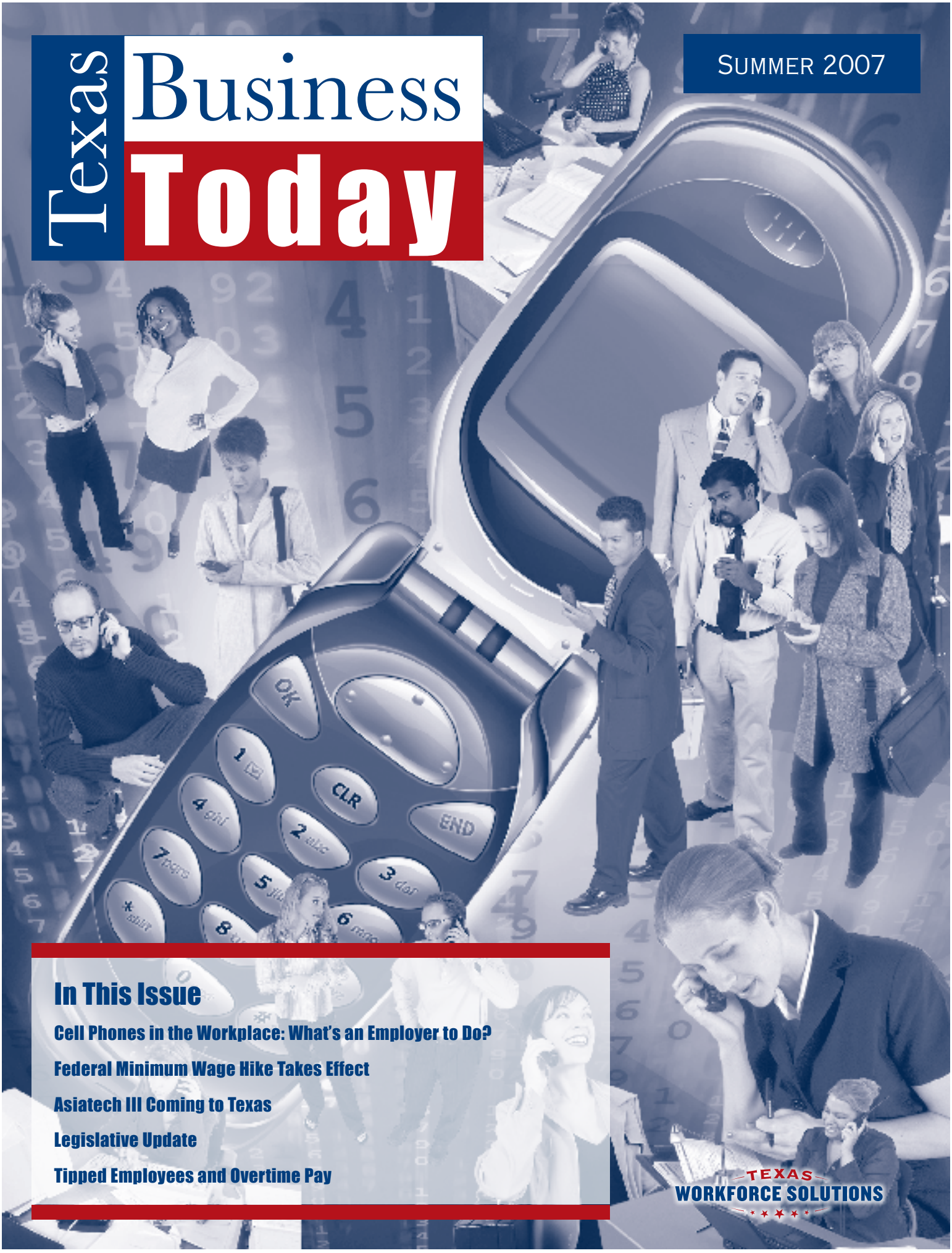
Texas Business Today

SUMMER 2007



In This Issue

TEXAS WORKFORCE SOLUTIONS

Cell Phones in the Workplace: What's An Employer To Do?

Judging by the ever-increasing number of calls on the Employer Commissioner's toll free hotline on the issue of cell phones at work, this is a concern that is growing by leaps and bounds. On the one hand, many employees believe that they have an inalienable right to have their personal cell phones on and ready to be answered at all times, regardless of the workload. On the other, employers have a number of legitimate concerns regarding these devices, including loss of employee productivity, potential employer liability for traffic accidents caused by employees talking on cell phones while making job-related calls, invasion of co-workers' privacy by taking inappropriate photos with camera phones, and transmission of camera phone images of product prototypes, trade secrets or other sensitive information to unauthorized parties.

First and foremost, there is nothing in any federal or state law forcing Texas employers to allow their employees to bring personal cell phones onto company premises at any time. Many employers flatly ban personal cell phones in the workplace, and require employees to leave their phones in their vehicles and make personal calls during authorized breaks or lunch hours only. That's a perfectly permissible, legal position for an employer to take.

