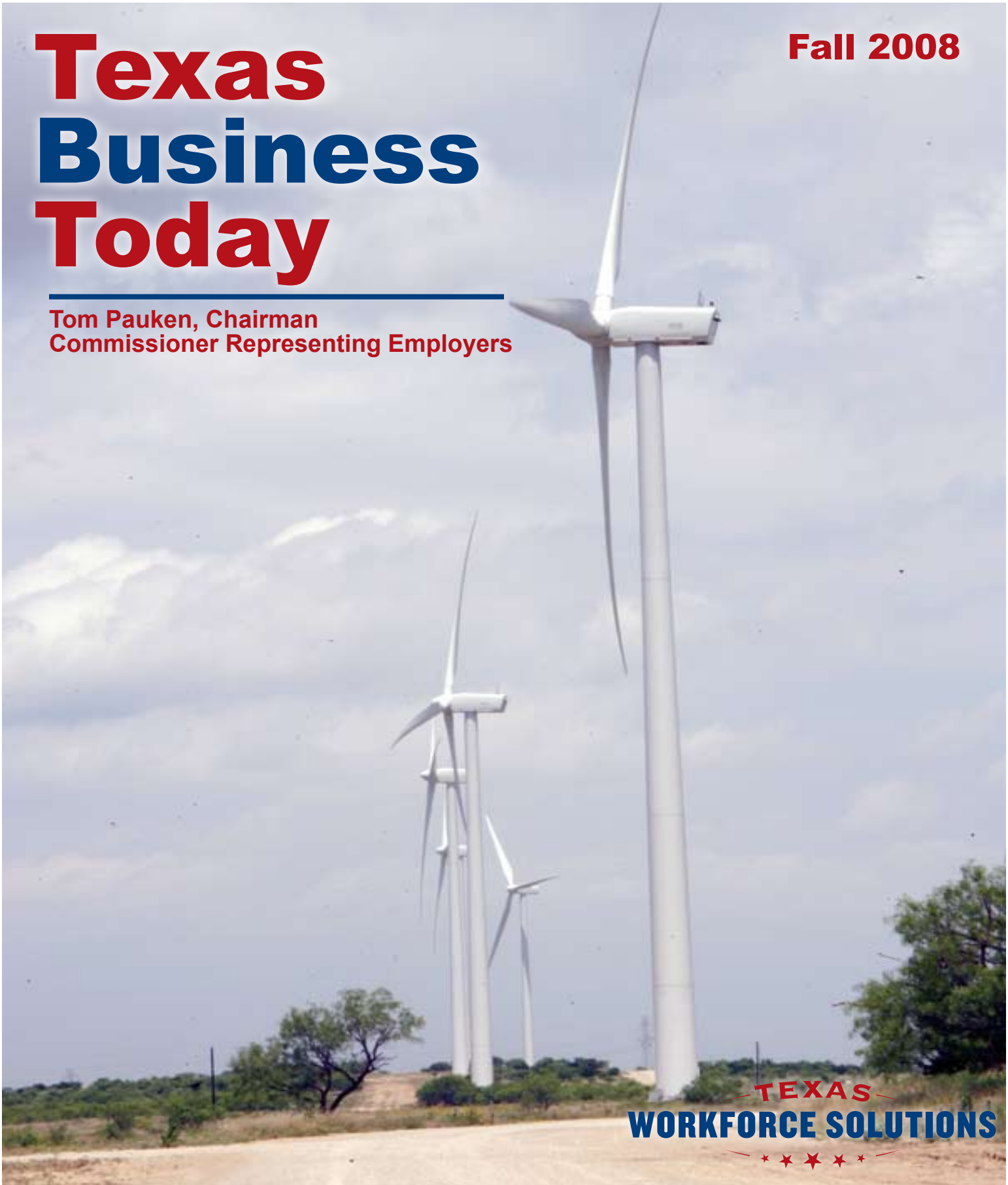
# Texas Business Today

Fall 2008

Tom Pauken, Chairman
Commissioner Representing Employers



TEXAS WORKFORCE SOLUTIONS

**As Wind Farms Crop Up, Both the Texas Economy and Jobs Grow**

**Developing a More Skilled Workforce • Putting America Back to Work • How Do Unemployment Claims Affect an Employer?**

# Students need skills for today's workplace

## Chairman's Corner

The world is not the same as it was in the 1950s when 60 percent of jobs could be filled with unskilled workers. Today, 80 percent of high-growth, high-demand jobs require some education beyond high school. Research has shown students are not preparing for skills needed in today's workplace.

