for certain types of background checks. If an employer plans to use any kind of outside for-profit agency to investigate an applicant's or employee's background, the employer must first obtain that person's written authorization for the check and disclose to that person a summary of the person's rights under the FCRA. (Such a summary may be obtained from any agency that might do such a check and should be furnished as part of the service you pay the agency to perform.) If the applicant refuses to give you such written authorization, you have the right to disqualify them from further consideration. If employment is denied or terminated as the result of such a check, that fact must be disclosed to the applicant, along with an explanation of the problem leading to the denial or termination of employment and the name, address, and phone number of the company that conducted the investigation.

It is certainly permissible to ask about criminal history on the job application. Do not ask only about prior "convictions". In Texas, a common form of sentencing is deferred adjudication. If the person being sentenced satisfies the terms of probation specified by the court, no final conviction is entered on the individual's record, and they may legally claim never to have been convicted of that particular offense. However, they may not claim never to have pled guilty or no contest to the offense, since pleading guilty or no contest is one of the conditions for deferred adjudication in the first place. It is just a matter of asking the question in the right way. One way of asking a question about prior criminal background would be as follows: "During the past (x) years, have you been convicted of, or have you pled guilty or no contest to, any of the following charges: a felony of any kind, driving while intoxicated, driving

under the influence of a prohibited, controlled, intoxicating, or illegal substance, or (fill in the blank)."

This is not to say that the mere existence of criminal problems in the past should be a bar to employment under all circumstances. To be fair and to avoid possible discrimination charges, be sure to inquire only about criminal offenses or driving-related offenses that are relevant to the job in question.

In general, the job application should make it clear to applicants that supplying wrong or incomplete information can result in them not being hired, or if the problem is discovered after hire, can result in their discharge from employment.

Clear Policy on Uninsurability

The company's policies applying to employees with driving duties should address the following points:

- all drivers must maintain a clean driving record;
- all drivers must be insurable at any time they are performing driving duties;
- all drivers must have a valid driver's license at any time they are performing driving duties;
- any driver with a suspended or revoked driver's license may be taken off driving duties;
- any driver who becomes uninsurable, as determined by the employer's insurance carrier, agrees to be reassigned to other duties, or may be terminated from employment at the company's option;
- drivers who are reassigned due to uninsurability, lack of a clean driving record, or lack of a valid driver's license agree that they will accept whatever alternative assignments the company may give them and that they understand that a reduction in pay may result from the reassignment;
- any employee performing driving duties agrees to report any accidents in which they are involved as a driver or any violations of any motor vehicle laws for which they are cited by a law enforcement authority; such report to the company shall be made immediately or as soon as possible following the event;
- failure to promptly report accidents or motor vehicle law violations will result in disciplinary action, up to and possibly including discharge; and
- any driver involved in an accident or cited by a law enforcement official for violating a motor vehicle law must turn over any documentation



relating to such incident as soon as possible to the employer, and must cooperate with the employer in verifying the information with other parties involved and with law enforcement authorities.

- In developing such policies, employers should consult their insurance carriers, since each shares the common interest of keeping only good drivers on the roads.

Prompt Reporting of Problems to the Insurance Carrier

It is essential to provide your insurance carrier with up-to-date information relating to your drivers. This is so that you can ask the insurance company to make a prompt determination as to whether a particular driver will remain insurable under the policy. You do not want to end up losing an unemployment claim just because the problem causing uninsurability happened too far in the past. That happens in cases where the insurance carrier makes insurability or continued coverage determinations only once every 12, 18, or 24 months. Such intervals are far too large to be of use to employers who might have to deal with unemployment claims from drivers who are suddenly declared uninsurable or otherwise excluded from coverage long after driving problems occurred. The employer should do its best to let no more than a month pass between the incident and the discharge, if discharge becomes necessary. If the TWC claim examiner or hearing officer seems troubled by the interval between the final incident and the discharge, point out that you were simply trying to be fair to the employee by not taking unduly hasty action and that it takes time for an insurance company to make a determination.