However, if you don't want to issue a flat prohibition on personal cell phones at work (or don't do so until an employee flagrantly violates whatever reasonable company policy you decide to adopt), you have the flexibility to approach this issue in a number of different ways and impose some common sense policies in this area. Companies around the country have taken a number of steps to prevent inappropriate cell phone use – especially the use of camera phones – thereby protecting their own proprietary interests and the confidentiality and privacy concerns of their workers. Some employers have addressed the issue by:

- Requiring employees to leave cell phones at their desks or in their purses during working hours or when they are attending company meetings, or seeing

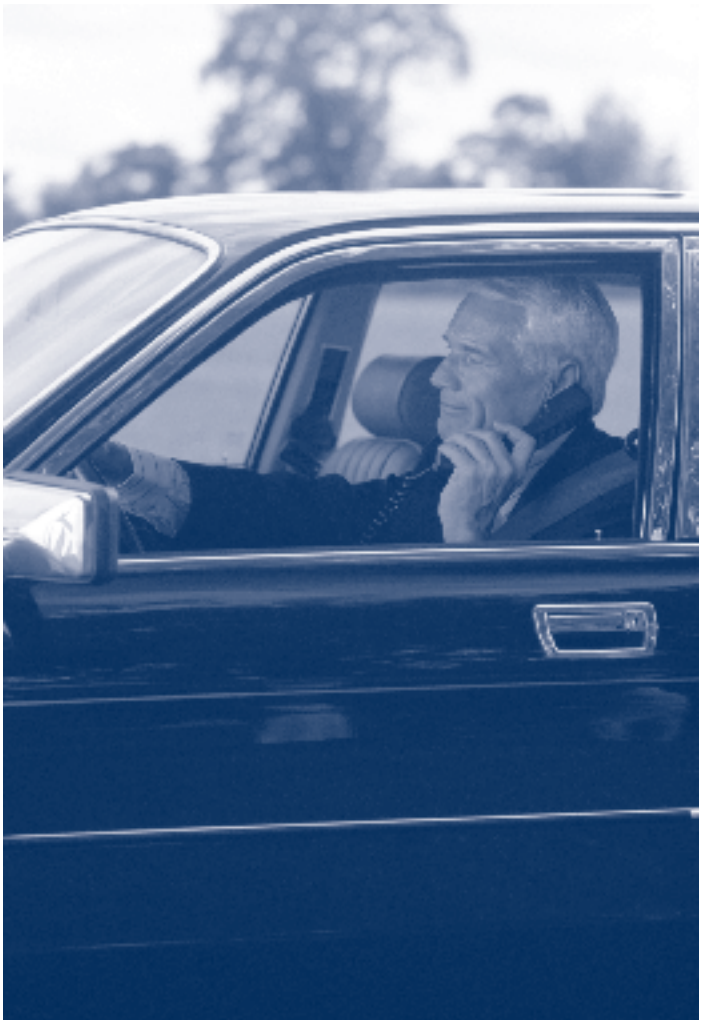
clients, customers, patients or vendors, and allowing all calls to go to voice mail. Calls may be returned at breaks and on lunch hours.
- Allowing employees to carry their cell phones in vibrate mode in the unusual occasion of an emergency that may require immediate attention.
- Prohibiting employees and visitors from bringing camera phones into any company building.
- Prohibiting camera phones in all product development areas.
- Limiting company-provided cell phones to those that do not have photographic capability.
- Allowing employees to bring their camera phones to work, but strictly prohibiting taking pictures with them.
- Prohibiting the use of camera phones in all areas of the business from which traditional cameras are prohibited.
- Prohibiting the use of camera phones in all areas where co-workers have a reasonable expectation of privacy such as company restrooms, dressing rooms, or locker rooms.

What About Driving and Cell Phone Use?

Just as in the case of alcohol served at office functions, employers may be held liable for accidents caused by employees while they're on the job. And, because of the availability of cell phone records, it may not be difficult to determine what type of phone call (business or personal) the employee was making when the accident occurred. However, the lines are becoming more and more blurred when it comes to determining whether the accident is "within the scope of employment." Whether the call was made on a business or personal phone makes little difference; however, the discovery that the accident occurred because the employee was making a job-related call makes the accident "within the scope of employment."

While there is no foolproof, guaranteed defense to employer exposure for cell phone-related accidents their employees cause while driving and talking, developing appropriate policies, providing training and consistent enforcement mechanisms can help limit your potential liability and increase public safety. Once again, you have wide latitude in determining what your company policies should be. Some Texas companies prohibit employees from using their cell phones while driving on company time, period. On the other hand, many businesses adopt cell phone safety policies and emphasize employee training and consistent enforcement. Any sound cell phone policy must begin with employee education about the potential consequences and risks of using cell phones while driving.

Every Texas employer should decide whether the benefits of employee cell phone use while driving outweighs the risks. Some examples of the types of company cell phone policies being used include:



- Completely prohibiting cell phone use while driving.
- Requiring all employees to use hands-free devices while driving.
- Requiring employees to pull over and safely park to take phone calls.
- Strongly encouraging employees to avoid or cut short phone calls involving highly emotional or stressful conversations.
- Creating employee job descriptions that make it very clear that their jobs do not include using cell phones while they drive.
- Prohibiting cell phone use in inclement weather or hazardous driving conditions.
- Limiting cell phone use to brief conversations.
- Instilling the importance of safety when taking phone calls on the road.
- Making it clear that failure to comply with company policies and guidelines may result in disciplinary action up to and including termination.

