

Texas Business Today

Ron Lehman
Commissioner Representing Employers
Texas Workforce Commission

“Contract Labor” and the Law

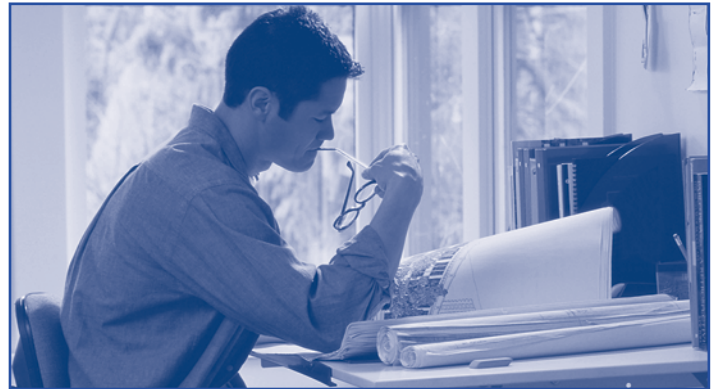
Judging by the number of calls the Employer Commissioner’s office receives on its employer hotline, “Contract Labor” is one of the most widely misunderstood concepts in employment law and the business world. The issue is really whether a given worker is an employee or an independent contractor. In basic terms, an employee is someone over whose work an employer exercises direction or control and for whom there is extensive wage reporting and tax responsibility. On the other hand, an independent contractor is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer’s direction and control. The distinction depends upon much more than what the parties call themselves.

A simple rule of thumb: if you hold the right to direct or control the day to day work performed, you are the employer. No contract or theoretical description on paper supercedes the actual, day to day working relationship between the parties.

The Texas Unemployment Compensation Act does not directly define “independent contractor.” Instead, it sets forth a broadly inclusive test, known as the “direction or control” or “common law” test, for who is an employee. “Employment” means a service performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the Commission that the individual’s performance of the service has been and will continue to be free from control or direction under the contract and in fact. By implication, an “independent contractor” would be a person whose services do not meet the above test.

It is important to note that it does not matter that one or both parties may call their arrangement “contract labor”. The above definition makes clear that the important consideration is the underlying nature of the work relationship. The law creates a presumption of employment and places the burden for proving otherwise on the employer. It sets forth the primary factor in an independent contractor relationship, namely, the absence of direction and control over the work.

A simple agreement to be called an “independent contractor” in no way frees an employer from the technical and financial responsibilities associated with employment status unless the day to day working relationship likewise meets the definition of an independent contractor.



As a further distinction, the less able employers are to offer their primary services without the help of the workers whose status is at issue, the more likely it is that those workers will be considered to be employees. If certain services are so essential to a business that it will succeed or fail based upon how well those services are performed, the business will naturally want to exercise enough direction and control over the services to ensure the quality of the work. That amount of control creates an employee relationship with those workers.

Independent Contractor Tests

In *United States v. Silk*, 331 U.S. 704 (1947), the United States Supreme Court established a widely-accepted five-part test, known as the “economic reality” test, that helps establish whether a person is an employee or an independent contractor. That case, which dealt with whether an employer owed Social Security taxes on certain workers, found the following factors to be important:

1. the degree of control exercised by the alleged employer;
2. the extent of the relative investments of the [alleged] employee and employer;
3. the degree to which the “employee’s” opportunity for profit and loss is determined by the “employer”;
4. the skill and initiative required in performing the job; and
5. the permanency of the relationship.

(quoted from *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987))

“Contract Labor” and the Law ... cont.

Brock, one of the leading cases from the Fifth Circuit explaining independent contractor/employee issues, goes on to state that the “focus is whether the employees as a matter of economic reality are dependent upon the business to which they render service”. The same case further notes that “it is *dependence* that indicates employee status...the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected” that they are employees.

This emphasis on dependence and economic reality demands nothing more than a common sense approach. An individual who has nothing to invest in an enterprise beyond the time he puts in and who sells his services to only one “customer” – the employer – is economically dependent upon that work. An independent contractor, on the other hand, is not dependent upon only one customer. Rather, because they are in business for themselves and have an investment in their own equipment and supplies, they have an entire customer base upon which to fall back.

A third way of approaching this problem is called the “ABC” test, which is used by almost two thirds of the states (not including Texas) in determining whether workers are employees or independent contractors for state unemployment tax purposes. In order to be considered an independent contractor, a worker must meet three separate criteria (some states require only that two criteria be met):

- A. The worker is free from control or direction in the performance of the work.
- B. The work is done outside the usual course of the company’s business and is done off the premises of the business.
- C. The worker is customarily engaged in an independent trade, occupation profession or business.

Finally, the Internal Revenue Service uses a so-called “Eleven Factor” test for determining the coverage of various federal employment tax laws. The eleven factors are all based upon the common law, economic reality and ABC tests and represent their various criteria broken down into more detail.

What will the Tax Department of the Texas Workforce Commission Be Looking For if You’re Audited?

The Texas Workforce Commission (TWC) is charged with auditing businesses to ensure that employee wages are being reported and that proper taxes are being paid on those wages. Employees are paid for their time and are not expected to provide their own workplace, materials, tools or supplies, or to otherwise invest their

own money in the business. An employee who makes a costly mistake or commits work-related misconduct can be fired, but cannot legally be forced to work without pay. On the other hand, independent contractors have expenses of their own, and are expected to provide or purchase everything needed to do the job. If they fail to satisfy the customer, they can be required to redo the work for no additional compensation, lest they risk non-payment by the customer under the contractual arrangement.

Clearly, workers who are told to work certain hours do not have control over their own schedules, which is an essential component of the profit or loss issue. If independent contractors want to take time off, that should be up to them to decide. If they can do so and still meet their contractual obligations, then it should not matter to the recipient of those services. That is not to say that a contract cannot specify that contractors will be available within certain guidelines for purposes of consultation or progress checks. However, the more control the employer exercises over the hours of the worker, the greater the likelihood that the relationship will be considered employment.

The right to hire or fire a worker is generally considered the privilege of an employer over an employee. Independent contractors will usually have some kind of contractual recourse if fired before completion of the work, and the contract will generally specify conditions that must be met if the contract is to be cancelled.

The only way an individual is covered by unemployment insurance – meaning they would be eligible to draw unemployment benefits should they be out of work through no fault of their own - is for the employer to be in compliance with the Texas Unemployment Compensation Act. Individuals whose wages are exempted by law or who do not qualify for employee status are not covered by the insurance program in the event that they lose their jobs. Therefore, the determination of whether an individual is an employee or an independent contractor is an integral part of the TWC’s enforcement responsibility.