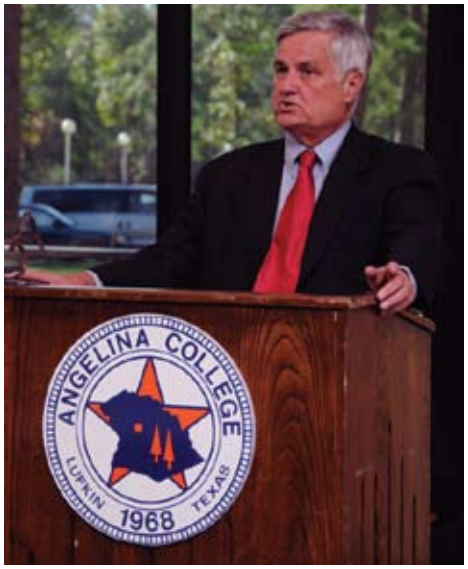
Texas has been very successful in job creation and attracting companies to our state in recent years. One area where we need to show more progress, however, is in aligning career and technology education with what is needed in the workplace. Without more skilled workers, we will be unable to maintain the rate of job growth we have seen over the past several years in Texas. An important requirement of employers seeking to relocate or expand their businesses is the availability of a skilled workforce. We must be able to supply workers on the employers' timelines in order to remain competitive in attracting jobs to our state.

Unfortunately, the Texas Workforce Commission continues to hear from employers that students are not learning the skills necessary for a modern economy. These employers are not alone in their opinions. According to a survey conducted by Hart Research Associates and Public Opinion Strategies, college instructors report that 42 percent of entering freshmen are unprepared for college work, and employers estimate that 45 percent of recent high school graduates lack necessary skills. These perspectives are shared by the high school graduates themselves: 35 percent of college students say that they graduated from high school with large gaps in basic academic skills, and 39 percent of high school graduates entering the workforce report such gaps.

There is an objective basis for these concerns. A study of Texas high school graduates taking the ACT in 2004 found only 18 percent had the foundational skills for college and work. In addition to learning the basics, students must also develop good analytical skills. Employers report that such applied skills as critical thinking, teamwork, and effective communication are essential to the preparation for today's workplace. For some occupations, these applied skills are even more important than basic or specific technical skills that can be gained on the job. Therefore, it is critical that our young people know how to learn on their own and how to analyze issues, identify solutions, and develop recommendations for solving problems.

Employers are especially concerned about the broken link between educational institutions at all levels and the businesses that employ their graduates. While one can make the argument that Texas is doing a reasonably good job of producing the quantity of four-year degrees, there is a huge mismatch between the areas of study and the jobs being created. As Tom Luce of the U.S. Department of Education pointed out in a recent column in the *Austin American-Statesman*, "America now graduates more sports exercise majors than electrical engineers," adding that "there were twice as many physics graduates in 1956 as in 2004."

But our real deficit is in the number of two-year technical degrees Texas produces. Employers tell us that their greatest needs can be met through quality high school education followed by associate degrees or advanced certification programs.




TWC Chairman Tom Pauken speaks at Angelina College. Chairman Pauken says students are not learning the skills needed for a modern economy. *Texas Workforce Commission photo*

Right now, the message parents are hearing is that their children have to get at least a bachelor's degree in order to obtain well-paying jobs. We have to work with parents and guidance counselors to educate them about the jobs being created and all of the potential career pathways, including good options requiring fewer than four years of college.