Sample Cell Phone Use Policy

Personal Cell Phones

XYZ Corporation expects all employees to use common sense and discretion when using their cell phones in the workplace. Employees must leave their personal cell phones at their desks or in their purses or lockers during working hours or when they are attending company meetings/seeing clients/customers/patients or vendors, and allowing all calls to go to voice mail. Personal calls may be returned during authorized breaks and during lunch hours. Employees are also asked to use discretion when discussing business matters in a public area. In the unusual occasion of an emergency that may require an employee's immediate attention, employees will be allowed to carry their personal cell phones in vibrate mode.

Employees may bring personal camera cell phones to work, but they are strictly prohibited from taking pictures with them. Employees may not take personal camera cell phones into restrooms, locker rooms, dressing rooms, or any other areas where co-workers maintain a reasonable expectation of privacy. Camera phones are also prohibited in any areas of the workplace where other cameras are already prohibited.

Violation of this policy can lead to a loss of cell personal cell phone privileges during working hours or discipline up to and including termination.

Driving During Working Hours and Cell Phones

XYZ Corporation employees who are issued company cell phones for business purposes and whose job responsibilities include occasional or regular driving are expected to refrain from using their phones while driving. Regardless of the circumstances, employees are strongly encouraged to pull off to the side of the road and safely stop the vehicle before checking messages and placing or accepting a call.

XYZ Corporation employees whose job responsibilities including regular driving and accepting of work-related business calls will be provided hands-free equipment to facilitate the provisions of this policy. XYZ Corporation employees whose job responsibilities do not specifically include driving as an essential function of their job, but who are issued a company cell phone for business use are also expected to abide by the provisions stated above. Under no circumstances are XYZ Corporation employees to place themselves or others at risk to fulfill business needs.

XYZ Corporation employees who are charged with traffic violations resulting from the use of their phone while driving will be solely responsible for all liability that results from such actions. Violations of this policy will result in the most serious forms of discipline, including termination.

From the Dais - Summer 2007

Dear Texas Employers,

As the Employer Commissioner at the Texas Workforce Commission, one of the highlights of my role is meeting with more than 6,000 employers each year from all across Texas and from all industry sectors. In addition, my staff receives more than 3,000 calls from employers each month.

Based on your inputs, I will use this space to update you on several key directions of the workforce system.

In terms of helping you find the qualified workers you need, the Texas workforce system is committed to treating you, the employer, as a primary customer by listening to your needs and helping you to solve your business and workforce challenges. During the past year, this network of twenty-eight local workforce development boards have provided services to over 75,000 employers in this state. More than 184,000 employers have registered to use our labor matching system "WorkInTexas.com,"and since its launch in the summer of 2004, more than 2.2 million jobs have been listed through this system, and 800,000 of them have been filled.

Helping you find the needed training and training support has been another major area of emphasis. Each of our local workforce boards have partnerships established and local funds available to assist the employers in their areas to identify and obtain the training they need for their workforce. At the state level, through the Skills Development Fund provided by the Legislature, more than 2,800 employers have received customized training for more than 168,000 trainees for their upgraded or newly created jobs.

The workforce system recognizes its responsibility not only to help employers obtain the workers needed for their near-term jobs, but also to help improve the alignment of the partners, priorities, strategies, and resources of each respective region so that the knowledge and skills of the workers of the future will be at the levels needed to compete successfully in a global economy. Each of the local workforce boards are working with the education, economic develoment, employer, and community organizations to better communicate the emerging needs and opportunities of the future to the workers and learners in their respective areas.

Lastly, I am very pleased to announce that over the next twelve months all of the local workforce boards in Texas will be adopting a common brand: *Texas Workforce Solutions*. While I am very proud of the accomplishments of each of the local workforce development boards and their partners, being market-driven means our customers must always come first. I believe this common brand will make it easier and more convenient for our employers, workers, and jobseeker customers to contact us for workforce services and solutions. I applaud and thank my fellow commissioners, and especially the leaders of the local workforce develoment boards for making this change.

I encourage all Texas employers to see what the local representatives from *Texas Workforce Solutions* have to offer. Information is also available at the agency's website at www.texasworkforce.org.

It is an honor to represent Texas employers here at the Texas Workforce Commission. If you have questions or suggestions about how we can serve you better, please contact my office at 1-800-832-9394, or 512-463-2826.

Sincerely,

Ron Lehman
Commissioner Representing Employers

Business Briefs – Summer 2007

Federal Minimum Wage Hike Takes Effect

On July 24, 2007, the federal minimum wage rose to $5.85 per hour, up from $5.15 per hour where it had been since 1997. On July 24, 2008, the minimum wage will rise again to $6.55 per hour, and then go to $7.25 per hour on July 24, 2009.

According to the U.S. Department of Labor's Bureau of Labor Statistics, approximately 1.7 million workers earned $5.15 or less in 2006. Federal labor statistics also indicate that at least half a million Texans will get a pay raise over the next year when the federal minimum wage increases to $6.55 per hour.

According to Bill Hammond, the president of the Texas Association of Business, his organization is philosophically opposed to the higher minimum wage; however, he acknowledged that the issue is not a huge concern for many of his members. "The marketplace has taken care of the issue. Today in Texas, we have essentially full employment. Times are pretty good right now. So the impact (of the increased minimum wage) is really small," Hammond said. He did caution that should the economy weaken, an increased minimum wage could result in thousands of fewer entry-level jobs being created statewide.