Heads Up, Texas Employers

A word to the wise: should the agency determine that individuals who have been classified as independent contractors are really your employees, then back taxes, penalties and interest are assessed. Eventually, the Internal Revenue Service is notified of TWC’s findings via a federal report matching program, and they in turn will investigate those same employers for compliance with federal laws. Employers must understand that TWC has the legal obligation to collect taxes on the wages of all individuals who qualify as employees under the Texas Unemployment Compensation Act. Take the time now, before there’s a Tax auditor standing on your doorstep, to make sure that you have properly classified your workers as employees or independent contractors.

“Contract Labor” and the Law ... cont.

What About Other Employers That Don't Comply With the Law?

Employers frequently complain that while they are in compliance with the law, their competitors are not. The TWC will investigate charges of non-compliance, but must have the names of specific businesses in order to do so. A blanket charge that an entire industry is out of compliance is not sufficient to begin an investigation. The TWC can protect the identity of anyone who reports a possible violation of the Texas Unemployment Compensation Act from disclosure.

In Summary

There are many factors the TWC will consider when determining whether your workers are employees or independent contractors. No single factor will determine the entire case, and not every case will involve every factor. Each case is decided on an individual basis after weighing all of the factors present.

The bottom line in any case: whether the facts show that the workers in question are in effect independent business entities in a position to make a profit or loss based upon how they manage their own enterprises. Employers in doubt over any of their workers are encouraged to contact their local TWC Tax office for further information. Additional information is also available on the TWC agency website at www.texasworkforce.org.

From the Dais - Fall 2004

Dear Texas Employer,

As all of you know, Governor Rick Perry has a vision to bring Texas to the forefront of economic development in the United States. We at the Texas Workforce Commission (TWC) and the 28 local workforce development boards and their training and support partners are proud to be a part of this vision to support employers as they create jobs and bring prosperity to this great state.

The Texas workforce system has already played an important role in helping to support this growth and economic prosperity. Texas is a national leader in providing real workforce solutions to employer needs, and we've won \$77 million dollars in performance bonuses from the Federal Government, which we reinvest in workforce training and support.

Last year, the workforce network of more than 280 workforce career centers across Texas:

- Listed over 450,000 job openings for Texas employers and helped over half a million workers find jobs.
- Helped employers qualify for over \$118 million dollars' worth of tax credits.
- Supplied tens of millions of dollars for customized training for employer needs.

One program, the Skills Development Fund has been so effective that, to date, it has provided customized training for over 130,000 workers at more than 2,400 companies. We are seeking increased funding for this program from the next legislative session.

In June 2003, in our role to help employers find qualified workers more quickly, save unemployment insurance tax dollars, and help get Texans back to work more quickly, the Commission adopted new performance measures. I call them “Measures that Matter to

Employers.” I applaud the Local Workforce Development Boards and their partners for the progress they've made as they stepped up to the challenge of these measures.

Their efforts to date have resulted in many thousands of jobs filled more quickly, potential increased wages of more than \$150 million earned by workers, and savings to the UI Trust Fund (and to employers) of several million dollars.

Based on this success and on input from many employers and business organizations such as the Texas Association of Business and the National Federation of Independent Business, the Commission recently increased these targets further. I appreciate the support of fellow commissioners, and especially the support of business leaders on local workforce boards. These measures will further enhance Texas' workforce system as pro-employer, pro-worker, and pro-economy. I've had numerous inquiries from business leaders in other states about adopting these measures in their states, and Federal Labor Department officials are considering implementing similar measures nationwide.

I remain committed to helping employers find the most qualified workers, and to the continued improvement of the workforce system to speed the re-employment of unemployed Texans back to work, and I believe that we are taking concrete steps in the right direction.

TWC's Program Integrity Policies Save Millions of Dollars

In previous issues, I highlighted some of our aggressive efforts to help keep Unemployment Insurance (UI) taxes on employers as low as possible and to ensure that only qualified applicants receive UI benefits. TWC continues to further strengthen its policies and procedures, and to invest in new technologies for increased ac-

From the Dais ... cont.

curacy. These new policies and procedures have already achieved measurable results by preventing an estimated \$83 million in overpayments during the past year.

Preventing overpayments is a challenging process--and there's more work to be done. To that end, TWC continuously strives to increase understanding of the unemployment insurance process and eligibility requirements. We've instituted increased work search requirements for claimants, and we've increased the number of UI claims that will be verified for compliance with these work search requirements. Currently, at least 1,000 work search verifications are conducted each week, and plans are in place to increase that number significantly in 2005. Increasing the work search requirements increases the likelihood that employers will become aware of more qualified applicants more quickly, and that claimants will be more likely to be considered for jobs more quickly. Further, if the UI program is being abused, early verification helps with discovery, prevention, or recovery of overpayments.

UI benefits distributed to ineligible claimants are the sole cause for overpayments. In some cases, overpayments result from error or fraud. The fraud detection unit investigates questionable claims, represents TWC in appeals hearings and prepares materials for use in prosecutions at the local level. Workforce boards have increased their follow-up activities after referring claimants to job openings, thus identifying claimants who should no longer be receiving benefits.

Employers---Report Your New Hires-It's in the best interest of your business.

The New Hire Crossmatch is another initiative used to detect fraud. TWC compares the names of the new hires that Texas employers report to the Office of the Attorney General with the current UI claimants or former claimants with outstanding overpayment balances. New Hire Crossmatch helped the agency avoid or recover nearly \$9 million in benefit overpayments in 2003. TWC also cross matches its database of UI claimants with Texas county jail populations to determine if any claimants are unavailable to seek work due to their incarceration.

While it is a law that employers report their new hires to the OAG, not all employers do. For each 1% increase in the number of employers reporting new hires, the savings in UI taxes amounts to several million dollars per year.

Employers---Respond to UI Claims

In some cases, when employers do not respond during the initial determination process, overpayments can result. Claimants begin receiving benefits after an initial determination; however, additional information discovered in an appeal may determine that the claimant does not meet the criteria to receive benefits.

I strongly encourage you to vigorously protest all claims as early in the process as possible. Both claims examiners and hearing officers rely heavily on the statements of witnesses, and a witness statement is always stronger and more credible the closer in time it is made to the relevant incidents. Memories fade, witnesses may leave the company, and appeal hearings are often held six to 10 weeks after the unemployment claim is filed. Making your witnesses available to claims examiners during the initial investigation helps you by creating a record of the events while memories are fresh. You also increase your chances of winning a disputed claim by providing as much information as possible to the TWC claims examiner as soon as possible during the claims process.

All employers benefit from controlling overpayments by having appropriate disqualifications imposed as early as possible in the claims process. Although it is true that overpayments cannot be charged directly to any one of your individual state unemployment tax accounts, all of the state's employers ultimately bear the cost of all unrecoverable overpayments.