A case in point is one of Gov. Rick Perry's major economic development initiatives – the Texas Energy Cluster. This Texas Industry Cluster Initiative encourages skills training for good-paying jobs in the following areas: oil and gas exploration and production, power generation, mining, power transmission, and renewable energy sources, such as wind, biofuel, solar, and geothermal energy. This cluster added 85,465 jobs from 2004 to 2007, but many of the technical professionals in the cluster are approaching retirement. The energy industry, as well as other high-skill, high-wage industries, will lose as many as half of its professional talent over the next five to 10 years as baby boomers retire.

Unless we can align career and technology education with what is needed in the workforce, we will simply not be able to realize the vast potential of the Texas Energy Cluster or other high-growth sectors.

In order to make the best use of our state resources, I believe that our education system should make a shift to one that is market-driven and takes into account the skills needed by employers.

Tom Pauken

Sincerely,
Tom Pauken, Chairman
Commissioner Representing Employers

# As wind farms crop up, both the Texas economy and jobs grow

## Prevailing winds, power grid energize West Central Texas region's renewable energy growth

> "TWC is proud to be part of the state's efforts to lead the way in developing wind energy for the future. Through this grant, the state of Texas can help to further develop a world-class workforce in industries with high demand."
>
> **Tom Pauken**
> **TWC Chairman and Commissioner Representing Employers**

**At Issue**

Wind is a clean, inexhaustible, indigenous energy resource that can eventually generate enough electricity to power millions of American homes and businesses. Wind energy is one of the fastest growing forms of electricity generation in the world. The United States can currently generate more than 10,000 megawatts of electricity from the wind, which is enough to power 2.5 million average American homes. Industry experts predict that, with proper development, wind energy could ultimately provide 20 percent of the nation's energy needs.

One area of the state, West Central Texas, is now considered the wind energy capital of the world, surging to the top in wind power capacity nationwide as well as bringing hundreds of jobs to the region.

"Over the past few years, we've seen the renewable energy industry grow from a few wind farms to the largest wind energy area in the world in the West Central Texas area," said Robert Puls, business development consultant for Workforce Solutions of West Central Texas, the region's local workforce development board. Prevailing winds and proximity to the electric power grid have contributed to that growth, he said.

A $2 million U.S. Department of Energy grant awarded to a consortium that includes the Texas Workforce Commission will contribute to Texas remaining in the renewable energy forefront. The Lone Star Wind Alliance, a coalition of business, academic and government partners, will use the funds to start a wind turbine research lab on the Texas Gulf Coast. The goal is to attract wind turbine and blade manufacturers once the test facilities are complete.

In late August 2008, Texas Tech University received a $1 million Workforce Investment Act Statewide Activity Fund grant from the Texas Workforce Commission to support the creation of the Texas Wind Energy Institute. The grant will be used to develop curriculum, expand capacity, and prepare students to meet the workforce needs of the wind energy industry in Texas. The Texas Wind Energy Institute is a partnership between Texas Tech University and Texas State Technical College in collaboration with the American Wind Energy Association,

the Lone Star Wind Alliance, the Utility Wind Interest Group, the Institute of Electrical and Electronic Engineers, and other energy-related organizations.

"TWC is proud to be part of the state's efforts to lead the way in developing wind energy for the future," TWC Chairman and Commissioner Representing Employers Tom Pauken said. "Through this grant, the state of Texas can help to further develop a world-class workforce in industries with high demand such as renewable energy."

The Texas Wind Energy Institute aligns with Gov. Rick Perry's Industry Cluster Initiative and the Governor's Competitiveness Council recommendations for how Texas can continue to achieve long-term sustained economic success. These market-driven educational and training opportunities will provide a skilled workforce to meet the short- and long-term needs of the industries within the Energy Cluster.

## A Little History

According to the American Wind Energy Association, Texas was the top state producing wind power by the end of 2006, with 2,768 megawatts of capacity. That's up from 1,901 megawatts at the end of 2001, when it was the fifth highest producing state.