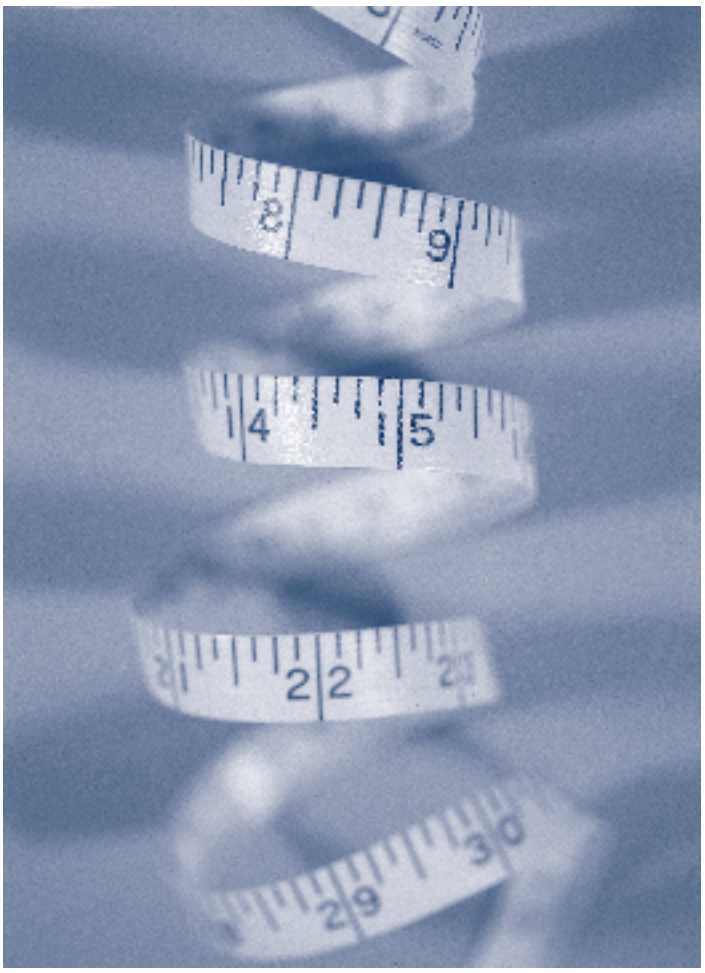
Not Your Father's IRS: The IRS Starts New, Free e-newsletter Especially for Small Businesses

Many small business owners may dislike paying taxes, and complying with federal tax requirements is not always easy. However, there's a lot to like about the IRS's new online newsletter, *e-News for Small Businesses*. The IRS has embraced the convenience and speed of the digital world to help small business owners, accounting professionals, and tax practitioners better understand and meet their tax obligations. And, *e-News* delivers timely, useful tax information right to your computer, including:

- Important, upcoming tax dates and deadlines
- What's new on the IRS Web site
- Reminders and tips to assist businesses with tax compliance
- IRS news releases and special IRS announcements.

e-News is distributed every Wednesday. The convenient format puts IRS tax information at your fingertips, and its "Useful Links" guide you quickly to the latest news and resource information available on IRS.gov.

To start your free subscription to *e-News*, visit IRS.gov at http://www.irs.gov/businesses/small/content/0,,id=154826,00.html, type in your e-mail address and submit.



Texas Employers Have Good Reason$ to Help Their Workers Lose Weight

As more and more Texans struggle with obesity (defined as having a high amount of body fat or a Body Mass Index of 30 or higher), recent research shows that those pounds can easily translate into economic losses. And, businesses are among the hardest hit economically, because they are the nation's primary source of private health insurance. However, employers are also among the best positioned to make a positive difference in their workers' lives.

According to Comptroller Susan Combs' recently released special report analyzing the cost of obesity in Texas workplaces, "***Counting Costs and Calories***," Texas businesses may pay even more for obesity than companies in other states. Almost 89% of adult Texans who have private health insurance obtain it from their jobs. Texans are also fatter: in 2005, a full 27% of Texans were obese in comparison to the national average of 24.4%. Considering that health insurance premiums have risen by an average of 68.2% since 2001, the obesity epidemic is a major factor in rising health care costs and skyrocketing health insurance premiums, as well as lost productivity and absenteeism among Texas' workforce.

In 2005, worker obesity cost Texas businesses $3.3 billion in higher health care expenses, absenteeism, lost productivity, disability and "presenteeism" (coming to work but achieving less because of weight-induced problems). If health care costs and current obesity trends continue, by 2025, 48.2% of Texas adults will be obese, and that could cost Texas businesses a staggering $15.8 billion annually.

What can be done to reverse the effects of the obesity epidemic and its associated costs to Texas employers? Many companies are shifting their health care focus from disease treatment to prevention in an effort to reduce future health care costs for preventable diseases. The most successful of these programs offer financial incentives to employees, such as lower health insurance deductibles or company paid gym fees, as well as other programs designed to encourage employees to choose healthy lifestyles.

One such program was recently instituted by Boston's Virgin Life Care, a subsidiary of the British Virgin Group. This company offers its physically active workers cash for physical activity. Provided with pedometers, employees can earn as much as $400 annually if they take enough steps.

While most such programs take from three to five years to show a return on investment, those returns can be significant when they materialize. Research shows that the programs that work best encourage their workers to eat healthier, exercise, or quit smoking with financial incentives According to the Comptroller's office, each dollar an employer spends promoting employee health equals an annual average savings on health care spending of $348 per worker. For example, San Antonio-based USAA's employee wellness program saved over $105 million in health care spending during a three year period.