In short, participating fully in the claims investigation, responding to every unemployment claim notice, reporting your New Hires to the Office of the Attorney General, and answering TWC calls to verify claimant work searches are some of the best ways to lower these costs for all employers. By working together, I am confident that we will continue to build an employer-driven workforce system here in Texas that is second to none.

Sincerely,

Ron Lehman
Commissioner Representing Employers

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LET'S GO BACK TO THE BASICS OF UI CLAIMS AND APPEALS

Every once in a while, it pays to review the most important basics of how to deal with unemployment claims that might be filed by your ex-employees. Even before a claim is filed, certain things are important to do. Following is an outline of essential things to keep in mind, both before and after a claim is filed.

Before a claim arises:

- Treat all employees as consistently as possible according to known rules and standards.
- If an employee wants to go to part-time status, or transfer to a different job, do not simply put the change into effect. Have the employee apply for part-time status or a different job on a form designed for purposes of recording job changes. You want it to be clear that the employee initiated the change and understood what he or she was applying for.
- 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.
- 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.
- 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:

- Respond on time to any claim notice, ruling, or appeal decision.
- Be as *specific* as possible.
- Be truthful and *consistent* in your responses, appeals, and testimony.
- Avoid name-calling or gratuitous derogatory comments toward the claimant. Claim examiners and hearing officers hear that and think "oh, it was just a personality dispute – no misconduct!"
- In discharge cases, avoid certain terminology such as "inability", "incompetence", "disloyal", "accumulation of things", "bad attitude", and "mutual agreement".
- In discharge cases, try to show four main things:
 - a specific incident of misconduct close in time to the discharge;
 - that the claimant either knew or should have known that discharge could occur for the reason given;
 - that the employer followed whatever policies it has and whatever warnings were given; and

- that the claimant was not singled out for discharge, but rather was treated the same as anyone else would have been under those circumstances.
- In voluntary leaving cases, avoid references to how bad the ex-employee might have been, and concentrate on the fact that the claimant left while continued work was still available.
- In voluntary leaving cases, avoid comments on how glad the company is that the claimant resigned. Instead, focus on how a reasonable employee otherwise interested in remaining employed would not have left for the reason given.
- In all cases, have all your evidence and firsthand witnesses ready for the hearing. Unless the claimant unexpectedly does your job for you by admitting misconduct at the hearing, you *will lose* if you do not offer firsthand witnesses.
- Make your testimony brief, factual, and concise. Hearing officers like that!

REAUTHORIZATION OF WORK OPPORTUNITY TAX CREDIT

The Work Opportunity Tax Credit (WOTC) is a federal tax credit used to reduce the federal tax liability of private-for-profit employers that hire from eight different targeted groups that have historically had the most difficulty securing employment. Those groups are: qualified recipients of temporary aid to needy families, veterans, ex-felons, high risk youth, summer youth, food stamp recipients, social security income recipients and referrals from vocational rehabilitation.

President Bush recently signed the "Working Families Tax Relief Act of 2004" (HR 1308). Along with various tax breaks, this legislation also contains a two-year extension of the Work Opportunity Tax Credit (WOTC) retroactive to January 1, 2004, and effective until December 31, 2005. There were no changes to the criteria of the targeted groups.

To qualify for the WOTC tax credit, new hires must begin work before January 1, 2006. The maximum credit available is \$2,400 per eligible worker for the adult target groups. For Summer Youth, qualified wages remain capped at \$3,000 for a maximum credit for \$750 for those individuals employed between 120 hours and 400 hours, and a maximum credit of \$1,200 if they are employed 400 or more hours. For additional information, visit the Texas Workforce Commission's website at www.texasworkforce.org.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Legal Briefs - Fall 2004

MONITORING EMPLOYEES' USE OF COMPANY COMPUTERS AND THE INTERNET – Part 2

In the Summer 2004 *Texas Business Today* (available online at www.texasworkforce.org), we looked at the issue of controlling and monitoring employees' use of laptops, PDAs, cell phones, and other small personal electronic devices. In Part 2 of this series, we take up the issue of monitoring the use of company computer systems. Business-related use of the Internet has grown by leaps and bounds in the last few years. At the same time, more and more employees must use computers in their work at least part, if not all, of the time. All in all, this increasing use of technology has helped fuel an unprecedented expansion of the state and national economies. However, along with the benefits, there are several risks for employers. This article will examine some of the basic issues and offer some solutions to business owners who are mindful of the risks involved. First, let's look at some of the risks of the electronic revolution.

Electronic Mail

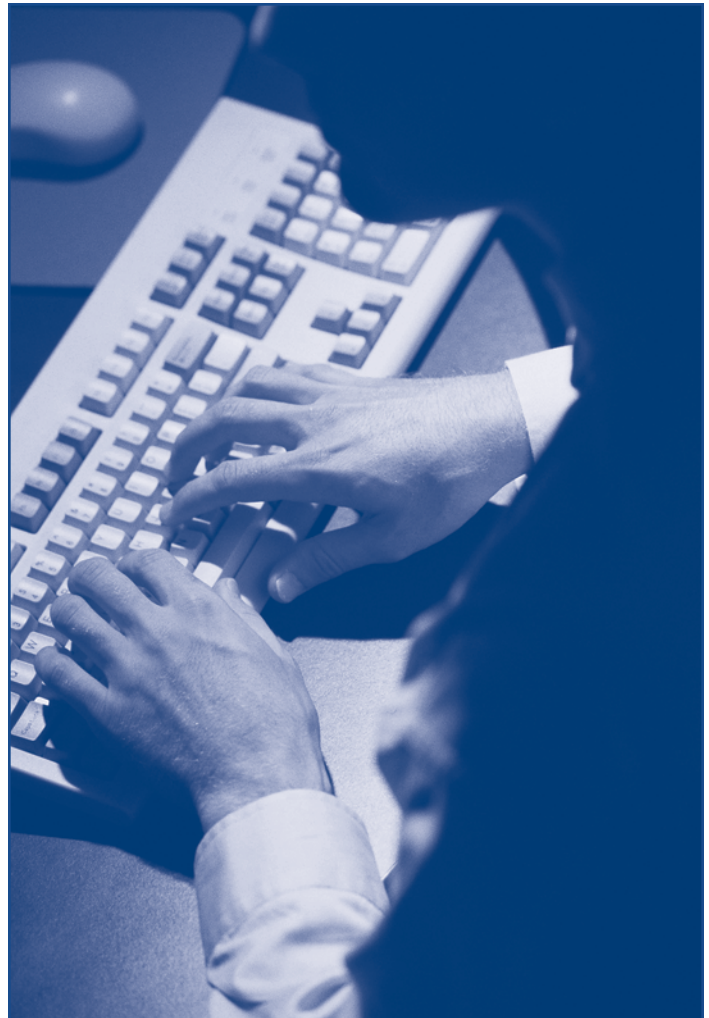
Electronic mail, or e-mail, has become the communication medium of choice for many employees and businesses. No one doubts its time-saving qualities, but employers must consider the dangers as well:

- Employers can be liable for employees' misuse of company e-mail
- Sexual, racial, and other forms of harassment can be done by e-mail
- Threats of violence via e-mail
- Theft or unauthorized disclosure of company information via e-mail
- E-mail spreads viruses very well

Internet

The Internet is like a super-network connecting countless other computer networks around the world. Literally millions of computers are connected to this vast resource. Every imaginable type of information is available on the Internet if one knows where and how to search for it. As with any kind of resource, it has its good and bad sides. Not surprisingly, employers have had some problems with employees' use of the Internet:

- Unauthorized access into for-pay sites
- Sexual harassment charges from display of pornographic or obscene materials found on some sites
- Trademark and copyright infringement problems from improper use or dissemination of materials owned by an outside party
- Too much time wasted surfing the World Wide Web
- Viruses in downloads of software and other materials from Web sites



Company Computers

Even with company computers that are not connected to the Internet, employers are finding problems with employees abusing the privilege of having computers to use at work:

- Software piracy - employees making unauthorized copies of company-provided software
- Unauthorized access into company databases
- Use of unauthorized software from home on company computers
- Sabotage of company files and records
- Excessive time spent on computer games
- Employees using company computers to produce materials for their own personal businesses or private use

Many employers wonder what they can do to protect themselves against these kinds of risks and to ensure that company computers and networks are used for their intended purposes. Fortunately, Texas and federal law are both very flexible for companies in that regard. With the right kind of policy, employers have the right to

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monitor employees' use of e-mail, the Internet, and company computers at work. Doing so successfully requires both a good policy and knowledge of how computers and the Internet work.

Policy Issues

Monitoring employees' use of company computers, e-mail, and the Internet involve the same basic issues as general searches at work, telephone monitoring, and video surveillance. Those issues revolve around letting employees know that as far as work is concerned, they have no expectation of privacy in their use of company premises, facilities, or resources, and they are subject to monitoring at all times. Naturally, reason and common sense supply some understandable limitations, such as no video cameras in employee restrooms, and no forced searches of someone's clothing or body, but beyond that, almost anything is possible in the areas of searches and monitoring. Let's turn to some specifics.

Every employer needs to have a detailed policy regarding use of company computers and resources accessed with computers, such as e-mail, Internet, and the company intranet, if one exists. Each employee must sign the policy – it can be made a condition of continued employment. The policy should cover certain things:

- Define computers, e-mail, Internet, and so on as broadly as possible, with specifics given, but not limited to such specifics
- Define the prohibited actions as broadly as possible, with specifics given, but not limited to such actions
- Remind employees that not only job loss, but also civil liability and criminal prosecution may result from certain actions
- Company needs to reserve the right to monitor all computer usage at all times for compliance with the policy
- Right to inspect an employee's computer, HD, floppy disks, and other media at any time
- Right to withdraw access to computers, Internet, e-mail if needed
- Consider prohibiting camera phones (also called cell phone cameras); such phones have been implicated in gross invasions of other employees' privacy and in theft of company secrets
- Make sure employees know they have no reasonable expectation of privacy in their use of the company's electronic resources, since it is all company property and to be used only for job-related purposes

There are some warning signs for computer abuse:

- the employee spends a lot of time online, more than is reasonably needed for the job, yet is strangely non-productive
- you hear a lot of hurried clicking as you approach, and the employee greets you with a red face

- the Temporary Internet Files folder is filled to capacity
- the employee's computer crashes more than anyone else's – viruses and excessive demands on RAM
- an increase in spam e-mail from employees leaving their addresses all over the Internet ("spam" is unsolicited commercial e-mail).

How to Monitor Compliance

Here is where you as an employer must know at least a few things about computers and the Internet. Naturally, you will leave many of the technical details to certain trusted computer experts on your staff, or in serious cases in which you need to preserve evidence, you can contract with one of any number of private computer forensic services companies out there. However, you should be armed with some technical knowledge so that you can make better use of the experts' time and be able to tell whether your efforts are successful.

Have your information technology department or computer person set up software monitoring capabilities. Some software can only detect which computer was used on a network, not who used it. An alternative would be to set up a "proxy server" – users have to log in with their own user names and passwords. With regard to the Internet, specific sites can be blocked by Web site addresses and keywords. Some software can analyze the hard drive of each computer on a network, thus establishing who might have unauthorized software or files on their computer.

Where to look for unauthorized computer and Internet activity? On PCs, look in C:\Windows\ for the following folders:

- Cookies - contains "cookies" left on the employee's computer during visits to Web sites - cookies are little files that let Web sites know whether someone has visited the site before
- History - this records the name and Web address of every site visited by the employee
- Temporary Internet Files - this folder contains a copy of every Web page, graphic image, button, and script file found in or on each Web page visited by the employee
- Start Menu: "Documents" – this shows what is in the user's "Recent" folder (recently-opened or recently-used files)

On Macintosh computers, look in the folder for the ISP (Internet Service Provider), then in the folder for the Web browser, then in either "Cache f" or the above names, depending upon what browser the employee uses. The "Apple" menu on Macs also has a "Recent" folder that shows what files the employee has worked on most recently.

With the files found in the above folders, it is possible to reconstruct an employee's entire Web surfing session.

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Other places on the computer may yield clues. On PCs, look in the “Recycle Bin” – some people forget to empty that folder when they delete files. Using whatever graphics application you find on the computer, click “File” and look at the recent files in use – you may be surprised at what images the employee has viewed. On Macs, look under “Recent Documents” or double-click the “Trash” icon to see deleted files.

A strong word of caution: if any files are found that seem to be flatly illegal, such as child pornography, *do not make copies* of such images, transmit them in any manner, or move the computer to an-

other location, and *do not shut the computer down*. Instead, leave a witness in place and *immediately* contact law enforcement officials, who have special procedures for dealing with such matters.

In Part 3 of this series, we will look at how courts are handling these issues and at how employers can design policies and disciplinary procedures to deal with problems of computer use and abuse.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Retaining Good Employees: The Key to Your Bottom Line Success

For most businesses, finding employees during the past several years hasn't been that difficult. Hiring and retaining good workers has been less challenging during the recent economic slowdown than it was in the late 1990s, but many experts believe that trouble is brewing. According to the federal Bureau of Labor Statistics (BLS), the U.S. is moving toward a period of severe labor shortages that many employers aren't prepared for. What that means is that finding – and retaining – good workers will be more important to you than ever before.