Cooperation with Insurance Carrier

Going hand in hand with prompt reporting of accidents and violations is the issue of cooperating with the insurance company regarding records and insurability determinations. This is one of those “I’ll scratch your back if you’ll scratch mine” propositions. Furnish whatever documentation you have regarding insurability issues to your insurance carrier, and ask the carrier to do the same for you. You will need such documentation in case you have to fire a driver and the driver files an unemployment claim, and the insurance company needs the documentation to be able to make a prompt insurability determination.

Furnishing Appropriate Evidence to TWC in Case of an Unemployment Claim

General

In order to have a decent chance of winning an unemployment claim involving a claimant who has been discharged, an employer must show two main things: first, that the discharge occurred due to a specific act of misconduct connected with the work that happened close in time to the discharge, and second, that the claimant either knew or should have known that discharge could result from such a problem. The burden of proving misconduct is on the employer. That means that if you are dealing with an unemployment claim from a driver you terminated, you must show sufficient evidence to justify a disqualification.

Excessive Accidents

If the driver was terminated for excessive accidents, you will have to show that specific accidents occurred at specific times and that the claimant was at fault in whatever accidents contributed to the decision to discharge. That is especially the case with the final accident. If the final accident was not the claimant’s fault, you will probably lose the case, since disqualification is based upon a final incident of misconduct, and if the most recent misconduct was one or two accidents ago, those problems would be too remote to have been the “proximate” cause of dismissal, i.e., the precipitating factor in the discharge.

Excessive Motor Vehicle Law Violations

If the driver was terminated for excessive traffic violations or violations of other motor vehicle laws, you will need to prove that the violations occurred and that the claimant was at fault in the violations. You can show the claimant was at fault if you have some kind of evidence showing that the claimant

paid a traffic ticket, was convicted and sentenced to some kind of fine or other penalty, or entered a guilty or no contest plea in order to receive probation, a suspended sentence, deferred adjudication, or some other form of alternative sentencing.

Failing to Promptly Report Problems

If the driver was discharged for failing to promptly report accidents or violations, you will need to show that the accidents or violations occurred and that the claimant failed to make a reasonable effort to promptly notify your company under whatever notification policy you have. You will also need to show how the claimant either knew or should have known he could be fired at that time and for that reason.

Loss of License to Drive

If a driver loses his job due to losing his license, the TWC ruling will depend upon whether the problems leading to loss of the license were within the claimant's power to control. If the claimant draws benefits, the employer should certainly ask for chargeback protection if it had no alternative but to lay the claimant off, i.e., was required by a state or federal law or regulation to discontinue the claimant's driving duties.

Supplying Wrong or Incomplete Information on the Job Application

If the driver was fired for falsifying the job application or for failing to supply all pertinent information, the employer will need to present a copy of the application and copies of any documentation showing how the claimant's original information was false or incomplete. Look back at the information above concerning "convictions". Do not fire a claimant and expect a favorable ruling from TWC if the problem was that the application asked only about "convictions" and the claimant failed to list a deferred adjudication sentence that was successfully completed. If that situation has happened to your company, you need to redesign your job application as noted above.

Uninsurability

If the driver was fired for uninsurability, you will need to prove that the incidents causing uninsurability happened close in time to the discharge and were the claimant's fault. Drivers are sometimes declared uninsurable for problems that happened before they went to work for the employer. While the employer may need to lay such drivers off, TWC will not disqualify them from unemployment benefits,

since any possible misconduct on their part occurred prior to working with the employer and was thus not misconduct "connected with the work". However, this does not apply if the problems occurring prior to employment were not reported on the job application. In that case, that would fall under the "falsification of a job application" category (see above).

Using the Driver's License Laws to Get Needed Information

Due to the Texas Commercial Driver's License Act and similar laws in other states, it is fairly easy to be aware of a driver's record and to properly protest an unemployment claim involving serious license or driving record problems. Under those state laws, which in turn were mandated by a federal law, there is a nationwide database of driving records of people who have commercial driver's licenses. Those laws also require prompt reporting of any problems that might affect a driver's ability to hold or renew a commercial driver's license. Using the database, employers should have another way of getting information relating to the ability and qualifications of applicants and drivers. In Texas, the Texas Department of Public Safety can give information on how a company can obtain such records.