Experts interviewed for the Comptroller's report agreed that decreasing the prevalence of obesity, and thus slowing the rise in health care costs, will require a coordinated effort by the public sector, private enterprise, and local communities. They must make a joint commitment to educate and to communicate the benefits of wellness activities and healthier behaviors.

Ultimately, only the individual employee can be held accountable for the lifestyle choices they make. However, employers are in a great position to promote wellness and provide their employees with knowledge, incentives and opportunities to make healthy choices in life. A healthy workforce is critical to our state's economy and its ability to compete globally. Ultimately, we must become a society focused on preventing obesity rather than treating the diseases it causes.

To view the Comptroller's special report online, "***Counting Costs and Calories***," visit http://www.window.state.tx.us/specialrpt/obesitycost/. To obtain hard copies of the publication, write:

Texas Comptroller of Public Accounts
Research and Analysis Division
P.O. Box 13528
Austin, Texas 78711-3528

2008 World's Best Technologies Showcase

Early submissions are currently being sought for the sixth annual World's Best Technologies Showcase (WBT) which will be held March 26-27, 2008 in the Dallas/Fort Worth Metroplex. Hosted by Governor Rick Perry, the WBT showcase is a hands-on event representing the largest collection of pre-screened and pre-prepped, first-to-market technologies emanating from top universities, federal labs, agencies, and research institutions. Presenting technologies as well as seed stage private companies are selected by, and presented to, the world's leading seed investors, venture capitalists and corporate licensing professionals. Over 100 investors and licensees attend each year's Showcase.

Previous participants have raised over $400 million in next round financing, been featured in magazines such as *Fortune* and *Time*, and succeeded in selling or licensing their platform technologies.

For more details, please visit www.wbtshowcase.com.

Asiatech III Coming to Texas

Asiatech III, sponsored by the Texas Asian Chamber of Commerce, is a conference designed specifically to provide new business and networking opportunities between information technology businesses and organizations from Asia and North America. It is scheduled for June 24 through 26, 2008 in Austin, Texas, and is a follow-up event to the World Congress of Information Technology 2006, Asiatech I (held in Texas in 2001) and Asiatech II (held in Tianjin, China in 2002).

The goal of the conference is to help attract investment in Texas industry, as well as facilitating the export of Texas products and services. For additional information or to pre-register, you may visit the organization's website, www.asiatech3.com. You can access the site free of charge, and fill out a 10-question survey regarding your businesses characteristics, as well as any plans and objectives you may have to develop or expand your international business opportunities. Based on an evaluation of the results, you can decide whether or not the event is right for your company.

This will be a great opportunity for Texas businesses to tap into the phenomenal economic expansion in Asia. And, while this is an excellent opportunity for large multinational North American and Asian companies to connect, it's especially great for small to medium size (up to 500 employees) information technology companies that may lack the resources to go international on their own. For additional information, visit www.smeplace.com.

David K.G. Chan
Chairman/CEO,
Texas Asian Chamber of Commerce

Legal Briefs – Summer 2007

Home "Companioship" Workers Exempt from Federal Minimum Wage and Overtime Laws

On June 11, 2007, the United States Supreme Court ruled that home care workers who provide "companionship" and custodial services to the disabled and elderly are not covered by federal overtime pay and minimum wage laws. Nationwide, this unanimous decision impacts an estimated one million workers who assist disabled and elderly individuals in their homes. These home care workers generally help the disabled and elderly with such daily activities as bathing, dressing, cleaning and cooking. Sometimes, these services are provided on a 24-hour, live-in basis.

In an opinion written by Justice Stephen Breyer, the high court upheld a U.S. Department of Labor (DOL) regulation exempting home care workers employed by third-party agencies from the overtime and minimum wage requirements of the federal Fair Labor Standards Act (FLSA). The Court ruled that the DOL did not exceed its authority by issuing the regulation, which fills in the gaps in the FLSA left by Congress.

The Facts

Evelyn Coke, a 73-year-old retired home care worker, sued her former employer, Long Island Care at Home, Ltd., and its owner, for unpaid overtime and minimum wages that she alleged were owed to her under the FLSA.

In 1974, Congress amended the FLSA to exempt domestic service workers who provide "companionship services for individuals...unable to care for themselves" from its maximum hours and minimum wage protections. (The DOL's regulations define "domestic services" as those performed "by a worker in the private home of the person by whom he or she is employed.") However, Congress left unanswered the question of whether the exemption applies only to workers employed by the individual who themselves receive the care in their household, or whether it applies equally to those employed by third parties such as private agencies engaged in the business of providing home healthcare services.

In 1975, the DOL seemingly addressed this matter when it issued a regulation which specifically applied the exemption to companionship workers "employed by an agency other than the family or household using their services." In this case, Long Island Care cited this 1975 regulation in its motion to dismiss.

What the Lower Courts Had to Say

The U.S. District Court for the Eastern District of New York dismissed Ms. Coke's lawsuit, holding that the DOL's regulation exempting home care workers employed by agencies from the FLSA's protections controlled. Later, the U.S. Court of Appeals for the 2nd Circuit reversed the lower court, ruling that the regulation was unenforceable.