Further, three of the five largest U.S. wind farms are in Texas: Horse Hollow – the world's largest – in Taylor and Nolan counties, King Mountain in Upton County, and Sweetwater, also in Nolan County.

In Sweetwater, where Renewable Energy Systems Americas, Inc. (RES) has one wind farm complete and two under construction, turbines "are like trees lining the highway," said Meredith Ingram, public relations and communications specialist for RES, which develops, builds, and operates wind farms.

## Construction Means Jobs

"Right now, I have about five teams that I need to assemble, "according to Karla Lovelady, a human resources generalist for RES, noting that openings at Texas sites can include engineering project managers, site civil mangers, site electrical managers, administrative staff, safety staff, and construction workers.

Wind turbines churn out energy at the Lone Star Wind Farm in Shackleford County while turbine blades sit in a transport case. West Central Texas is now considered the wind energy capital of the world, surging to the top in wind power capacity nationwide as well as bringing hundreds of jobs to the region. *Texas Workforce Commission photo*

Salaries can range from $13 an hour for administrative staff, $15 to $24 for other positions, and $70,000 to $90,000 annually for managers.

Ingram emphasized RES' philosophy to hire locally: "We have a constant stream of local folks coming on site," she said. "We want to be part of the community."

Puls said that the West Central Texas Workforce Center works to meet the increased demands on employers during the construction and development of area wind farms. In addition to offering WorkInTexas.com, workforce center staff also participate in and host job fairs as needed.

Recent job fairs for Global Energy Services USA Inc. (GES USA) drew nearly 75 job seekers for the company that assembles, installs, and maintains wind farms. The company, which offered positions to almost 25 applicants, was seeking operations and maintenance workers with an electrical background. Starting pay was $15 per hour, Puls said.

"We currently are looking to hire more than 200 employees throughout all of our sites by the end of 2008," said Antoinette Means, GES USA payroll coordinator. "We have hired a substantial number of entry-level employees who will go through our own level of training courses."

Puls noted the effect the wind farms and the resulting jobs are having on West Central Texas, saying, "Economically, our rural communities and school districts have felt the greatest impact from wind energy. Local tax bases have gone up, providing needed funds in the rural areas."

Mike McMahan, Abilene Chamber of Commerce president, agreed with Puls, saying, "For many decades, West Texas has enjoyed energy production as a source of employment and economic growth. Wind energy has added a new dimension to this business sector. As a clean, renewable source of energy ready for export, wind turbines will aid the growth of the region for years to come."

# Using E-Verify doesn't protect company from immigration raid

Howard Industries, a manufacturer of electrical products located in Mississippi, is a recent example of a business targeted for immigration enforcement, despite using an employment verification system run by the federal government. U.S. Immigration and Customs Enforcement agents arrested 595 Howard employees who were suspected of being in the United States illegally in an August 25, 2008 raid. The arrested workers were charged with fraudulent use of Social Security numbers and identity theft.

## Business Briefs

In a statement, the company said that, "Howard Industries runs every check allowed to ascertain the immigration status of all applicants for jobs. It is company policy that it hires only U.S. citizens and legal immigrants."

According to Eric Bord, a partner at the Washington, D.C., law firm Morgan Lewis, "What this will do is focus employers on compliance in general, but E-Verify is an ineffective compliance tool because it doesn't protect against identity theft."

An earlier raid in December 2006 at Swift and Company, a large food-processing business, resulted in the arrests of almost 1,200 workers suspected of being in the United States illegally on identity-theft charges. Swift was also using E-Verify at the time of the raid.

E-Verify, which compares information from I-9 forms against Social Security Administration and Department of Homeland Security databases, cannot distinguish whether a worker is providing a stolen Social Security number. That is one of the major criticisms made against the system by critics, including the HR Initiative for a Legal Workforce.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That organization, led by the Society for Human Resource Management, also points to a Social Security Administration database error rate of 4.1 percent that could potentially – and erroneously – declare millions of individuals ineligible to work in the United States. On the other hand, supporters of E-Verify assert that it has demonstrated an error rate of less than 1 percent.