In addition to cooperating with law enforcement authorities and their insurance carriers, employers may also contact Commissioner Lehman's office for assistance on this subject at 1-800-832-9394. As is usually the case, timely information can make all the difference. 🇹🇽

William T. Simmons
Legal Counsel to Commissioner Ron Lehman



Quick Do's and Don'ts in Unemployment Insurance Claims and Appeals

Before a claim arises:

1. If an employee is about to be fired, go through a termination checklist. At the very least, ensure that the employee has been given the benefit of whatever termination procedures are outlined in the company policies and in whatever warnings they may have received.

2. If an employee is quitting, do not have the person sign a boilerplate resignation form; have the person do their own letter, in their own handwriting if possible. Just a few sentences can come in very handy should an unemployment claim arise down the road.

3. If an employee is quitting, do not let the person quit until and unless you are satisfied that the company has done everything appropriate to address any legitimate grievances they may have.

After a claim arises:

1. Respond on time to any claim notice, ruling, or appeal decision you receive from the Texas Workforce Commission.

2. Be as specific and factual as possible.

3. Be consistent in your responses, appeals, and testimony.

4. Avoid name-calling or gratuitous derogatory comments toward the claimant.

5. In discharge cases, avoid certain terminology such as “inability”, “incompetence”, “disloyal”, “accumulation of things”, “bad attitude”, and “mutual agreement”.

6. In discharge cases, try to show four main things:

a. a specific final incident of misconduct close in time to the discharge;

b. that the claimant either knew or should have known that discharge could occur for the reason given;

c. that the employer followed whatever policies it has and whatever warnings were given; and

d. that the claimant was not singled out for discharge, but rather was treated the same as anyone else would have been under those circumstances.

7. In voluntary leaving cases, avoid comments on how glad the company is that the claimant resigned or on how bad the ex-employee might have been. Instead, focus on how a reasonable employee otherwise interested in remaining employed would not have left for the reason given. Additionally, emphasize that the claimant left while continued work was available.

8. In all cases, have your evidence and firsthand witnesses ready to participate in the hearing.

9. Make your testimony brief, factual, and concise. 🇹🇽



Workforce Round Up – Summer 2006

WorkInTexas.Com: 500,000 Hires and Counting

As Texas employers continue to add jobs at twice the annual U.S. growth rate, more than 143,000 of them have used WorkInTexas.Com, the Texas Workforce Commission's online job-matching system, resulting in 500,000 hires since its launch in June 2004. WorkInTexas.com is a free, comprehensive, and easy-to-use online employment resource that matches employers of all sizes and types with qualified job seekers.

And, even more innovative technological solutions are on the way to meet employers' and job seekers' needs. Texas employers can utilize WorkInTexas.com's new mass ability to download all the applications for their posting with the click of one button. WorkInTexas.com's recently enhanced employer and job seeker browsers allow users to search by company name or specific keywords. And, work is underway to further enhance the system to supplement existing occupation lists with lay titles based on keywords, allowing users to more precisely target their search. It is an increasingly agile one-stop recruiting/hiring/tracking system. The system also supplies labor market information that allows employers to strategically plan their human resource and training needs.

Visit WorkInTexas.Com today to see if this tool can help you with your hiring needs.



Jefferson Physician Group Partners with Brookhaven College for Job-Training Grant from TWC

The Dallas-area workforce will benefit from a recent \$554,482 job-training grant that partners Jefferson Physician Group with Brookhaven College. This grant will be used to custom-train workers in the fast-growing health care industry for 100 new and 440 upgraded jobs. Upon completion of training, workers will fill positions as registered nurses, managers, and health care support specialists, among others, earning an average hourly wage of \$15.71.

In fiscal year 2005, Skills Development Fund grants created or upgraded 12,247 Texas jobs that paid an average hourly wage of \$17.01. The grants totaled \$8.6 million and assisted 95 Texas employers with their customized training needs. The Legislature has appropriated \$40.4 million to the Skills Development Fund for the 2006-07 biennium.

Employers seeking more information about the Skills Development Fund may visit the TWC Web site at www.texasworkforce.org.