Long Island Care then successfully petitioned the U.S. Supreme Court to review the

case, arguing that the DOL had the authority to extend the exemption for companionship services to those workers employed by home care agencies. The company went on to argue that the DOL followed all the proper procedures in promulgating the rule.

Ms. Coke countered that the DOL exceeded its statutory authority by issuing the 1975 regulation, and that the regulation was a mere interpretation of the FLSA which did not warrant court deference. She further argued that it conflicted with the regulation defining "domestic service" workers as those paid by the client directly.

What the U.S. Supreme Court Decided

The Supreme Court disagreed, and found the DOL regulation to be binding and enforceable because the DOL acted reasonably and within the authority granted by Congress. According to Justice Breyer, "The statutory language refers broadly to 'domestic service employment' and to 'companionship services'... It expressly instructs the agency to work out the details of those broad definitions. Whether to include workers paid by third parties within the scope of the definitions is one of those details."

While the Supreme Court found that the literal language of the two DOL regulations conflicts as to whether workers paid by third parties are included in the statutory exemption, the court chose to apply the 1975 regulation, which provides the more specific exemption of agency workers from the FLSA. Justice Breyer went on to write that to resolve such regulatory conflicts, the specific is controlling over the general. The Supreme Court further held that despite being labeled an "interpretation" by the DOL, the 1975 rule is legally binding: the high court said it must fully defer to the regulation because the DOL used the full notice and comment procedures of the Administrative Procedure Act to promulgate the rule, focused on the issue at hand, and acted within its statutory authority.

What About the Texas Minimum Wage Act?

After discussions with the Texas Workforce Commission's (TWC's) Office of the General Counsel, the Regulatory Enforcement Division and the Labor Law Section, it appears that these domestic employees are not covered by the Texas Minimum Wage Act, Chapter 62 of the Texas Labor Code, either.

Texas Payday Rule 821.6 requires the TWC to consider any applicable minimum wage and overtime requirement in determining if wages are due and unpaid. More specifically, it requires the agency to look at the Federal Fair Labor Standards Act for federal minimum wage and overtime requirements, and to look at the Texas Minimum Wage Act for state minimum wage (which is indexed to the federal minimum wage).

Based on this court case, it appears that this "domestic" classification of employees is not covered by the FLSA, so TWC would be required to look at the Texas Minimum Wage Act. In reading the Texas Minimum Wage Act, it, too, provides for an exemption for Domestic Employment (62.154). Based on the facts of this case, it appears that TWC would not be able to order wages due because of a lack of jurisdiction since these employees appear not to be covered by the Texas Minimum Wage Act; there is no existing case law that would lead to any other conclusion.

The Bottom Line

Obviously, this case has been followed closely by the home healthcare industry nationwide, especially since the vast majority of homecare "companionship" workers in the U.S. are employed by third parties – companies that engage in the business of providing homecare services. Paying both minimum wage and overtime to such employees could have cost this industry billions of dollars. The case also highlights the high stakes that come into play when federal and state wage and hour laws are interpreted.

Legislative Update

Well folks, it's that time again: as soon as you get used to the laws of the land, we see legislative changes at both the state and federal level, many of which impose new requirements on employers. A number of agencies have also amended their regulations. This article will guide you through some of the most important changes that directly affect the way you do business.

TEXAS:

1. NEW HIRE REPORTING: Affecting all employers is an amendment to the new hire reporting law. You may not know that businesses are required to report their new hires to the Attorney General of Texas. This law was established to assist in the collection of child support payments from workers. Effective September 1, 2007 (Senate Bill 228) there is a penalty associated with a failure to report new or newly rehired employees, so please familiarize your appropriate personnel with this amended law. The civil penalties are $25.00 for each occurrence, or $500.00 for each occurrence in which the conduct is the result of a conspiracy between the employer and an employee not to supply a required report or to submit a false or incomplete report. The attorney general may sue to collect the civil penalty.

Compliance with this statute helps employers in general because the new hire reporting database also helps identify Unemployment Insurance (UI) fraud caused by a claimant working, but not reporting their earnings. Therefore, this report positively impacts the UI Trust Fund and helps to keeps your state unemployment taxes as low as possible. To file this report online, see the Texas Attorney General's website: www.oag.state.tx.us and look in the "site index" for "new hire program."

2. Texas Workforce Commission (TWC): 2007 bills positively impacting employers include: SB 679, which allow the TWC complete flexibility in dealing with UI trust fund surpluses. SB 1619 and HB 2120, which provide that UI confidentiality can be upheld to a maximum extent by TWC rule and HB 1, which increases the Skills Development Fund allocations. Those bills presenting challenges for employers include: HB 550, which provides UI benefits for victims of family violence and spouses of the terminally ill, and HB 2120, which grants UI benefit wage credits for wage claim awards. These two bills are effective immediately.

3. MILITARY RELATED LAW: SB 311, effective immediately, provides that a private employer may not terminate a permanent employee who is engaged in training or duty as a member of state military forces such as the National Guard. The employee must be returned to work at the same level of benefit that she would have attained had they not been absent.