As the economy continues to improve, labor analysts predict that employers will continue to create jobs. For example, it is estimated that there will be 167,754,000 jobs available by 2010 – all looking for the best talent. In contrast, the pool of available workers isn't growing as rapidly as the job market. It's predicted that there will be 157,721,000 workers in 2010, meaning there will be over 10 million more jobs than workers to fill them. And, when the 77 million members of the Baby Boom generation begin to retire in large numbers over the next decade, the shortage of workers will intensify.

This challenge isn't getting a lot of attention because the news media – like many employers – have been lulled into complacency by the recent stability in the workforce. A surprisingly large group of business leaders believe that the labor shortage seen in the late 1990s is over forever because they haven't had problems hiring qualified workers lately. This attitude may be extremely shortsighted and harmful in the long run.

Remember: Your Employees Have Options

It's also important to remember that your employees have many more options and choices now and in the future than ever before. The Internet is filled with a wide array of “job boards” listing thousands of jobs worldwide. Even today, some types of employees are

so scarce that employers are raiding their competitors for workers. If your employees don't feel challenged, appreciated or adequately rewarded, nothing can force them to stay with your company; they may very well find someone else who does value their skills. And, while a fair salary and financial stability are certainly important, they really don't tell the whole story. It seems that many workers are looking for personal fulfillment – in other words, meaning over money.



Becoming a Retention-Driven Employer

So, what does a “retention-driven” employer look like and how do you hang on to your star employees? According to several studies investigating why employees stay in their jobs, the solution seems to lie in a combination of factors including challenging assignments, opportunities for career growth, development and personal fulfillment, employer flexibility, a family-friendly atmosphere, and the chance to work with good people. While you can't force or threaten an employee into improving their performance, as an employer or supervisor, you can play a huge role in moving them in the direction of success – yours and theirs.

Retaining Good Employees: ... cont.

When you have few, if any, workers leaving unexpectedly – a stable workforce – you are far more likely to have good morale in the company. Employees are comfortable with each other, they know each other, and they work well together. These relationships can be powerful when there's a problem in the manufacturing process or a last minute rush order that has to get out. Workers are far more likely to help each other and pitch in when they know how things are done, where things are and how to fix the myriad little problems that can pop up in any workplace.

If you're still not convinced, think about retaining your employees in very pragmatic, monetary terms. Several years ago, the Coca-Cola Retailing Research Council commissioned a study on employee turnover in the supermarket industry. According to that research, employee turnover costs the average American supermarket an astonishing \$198,977 per store each year. The study's author, Blake Frank, a professor at the Graduate School of Management at the University of Dallas, points out that this translates to a staggering \$5.8 billion annually for the industry.

The study also revealed that managerial and hourly employees have different "retention drivers" and different needs. Store managers' top three desires were a clear sense of organizational direction, high-quality training, and the chance to advance. On the other hand, hourly employees' top three desires were good direction, appropriate and sufficient equipment and supplies, and good immediate supervision. Surprisingly, neither group mentioned monetary compensation as one of their top three desires.

How Much Does Employee Turnover Cost? It's an Issue of Dollars and Cents

On a statewide basis, the Texas civilian labor force consists of more than 10 million workers. There are 400,000 plus employers with over 800,000 hiring locations statewide, and according to the New Hire Reports they file with the Office of the Attorney General, they hire between four and seven million workers each year. Some economists estimate that this so-called employee "churn" comes with a \$93 billion annual price tag.

And, closer to home, while many business owners and executives sense that high employee turnover is expensive, few understand the huge risk to their financial well-being. The fact of the matter is that each time you lose a highly qualified, valued employee, you're losing dollars right off your company's bottom line. It can be very expensive to replace an employee. First, you may have to hire temporary workers or pay overtime to fill the void. Falling behind is expensive, and may even cost you customers, clients or patients. Then, advertising for, recruiting, selecting and hiring a new employee takes both time and money, both of which are often in short supply. When you finally do find someone that you hope will work out, you have to invest in team building and training to push that new worker into a productive position. At the same time, the business keeps moving; there's no "pause" button to push while everyone adjusts.

To estimate the cost of employee turnover for your particular company and salary levels, you may wish to visit www.expresspersonnel.com, click on the "Employers" icon, and then click on the "Turnover Calculator." You can enter your company's variables to get an idea of the cost of turnover. It's an eye opening experience. For example, an employer with an average of five employees that had two employees leave in the past 12 months has a 40% turnover rate. Hypothetically, these employees had an annual salary of \$30,000, with 30% benefits percentage, and an expected 60-day job vacancy. The minimum estimated turnover cost per employee is \$5,044, with a minimum estimated annual turnover cost of \$10,088. And, as employee salary and benefit levels rise, so does the estimated turnover cost.

What Can Be Done

Nobody is going to be able to completely insulate their company from the coming labor shortage. However, with effective planning and strong leadership today, you can position your company to thrive in the years to come. Here are 10 ways to help you keep good people around, now and in the future.

1. **Hire the right people for company fit.** Even though it takes a little longer, your best bet is to get it right from the start by investing in the hiring process. Employers must be clearly aware of their goals up front and the kinds of skills, people, behaviors and competencies needed to meet those goals. Don't make a bad hire assuming you're going to "fix" it later. Once you've defined your goals, finding the right person to hire may require you to interview job candidates longer and more often, asking more targeted questions about job skill and attitudes and then listening carefully to their answers. Don't dominate the interview: spend 80% of your time listening, 20% speaking. And, pay as much attention to non-verbal signals such as body language and eye contact as to what's actually being said. Before making a final decision, you may also want to ask other managers to interview the top candidates as well. You're looking for people with the skills you need; this includes both such hard skills as math, literacy and problem solving as well as "soft" skills such as motivation and attitudes. If it's important to do background/reference/licensing checks or drug testing, do it before, not after, the new employee is put on the payroll.
2. **Intensively manage an employee's first week of work.** From day one, do everything possible to make new employees feel welcome. Set the tone early by letting employees know what the company's values are right away, and provide meaningful orientation and training sessions. The more you can teach your employees, the more you empower them to do a good job. Before beginning a new employee's on the job training, meet with supervisors and other key employees to decide exactly what the new employee will be doing. Write these functions down, and

Retaining Good Employees: ... cont.

go over them carefully in clear, straightforward language with the employee on their first day with the company. New employees need to know exactly what is going to be expected of them; not only does it help to focus them, it also gives them tangible goals.