WorkSource Efforts Return Workers to Cavco

When Alamo WorkSource's Seguin Workforce Center learned Cavco Industries planned to reopen a Seguin plant that closed in 2000, the board promptly went to work to help the company rehire employees with the housing manufacturer. Cavco expects to resume operations with 30 to 50 employees, and eventually will increase its workforce to as many as 100.

WorkSource for Dallas County Delivers New Hires to FedEx

When the South's largest FedEx Ground hub opened in Hutchins, WorkSource for Dallas County ramped up its resources and delivered almost 400 employees in two months.

FedEx Ground, a \$2 billion subsidiary of FedEx, provides businesses and residential ground package delivery services supported by a team of 35,000 employees. In 2003, FedEx Ground began construction on the 330,000 square foot Hutchins distribution hub. This brought \$40 million in taxable value and hundreds of new jobs to this economically challenged area of Dallas County.

FedEx Ground needed to employ 380 people to open its doors. Within two months of placing its order with WorkSource for Dallas County, it had filled its employment needs, with 80% of the candidates being referred from WorkSource. According to Robin Fisher, FedEx Ground employee relations manager, "We opened in April. By June, we were fully staffed. WorkSource helped us maneuver through the difficulties of finding the right candidates." She went on to state that with the assistance of WorkSource, FedEx Ground plans to expand and hire almost 1,000 more people by year's end. 🇺🇸

TEXAS WORKFORCE SOLUTIONS

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Dedicated to helping Texas employers and job seekers succeed, Texas Workforce Solutions is part of a statewide partnership that provides local services on a regional level through 28 local workforce boards. This system gives our customers further access to local and statewide services in a single location at any one of 275 local Texas Workforce Centers and satellite offices across the state.

Texas Workforce Solutions offers Texans an array of services, including job matching, recruiting, retention, training and retraining, and outplacement services, as well as valuable information on employment laws and labor market statistics.

The valuable services of a Texas Workforce Center may include:

- Screening, testing and referring qualified candidates to meet employment needs
- Coordinating interviews and testing, as well as providing meeting space for interviews
- Brokering pre-employment services, such as drug and alcohol testing, background checks, etc.
- Providing information and technical assistance on federal and state rules affecting employment (payday, new hire reporting, unemployment tax and reducing unemployment tax chargeback)
- Explaining information on tax code provisions that favor employment and training (e.g., wage subsidies, tax credits and tax-free education assistance not related to jobs)
- Continuing an ongoing relationship to assist with human resources needs so businesses remain competitive and profitable in the marketplace

Local workforce development boards

Alamo (Alamo WorkSource) (210) 272-3260 www.alamoworksource.org	Deep East Texas (Workforce Solutions Deep EastTexas) (936) 639-8898 www.detwork.org	North Central Texas (North Central Texas WorkForce) (817) 695-9176 www.dfwjobs.com	South Plains (WorkSource of the South Plains) (806) 744-1987 www.worksourceonline.net
Brazos Valley (Workforce Solutions-Brazos Valley) (979) 595-2800 www.bvjobs.org	East Texas (903) 984-8641 www.easttexasworkforce.org	North East Texas (903) 794-9490 www.netxworkforce.org	South Texas (956) 722-3973 www.southtexasworkforce.org
Cameron County (Cameron Works) (956) 548-6700 www.cameronworks.org	Golden Crescent (Texas Workforce Solutions of the Golden Crescent) (361) 576-5872 www.gcworkforce.org	North Texas (Workforce Resource) (940) 767-1432 www.workforceresource.info	Tarrant County (Workforce Solutions for Tarrant County) (817) 413-4400 www.workforcesolutions.net
Capital Area (WorkSource – Greater Austin Area Workforce Board) (512) 597-7100 www.worksourceaustin.com	Gulf Coast (The WorkSource – Gulf Coast Workforce Board) (713) 627-3200 www.theworksource.org	Panhandle (Panhandle WorkSource) (806) 372-3381 www.work2at.com	Texoma (Workforce Texoma) (903) 957-7408 www.workforcetexoma.com
Central Texas (Central Texas Workforce System) (254) 939-3771 www.workforcelink.com	Heart of Texas (Heart of Texas Workforce) (254) 756-7844 www.hotworkforce.com	Permian Basin (Permian Basin WorkforceNetwork) (432) 563-5239 www.pbwdb.org	Upper Rio Grande (Upper Rio Grande @ Work) (915) 772-2002 www.urgwdb.org
Coastal Bend (Work-Force 1) (361) 225-1098 www.work-force1.com	Lower Rio Grande Valley (WorkFORCE Solutions) (956) 928-5000 www.wfsolutions.com	Rural Capital Area (Rural Capital Area WorkForce) (512) 244-7966 www.ruralcapitalworkforce.com	West Central Texas (325) 795-4200 www.workforcesystem.org
Concho Valley (325) 655-2005 www.cvworkforce.org	Middle Rio Grande (830) 591-0141 www.mrgwb.org	Southeast Texas (409) 719-4750 www.setworks.org	
Dallas County (WorkSource for Dalla County) (214) 290-1000 www.worksource.org			