4. PREVAILING WAGE: HB 2625 allows a public entity to use its own survey information or a DOL determination to establish the prevailing wage rate, even if the data is more than three years old. This law is effective September 1, 2007

5. THE RESTROOM ACCESS ACT: A new Texas law entitled the "Restroom Access Act" (House Bill 416) provides customers with certain medical conditions access to the employee restroom if a business does not have an immediately accessible public facility. Eligible medical conditions include Crohn's disease, ulcerative colitis, irritable bowel syndrome, or a condition that requires immediate access to a toilet facility. Retail stores with fewer than three employees on duty are exempt and the customer can be asked for medical verification of their condition. An employee refusing a legitimate request by someone with medical proof of a qualifying medical condition can be fined up to $100. This law takes effect on September 1, 2007.

6. DRIVER LIABILITY FOR EMPLOYERS: Of interest to employers who have commercial

drivers is SB 332/HB 1765, effective September 1, 2007. This law holds employers liable for allowing employees to drive a commercial vehicle if the employee is not authorized to do so or if the employer is subject to an out-of-service order. A violation is a Class B misdemeanor.

7. IN-HOUSE CHILDCARE: This law focuses on small businesses with fewer than 50 employees. Effective September 1, 2007, House Bill 1385 simplifies the day-care permitting process for small businesses that wish to provide on-site care for children of employees. The new law applies only to companies with fewer than 50 employees and allows care for up to 12 children. While small businesses will face a simplified application process, the new rules require background checks for day-care employees and will address health and safety issues.

FEDERAL:

1. FEDERAL MINIMUM WAGE INCREASE: On May 25, President Bush signed the "Iraq war" funding bill that, among other things, amended the Fair Labor Standards Act (FLSA) to increase the federal minimum wage. Effective July 24, 2007, the minimum wage increased to $5.85 per hour. Please see "Business Briefs" on page 6 for further details on this new law.

2. FMLA: In response to the 2002 court case, *Ragsdale v. Wolverine*, the DOL is moving to formally allow employers to retroactively designate job-protected family and medical leave as FMLA leave. Regardless of what DOL does, it is always best to operate according to a clear written policy and be proactive about properly designating leave as FMLA leave.

3. OSHA: Reversing a 30-year interpretation, the Occupational Safety and Health Review Commission ruled that general contractors are no longer liable for workplace safety violations of their subcontractors. Each employer is responsible for its own actions. Case: *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC No. 03-1622 (Apr. 27, 2007).

4. Equal Employment Opportunity Commission (EEOC): The EEOC is considering how to apply current laws to address the issue of "family responsibility discrimination", aka "caregiver discrimination." Background: caregivers are most often females, so the EEOC sees it as a potential gender discrimination issue. The agency guidance was issued on May 23, 2007 and the most likely outcome is a push for expansion of family rights legislation. (Visit www.eeoc.gov for additional information).

5. CHILD LABOR: Regulation changes for 14 and 15 year olds include: no operation of power-driven machinery, other than office machines. No riding on the outside of motor vehicles. No loading/unloading of materials, other than personal hand tools and equipment. No working in meat coolers and freezers. No door-to-door or street sales. No poultry catching or cooping. Lifeguard duties may start at 15 and work of a mental or artistically creative nature is permitted.

Changes for 16 and 17 year olds include: an expansion of the logging and sawmill operation prohibition to cover forest fire fighting and logging camp construction. There was also the tightening of regulations on operation of various types of dangerous machinery, including no operation of compactors designed for materials other than paper.

6. US SUPREME COURT: Pay discrimination case: *Ledbetter v Goodyear Tire & Rubber Co, Inc.*, May 29, 2007. Past pay discrimination is not addressable under Title VII unless it occurred within 180 or 300-day jurisdictional time limits. Some in Congress are threatening to address that issue with legislation.

7. PENDING BILLS: Genetic Information Nondiscrimination Act: H.R. 493 would prohibit the use of genetic information in employment decisions; Texas law already does this. An American with Disabilities Act (ADA) issue is almost unavoidable, even without the proposed law. Therefore, employers should consider genetic information to be as desirable

as toxic waste. Also, H.R. 2637 would increase the penalty for child labor law violations from $11,000 per violation to $50,000 for a death or serious injury. The penalty can double for a willful or repeated violation.

Tipped Employees and Overtime Pay

With the Federal and Texas minimum wage going up to $5.85 on July 24, 2007, we have received many questions about minimum wage for tipped employees. A tipped employee is someone who earns at least $30 per month in tips, and the minimum wage for these employees remains at $2.13 under Section 203(m) of the Fair Labor Standards Act. However, these employees must still earn $5.85 per hour with their tips. The difference between these two rates of pay is $3.72 and is called the "tip credit". Employers are entitled to take this credit, meaning they don't have to pay this amount to the tipped employees as the amount is paid by customers. Should these employees not earn $5.85 per hour with their tips, the employer is required to make up the difference. The Texas Payday Law governs wage payments made "in kind or in another form" and tips would be considered "another form". As such, the tip credit should be authorized in writing by the employee.

An area of confusion is how to pay overtime for tipped employees. In order to avoid audits and/ or fines, tipped employees must be paid $5.06 per hour for any hours worked over forty in a seven day workweek (a regularly recurring period of seven consecutive 24-hour periods typically Monday through Sunday). This overtime rate of $5.06 is calculated by multiplying the minimum wage of $5.85 by 1.5 which equals $8.78. From this amount, the tip credit of $3.72 is subtracted leaving $5.06. The amount of the tip credit does not change for hours worked over forty in a workweek.