3. **Introduce your company's policies to your new workers in writing as soon as possible.** Have them sign a statement acknowledging that they have received and understood these policies, and then live with them, every time, with every worker. Clearly explain what the company expects of its employees in the simplest and most straightforward language possible. A word to the wise: there is no federal or state law requiring a private sector employer to translate job descriptions, policies or safety rules into a language other than English. However, if you realistically expect to have enforceable policies or meaningful job descriptions (or should the situation turn into an unemployment claim down the road), it is extremely helpful to make sure that your expectations are explained to all new workers in a language that they understand and comprehend.
 4. **Be patient with your employees.** Just because you know how something needs to be done doesn't mean that your new workers do, no matter what their resumes say they did for another company. Try to deal calmly with what you consider to be dumb mistakes; losing patience tells your employees that you think they're stupid and destroys their self-confidence, just when they need it most. You want to create an atmosphere that encourages people to grow and stretch as employees, not an atmosphere of fear and mistrust. If at all possible, assign an experienced employee to work with your new hires during their training period. This veteran employee should explain every facet of the job and continue to monitor the individual's command of the work until it is completely satisfactory.
 5. **Let your employees know that they have the opportunity to grow by staying with the company.** While salary levels are certainly an important part of staying competitive, also consider sideline benefits which not only attract employees initially, but entice them to stay. Top performers expect to be paid well, but they also want challenging work, learning opportunities and flexibility. Many employers are finding ways – fortunately, often inexpensive ways – to hold the loyalty and interest of their workers. You want employees to feel fortunate to work for the company. Many companies (especially larger ones) provide such perks as fully stocked kitchens, free lunches, health club memberships and concierge services. The question to consider here is what work benefits do you offer that an employee could not find elsewhere that help them meet their long-range goals and/or make their
- everyday lives a little easier. By the same token, don't make promises you can't keep. Don't promise to reward extra effort with a promotion or raise if you can't deliver. Don't promise to provide insurance, vacation and sick leave benefits, or year-end bonuses if they aren't going to happen.
 6. **Talk to your employees often and really listen to their answers.** Research shows that employee retention is higher in companies where the boss is highly visible to the workers. All employers are busy people; however, your most important asset is your people – you can't succeed without them. "Management by walking around" will put you in a much better position to observe employees who are ready to handle more responsibility or to detect morale problems quickly. Give your employees meaningful feedback. When they do a good job, let them know it; feeling appreciated will go a long way toward encouraging employee loyalty and distinguishing your business from others in a positive way. Praising employees for the good work they do can encourage them to adopt a more positive attitude towards improving the areas where they may be deficient. When your workers make mistakes, give them prompt corrective feedback in as positive a manner as possible. Remember: while it isn't always possible to achieve, the ultimate goal is to encourage an employee's success and to improve performance deficiencies.
 7. **Address performance problems as soon as they arise.** Performance problems aren't going to go away by themselves. The biggest counseling mistake is to avoid dealing with the problem. Don't let little problems grow into big ones, or sit by helplessly, waiting for disaster to strike. Counseling your problem performers may take 10% of your time if you handle a situation when it first arises and is still manageable. While that's certainly a large investment of time, you ignore these problems at your peril. If you allow your employees' bad habits to become chronic, you may suddenly find yourself spending half or more of your day trying to undo the damage. And, don't think for a moment that these problems go unnoticed by others in the workplace, especially your top performers who end up shouldering more of the workload.
 8. **Be specific, not general, when giving constructive feedback.** You can't fix a problem without first discussing its nature; an employee can't correct their behavior unless they first acknowledge there's a performance deficiency. Describe performance problems by using objective, meaningful terms that relate directly to job-related behaviors. Instead of focusing on an employee's poor attitude or calling them lazy, you might say, "You've been seen making personal phone calls, smoking, playing games on the Internet and reading the newspaper when

Retaining Good Employees: ... cont.

co-workers needed your help to meet a critical deadline. On August 5, 8, and 11, Cindy asked you to help out with secretarial overflow work and you refused on all three occasions. This is unacceptable and could lead to further discipline if it happens again.” This calls attention to behavior that is completely within the employee’s ability to control and change. Follow your company’s progressive discipline policy and document all encounters with problem employees in writing. Remember: the “fuzzier” the reason for discharge or discipline, the more ammunition an employee has for alleging that the stated reason wasn’t the real reason for the disciplinary action taken.

9. **Firing an employee is your last resort, but there are some situations that warrant termination.** No matter how serious the coming labor shortage may be, there will still be occasions when an employee simply cannot or will not do what needs to be done in the workplace on a consistent, reliable basis, even after intensive training, repeated warnings, and coaching. Further, you should not tolerate threatening, harassing or violent words or actions from anyone. Keeping poor performers after you’ve taken all promised disciplinary steps not only creates management headaches for you, it lowers the productivity and morale of other workers and affects the company’s bottom line. Remember: always have documentation to support your actions and final decision to fire the employee.
10. **Respect the work/life balance-juggling act that your employees face daily.** It’s often the little things that

make your office a more satisfying and enjoyable place to spend the day; it’s also the little things that can make a huge difference in whether a prized employee stays with you or goes elsewhere. Millions of American workers find themselves in the so-called “sandwich generation” – caring for young children and aging parents simultaneously. For many of these employees, instituting family-friendly policies and programs can make your workplace too good to pass up. According to a recently study done by the Work and Family Institute, 37% of the companies that offer child care services report lower turnover rates as a result; other benefits include higher morale (reported by 62% of respondents), reduced absenteeism (54% of respondents) and increased productivity (52%). “Family friendly” covers a wide range of programs associated with non-traditional schedules, such as flextime, job sharing, compressed work weeks and telecommuting.

If you still think that providing certain benefits to your employees is too expensive or time consuming, take a moment to compare the costs of implementing such programs against the expense of hiring new employees again and again (if you can find them) while simultaneously fighting unemployment claims filed by former workers.

From a strictly business standpoint, it just makes good sense to be a retention-driven employer. Let’s face it: disloyal employees are very unlikely to help you develop customers who are loyal to your company. A content, happy workforce of productive, long-term employees is your best asset – now and in the future - and can give you an invaluable competitive advantage.

Hiring People with Disabilities: “You’re Hired! Success Knows No Limitations!”

“You’re Hired! Success Knows No Limitations!” was the theme for National Disability Employment Awareness Month this past October. As Governor Rick Perry recently pointed out, “Texas continues to look toward the future with optimism, recognizing that the economic successes to be achieved will significantly depend on our having a skilled, motivated workforce. As we look ahead, it is especially important that individuals with disabilities have every opportunity to participate and excel in the workforce. To this end, private and public sector employers continue to make significant strides.”

The Texas Workforce Commission’s new, award-winning, *WorkinTexas.com* Internet job-matching site is designed to facilitate the employment process for both employers and job seekers and incorporates web site accessibility features such as alt tags for graphics, accessible forms and more. With this new service,

Texans with disabilities can independently apply for jobs. Local Workforce Development Boards around the state are increasing interaction with people who have disabilities. For example, during the last fiscal year, as a result of assistance from the Texas Workforce Commission and local boards, 2,250 people who self-identified as having a disability successfully found employment. In that same time frame, the Department of Assistive and Rehabilitative Services (formerly the Texas Rehabilitation Commission and Texas Commission for the Blind) assisted 21,314 Texans with disabilities in gaining employment.