HELPFUL EMPLOYMENT LAW-RELATED WEB SITES

Federal Laws

General U.S. government Web site - FedWorld - www.fedworld.gov/
 General legal information site - U.S. and state laws and court decisions - www.law.cornell.edu/
 U.S. Department of Labor (DOL) - Home Page: www.dol.gov
 DOL - Small Business Compliance Assistance - <http://www.dol.gov/osbp/sbrefa/main.htm>
 DOL - Wage and Hour Laws and Regulations - Main Page: www.dol.gov/esa/whd/
 DOL - Required Posters - www.dol.gov/osbp/sbrefa/poster/main.htm
 DOL - Code of Federal Regulations - www.dol.gov/dol/allcfr/Title_29/toc.htm
 DOL - Wage and Hour Regulations - www.dol.gov/dol/allcfr/Title_29/Chapter_V.htm
 DOL - OSHA - www.osha.gov/
 Equal Employment Opportunity Commission - www.eeoc.gov/
 INS (now USCIS) and I-9 information - www.uscis.gov/graphics/index.htm
 Federal Trade Commission - Fair Credit Reporting Act information - www.ftc.gov
 Social Security Administration - verification of SSNs - www.ssa.gov/employer/ssnv.htm
 IRS Home Page - payroll tax information and forms - www.irs.gov/
 National Labor Relations Board - www.nlrb.gov/

Federal Court Sites - www.uscourts.gov/courtlinks
 Job descriptions - http://www.dol.state.ga.us/em/faq_em.htm (scroll down to "Occupational Information")
 U.S. Small Business Administration - Texas Locations - www.sbaonline.sba.gov/tx/

Texas Laws

Texas - Home Page - www.state.tx.us/
 Texas - State Laws - www.capitol.state.tx.us/statutes/statutes.html
 Texas - State Regulations - <http://www.sos.state.tx.us/tac/index.shtml>
 State of Texas New Hire Program - <https://portal.cs.oag.state.tx.us/wps/portal/employer>
 Texas Association of Business - www.txbiz.org
 National Federation of Independent Business (Texas Chapter) - www.nfib.com/page/homeTX.html
 Texas Workforce Commission (TWC) - www.texasworkforce.org/
 TWC Employer Page - www.texasworkforce.org/customers/bemp/bemp.html
 TWC Tax Department Page - www.texasworkforce.org/customers/bemp/bempsub3.html
 TWC Labor Law Page - www.texasworkforce.org/ui/lablaw/lablaw.html
 Especially for Texas Employers book - www.texasworkforce.org/news/efte/tocmain.html
 Required Posters - <http://www.twc.state.tx.us/ui/lablaw/posters.html>
 Texas Court Sites - www.courts.state.tx.us
 Texas Attorney General's Office - www.oag.state.tx.us
 Texas Department of Insurance - employer information - www.tdi.state.tx.us/commish/smbiz.html

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

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

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

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

Corpus Christi – September 29, 2006
Amarillo – October 6, 2006
Waco – October 20, 2006

please print

Seminar choice:

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