If a tipped employee works forty-five hours in a workweek, the employer would pay $2.13 per hour for the first forty hours ($85.20) and $5.06 per hour for the five overtime hours ($25.30) for a total gross wage of $110.50.

The same employee working fifty hours in a workweek would earn $135.80 in gross wages. $85.20 for the first forty hours and $50.60 for ten hours overtime.

As you can see, simply paying time and one half based on the $2.13 paid per hour is not the correct way to figure overtime for tipped employees. The minimum wage of $5.85 must be considered.

The minimum wage increases on July 24, 2008, to $6.55 so the overtime rate for tipped employees will be $5.41. Beginning July 24, 2009, when the minimum wage increases to $7.25, the overtime rate for tipped employees will be $5.76.

Proposed New Rules on Employers of Immigrants: On Hold, But Worth Watching

In an effort to crack down on illegal immigration, the Department of Homeland Security (DHS) recently announced tough new rules that would require businesses to fire workers who use false Social Security numbers. Failure to do so could result in fines of up to $10,000 per incident. Federal officials also said the rules would be enforced with stepped-up nationwide raids on workplaces that employ illegal immigrants.

However, on August 31, 2007, a federal judge in San Francisco temporarily barred the DHS from carrying out the new rules which were announced in August and scheduled to become effective on September 14, 2007. Judge Maxine M. Chesney of the federal court for the Northern District of California also ordered the Social Security Administration to suspend mailing 140,000 letters to employers informing them that some of their employees' Social Security information did not match that agency's records.

These so called "no-match" letters were going to be accompanied by a two page notice from the DHS informing employers of the new rules, which would give them 90 days to fire any worker who could not show valid Social Security identification or risk civil and even criminal charges for knowingly hiring individuals who are not legally authorized to work in the United States. Saying that the court needed "breathing room" before making any decision on the legality of the new penalties designed to crack down on employers that hire illegal immigrants, Judge Chesney set a hearing on the matter for October 1.

The ruling came in response to a lawsuit filed in late August by the A.F.L.-C.I.O, the American Civil Liberties Union, and several California labor organizations. In their lawsuit, the plaintiffs assert that the proposed rules not only threaten to violate workers' rights who are legally authorized to work in the United States, they are also an unfair burden on the nation's employers. The suit also alleges that the rules could lead to discrimination against Hispanic workers.

Judge Chesney noted that the lawsuit raised "serious questions" regarding whether both the DHS and the Social Security Administration had exceeded their authority, and that postponing the implementation of the rules would be less harmful than allowing them to become effective before the court had an opportunity to review them.

The proposed rules have been criticized by both business and labor groups. In late August, the Essential Worker Immigration Coalition, which represents major restaurant, meatpacking, hotel and landscaping companies, asked DHS Secretary Michael Chertoff to delay implementation of the rules for six months. In its letter requesting the delay, the group included 81 questions about various aspects of the rules that it asserted were unclear or confusing.

This issue is obviously far from resolved, and certainly bears watching. The impact on employers and workers alike could be enormous.

Watch How Those Screening Tests Are Used:

Louisiana Federal Contractor to Pay $749,076 for Alleged Racial Hiring Discrimination

The federal Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently announced that Georgia-Pacific Consumer Operations LLC will pay 399 African American job applicants $749,076 to settle allegations that the company engaged in hiring discrimination based on race at its Port Hudson facility in Zachary, Louisiana. OFCCP investigators found that the company administered pre-employment literacy tests as part of the selection process for utility worker jobs that "adversely impacted black applicants."

Under the terms of the conciliation agreement, Georgia-Pacific will pay the affected black applicants back pay and interest, hire 24 utility workers from the class members who were discriminated against, immediately correct any discriminatory practices, and engage in extensive self-monitoring for a period of two years to ensure that all company hiring practices fully comply with the law.

According to Fred Azua, Jr., director for the OFCCP's Southwest and Rocky Mountain Region, "(federal) contractors who utilize any testing procedure in their employment selection process, including written and skill tests, must ensure that a test is valid for the particular job if it disproportionately screens out applicants from a protected group." In other words, an employer using a literacy test as a screening tool for a position would need to be able to show that a particular level of literacy is necessary for that particular position.

"This settlement... should put all federal contractors on notice that the Labor Department is serious about eliminating systemic discrimination," according to OFCCP Director, Deputy Assistant Secretary of Labor Charles E. James, Sr.

The OFCCP enforces Executive Order 112426 and other laws that require federal contractors and sub-contractors to implement affirmative action programs and to guarantee equal employment opportunity in the workplace without regard to age, race, sex, religion, disability or veteran status. Georgia-Pacific provides tissue products for resale to the Defense Commissary Agency. As a federal contractor, the company is subject to the affirmative action and equal employment opportunity laws that the OFCCP enforces. According to the agency, Georgia-Pacific was cooperative during the compliance review and subsequent conciliation, and no longer uses the tests.

The OFCCP selection procedure validation regulations are found at 41 C.F.R. Part 60-3, which are available online at www.dol.gov/dol/allcfr/TYitle_41/Part_60-3/toc.htm.

The bottom line for all federal contractors and sub-contractors: make sure that any pre-employment assessment tools or tests are directly related to the knowledge, skills and ability an employee will need to do a particular job. Otherwise, a company runs the risk of being found to engage in discriminatory hiring practices.

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