If it isn’t already, hiring and accommodating people with disabilities will be a part of many business’s future; that’s especially true if the predicted coming labor shortage is as severe as some predict. By the year 2010, 51% of workers will be 40 years or older, while the workforce aged 25 to 39 will decline by 5.7%. In addition, people

Hiring People with Disabilities: ... cont.

aged 45 to 54 have an 11.5% chance of developing a disability and people aged 55 to 64 have a 21.9% chance of developing a disability. Compared with adults under age 45, individuals between 45 and 64 are more than twice as likely to have some visual impairment, and nearly five times more likely to have some hearing loss.

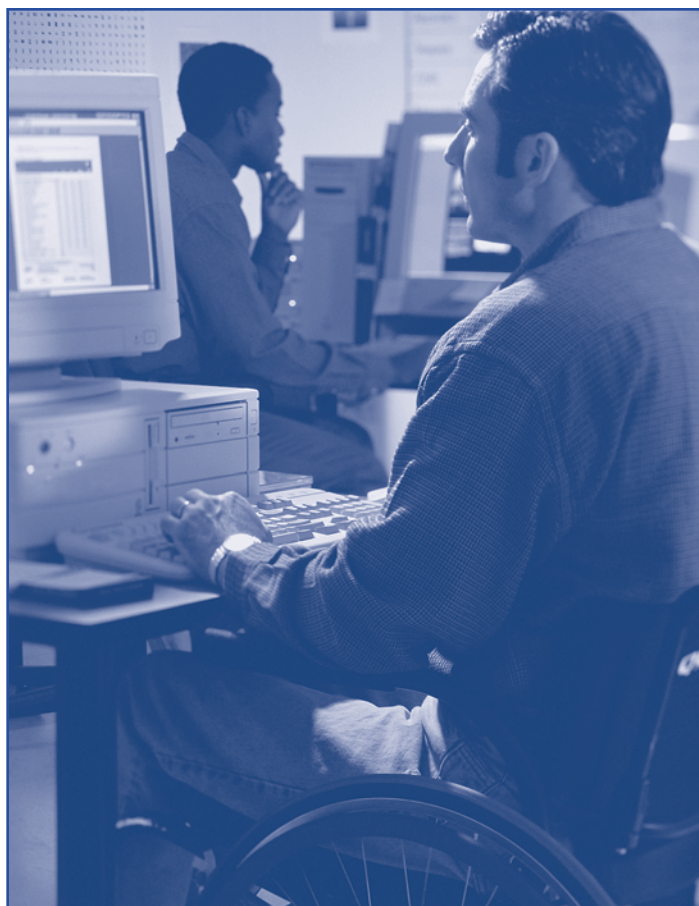
But these statistics shouldn't frighten employers, as accommodating employees with disabilities is becoming easier. Today, 65% of the workforce are information workers, meaning that they use computing and Internet devices. Fortunately, computer software now makes it easier to increase font size, change font settings, and receive notifications through sound or visual means. Additionally, assistive devices allow employees to operate computers with pointers, voice commands, and keystrokes rather than a mouse, and to receive output in print, spoken word, or Braille.

Texas employers have already accommodated employees and customers with disabilities by installing ramps, checkout counters at wheelchair level, and providing electric carts for customers, as well as providing sign language interpreters, teaching sign language to staff, and providing flexible work hours. They also allow employees to sit or stand and structure work so it can be done independently or with supervision. The Job Accommodation Network (800-232-9675), a federal service that facilitates the employment and retention of workers with disabilities, reports that Texas employers made 1,632 inquiries last year about accommodations.

Texans with disabilities also enhance the economy as business owners and entrepreneurs. Look at what some Texas entrepreneurs have accomplished:

- Designed and sold a unique rolling chair for use by passengers with disabilities in airplanes that received an industrial design award. (Austin)
- Operated a horsemanship center devoted to an understanding of horses, and provided motivational speaking about equine and human potential. (Hico)
- Operated an outdoor expedition company. (Austin)
- Operated an Internet business providing quality services to parents and students by locating the maximum financial aid for college. (San Antonio)
- Developed and managed an accessible river cruise focusing on bald eagles and Texas wildlife. (Burnet)
- Operated a business providing motivational training including speeches, a book and audio/video training based on personal business experiences, Olympic competitions, and dealing with a disability. (Terrell)

Employers gain, not only by getting qualified and capable employees when they hire people with disabilities, but by getting tax deductions as well. In 2001, the Texas Legislature passed a franchise tax credit for corporations that hire certain employees with disabilities. Federal law provides tax credits through the Work Opportunity Tax Credit program, which can reduce employers'



federal tax liability by as much as \$2,400 per "new" hire. For additional information on these and other programs, you may wish to visit various workforce resources including:

Texas Governor's Committee on People with Disabilities
512-463-5739

www.governor.state.tx.us/disabilities

Governor's Committee Employment Awards (entry deadline December 31)

<http://www.governor.state.tx.us/disabilities/awards>

ADA Guide For Small Business

U.S. Department of Justice

800-514-0301

www.usdoj.gov/crt/ada/smbustxt.htm

Employment Provisions of the Americans with Disabilities Act

Equal Employment Opportunity Commission

800-669-4000

www.eeoc.gov/ada/adahandbook.html

Texas Franchise Tax Credit for Hiring Persons with Disabilities

Texas Comptroller of Public Accounts

800-252-1381

www.window.state.tx.us/taxinfo/taxpubs/tx98_673.html

Hiring People with Disabilities: ... cont.

Work Opportunity Tax Credits (WOTC)
Texas Workforce Commission
800-695-6879
www.twc.state.tx.us/svcs/wotc/wotc.html

Office of Disability Employment Policy, U.S. Department of Labor
866-633-7365
www.dol.gov/odep/

Job Accommodation Network (JAN)
800-232-9675
www.jan.wvu.edu

Texas Department of Assistive and Rehabilitative Services
800-628-5115
www.dars.state.tx.us

Relay Texas (provides telephone interpreting between people who can hear and individuals who are deaf, hard-of-hearing, deaf-blind or speech-impaired)
Dial 7-1-1
www.puc.state.tx.us/relay/index.cfm

Pat Pound
Kelly Yarbrough
Texas Governor's Committee on People with Disabilities

The Texas Manufacturing Assistance Center (TMAC): Making a Positive Difference for Texas Manufacturers

Texas manufacturers face many challenges in an increasingly global economy. For smaller firms with fewer resources, the challenges can seem particularly daunting: cut costs, improve quality, adopt new technology, eliminate waste, reduce cycle time, increase profitability. And do it all now.

Fortunately, Texas companies don't have to go it alone, thanks to the Texas Manufacturing Assistance Center, or TMAC. With the mission of enhancing the competitive position of the state's manufacturing sector, TMAC's manufacturing professionals have worked with a wide range of manufacturing-related firms, delivering training, providing technical assistance and implementing best business practices over the past 10 years.

And, these efforts are paying off in a big way. An independent survey of all TMAC customers is done one year after every project is completed. The survey covers numerous measures of the business results achieved, everything from increased profit margins to reduced defect rates. Companies are also asked to quantify the benefits of working with TMAC. Through mid-2004, TMAC customers reported impressive cumulative impacts totaling:

- \$500 million in new or retained sales;
- \$99 million in cost savings and cost avoidance on materials, labor, inventory and equipment;
- \$153 million in new investments in equipment, technology and the workforce and
- More than 6,200 Texas jobs created or retained.

These figures all represent direct impacts reported by TMAC's customers, not the indirect impacts on the economy at large.



Here's another impressive result: the direct, bottom line impacts for these customers – measured as cost savings and/or avoidance plus the profit margin on sales – represent a return of nearly 11 to 1 on the federal dollars invested in TMAC for the most recent reporting period.

One Company's Success Story

Garrett Metal Detectors of Garland, Texas makes security systems – both the walkthrough and the wand kind; most of us have probably been scanned with their products at the airport. Garrett worked with and continues to work with TMAC on both lean manufacturing projects and quality management system implementation. By implementing various process improvements, they were able to meet a large spike in business which occurred after the terrorist attacks of 9/11.

(TMAC): Making a Positive Difference ... cont.

After implementing the lean manufacturing techniques and processes suggested by TMAC to meet the increase in orders, this company was able to increase production by 300%, all with the same number of staff. They also reduced production cycle time by 75% while simultaneously reducing the amount of floor space needed. Their quality project led to their being registered to the ISO 9001:2000 standard, which enabled them to better compete on an international basis. (ISO is the International Standards Organization).

Who is TMAC? A Little Background

TMAC is the Texas affiliate of the Manufacturing Extension Partnership operated by the U.S. Department of Commerce. TMAC consists of seven partner institutions delivering services to manufacturers across the state. The Texas partners are: the Texas Engineering Extension Service (part of the Texas A&M University System); the University of Texas at Arlington; the University of Texas at El Paso; the University of Houston; Southwest Research Institute; Texas Tech University and the University of Texas – Pan American.

What TMAC Can Do For You

With particular emphasis placed on the needs of small to mid-sized manufacturers, TMAC's focus areas include principles of lean manufacturing and administration, quality management systems, strategic management services, facility layout and manufacturing information systems. Among other things, TMAC:

- Supports the competitiveness of Texas' manufacturing sector by focusing on firms committed to continuous improvement and willing to invest in their own growth.
- Provides affordable statewide access to training and technical assistance that smaller manufacturers and those in rural areas would not otherwise be able to access.
- Enhances the development of supplier relationships between large and small manufacturers in Texas, helping to keep dollars circulating within the state.
- Leverages partners' funding and customer fees with federal dollars in a unique public/private partnership.
- Has a measurable positive impact on its customers and the state economy.

Texas Manufacturers Assisted

Over the past eight years, TMAC has assisted more than 3,100 Texas manufacturing firms – about 14% of all manufacturers in the state. The continued growth in repeat customers is a testament to the value of TMAC services.

Contact TMAC

Any Texas manufacturer can contact TMAC by dialing their toll free number, 1-800-625-4876, or by e-mailing tmac@tmac.org. You may also visit TMAC's website at www.tmac.org for more information. Take the first step to improving your operations. Call today to schedule your no-cost, no-obligation TMAC site visit.

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

In the Summer 2004 issue of *Texas Business Today* (available online at www.texasworkforce.org), we covered the changes recently made by the United States Department of Labor (DOL) to the overtime exemption regulations. As a result of the media coverage (or media confusion), many employers are now more concerned than ever about their obligations under the Fair Labor Standards Act (FLSA). To refresh your memory, here is a back to basics recap of FLSA issues that all employers need to be aware of.

1.) What is the current federal minimum wage rate and overtime requirements?

The federal minimum wage rate continues to be \$5.15 per hour. Overtime is still required to be paid at time and one-half when an

hourly worker works more than 40 hours in a seven day work week. Remember: when computing overtime, employers must include commissions and non-discretionary bonuses earned by the worker in the calculation.

2.) Is it true that all workers are entitled to minimum wage and overtime, unless the employer can show that an exemption applies?

Yes. Unfortunately, many times employers assume that the presumption is the other way around, which can be a costly mistake. If you are ever faced with an audit or wage dispute, and you are claiming an exemption, you are responsible for showing how the exemption applies to your worker.

The Federal Fair Labor Standards Act: ... cont.

3.) What is the difference between an FLSA Non-Exempt employee and an FLSA Exempt employee?

The terminology can be a bit confusing to everyone except human resource and payroll professionals. The term *FLSA Non-exempt* means that the worker is entitled to minimum wage and overtime. Essentially, the employer has not placed this worker into an exemption category. The term *FLSA Exempt* means that the employer is claiming that an exemption applies to the worker. The exemption could be an exemption from minimum wage, or overtime, or both, depending on the exemption claimed by the employer. Workers placed under the white-collar exemptions, also known as the executive, administrative, and professional exemptions, are generally referred to as *salary exempt*.

4.) Are there other exemptions under the FLSA other than the white-collar exemptions?

Yes. In addition to the white-collar exemptions set out under the DOL regulations that were covered in the last issue, there are sev-

eral other exemptions established under the FLSA. Examples of other industries and occupations with exemptions available include agriculture and ranching, automobile sales, amusement and recreational establishments, companions of the elderly, outside sales, and computer professionals. These and other exemptions can be found under Sections 213 and 214 of the Fair Labor Standards Act. You can also get more information about these exemptions by reviewing the DOL Fact Sheets at www.dol.gov/esa/fact-sheets-index.htm.

5.) Am I required to maintain timesheets on my workers?

Yes. The FLSA requires employers to maintain certain records on non-exempt workers, including the number of hours worked and wages earned by those workers. Although it is not mandatory to keep those records in a certain type of form, the information does need to be accessible and accurate. For basic information about record keeping requirements, check out DOL's Fact Sheet at: www.dol.gov/esa/regs/compliance/whd/whdfs21.htm.

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 new Federal Wage and Hour Regulations, the Unemployment Insurance Hearing Process, Workers' Compensation, the Texas Payday Law, Hiring, Firing, Sexual Harassment and Policy Handbooks. 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

• Galveston - December 3, 2004

• San Antonio - January 21, 2005

Arrangements are pending for future Texas Business Conferences to be held in early 2005 in Lubbock, Sherman, Houston, Arlington, Austin and Dallas. Visit the agency's website at www.texasworkforce.org to learn when dates and locations are finalized.

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