Howard Industries has been using E-Verify since 2007 and is one of about 75,000 businesses nationwide that have signed up for the system. While nearly all of the businesses are participating voluntarily, the state of Mississippi has mandated that companies use the system. (The state of Texas has not imposed such a requirement).

The law that authorizes the E-Verify program is set to expire in November 2008. On July 31, 2008, the House approved an extension of E-Verify for five years as a voluntary program. As of press time for this publication, Senate action had not been scheduled.

The Department of Homeland Security is not only encouraging businesses to sign up for E-Verify, it has made the system the cornerstone of its immigration compliance efforts. According to Bord, however, that will be a tough sell, because there is no advantage to participating in E-Verify: "Employers who have effective I-9 compliance programs derive no additional benefits in defending themselves against an investigation by

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ICE (Immigration and Customs Enforcement)" he said.

In addition to supporting voluntary E-Verify adoption, the Department of Homeland Security is also working on a regulation that would mandate that federal contractors use the system to check all new hires and existing workers. It has been compiling public comments on the proposed rule.

One of the organizations that has filed a negative comment of the proposed regulation is the U.S. Chamber of Commerce. According to Randel Johnson, the chamber's vice president of labor, immigration, and employee benefits, "The E-Verify system is not ready for prime time."

Johnson also asserts that the Department of Homeland Security is overstepping its authority by attempting to make the program mandatory: "We think that's contrary to the congressional statute."

No matter what the ultimate outcome, Bord stated that E-Verify would continue to be central to federal work-site enforcement until comprehensive immigration reform is revived on Capitol Hill. He also encouraged businesses to ease their transition to E-Verify by first establishing an electronic I-9 process to ensure compliance with immigration laws. "If you get it wrong, the damage is critical," he stated.

## Amarillo Man Receives More than Five-Year Prison Sentence for Unemployment Insurance Fraud

The Texas Workforce Commission (TWC) assisted the U.S. Attorney's Office, the U.S. Department of Labor – Office of Inspector General, and the U.S. Postal Inspection Service to prosecute three individuals involved in a scheme to fraudulently collect Unemployment Insurance (UI) benefits. One individual was sentenced to more than five years in prison, while two others received lesser sentences.

"This case is a clear example of how TWC pursues criminal prosecutions aggressively," said TWC Executive Director Larry Temple. "This success is the result of agencywide systems implemented by our UI Tax and Regulatory Integrity Divisions to detect fraud."

Those prosecuted include:

- Warren D. McDonald of Dimmitt, the lead defendant, who received a sentence of 65 months in prison. He pleaded guilty to conspiracy to possess stolen mail matter and aggravated identity theft, and was ordered to pay $15,700 restitution.
- Barbara Glover-Williams of Amarillo, who received a sentence of six months in prison and 36 months supervised release. She pleaded guilty to mail fraud and aiding and abetting, and was ordered to pay $3,850 restitution.
- Christopher Hughes of Amarillo, who received a sentence of seven months in prison. He pleaded guilty to mail fraud and aiding and abetting, and was ordered to pay $4,900 in restitution.

TWC's Regulatory Integrity Division is charged with detecting and preventing fraud, waste, and abuse. The division enforces all regulatory statutes within the jurisdiction of the agency, including Tax, Workforce, Trade Act, Skills Development, Self-Sufficiency, Child Care, and all other programs TWC administers.

Prevention, detection, and elimination of fraud and abuse in the UI program are top priorities, ensuring that funds are available only to workers who become unemployed through no fault of their own and are actively seeking work.

For monthly updates on fraud convictions, you may visit TWC's Web site at http://www.twc.state.tx.us/ui/bnfts/prosecutiondispo.html. To report fraud, you may call the TWC's fraud hot line at 1-800-252-3642.

## Health Care Costs Rise by 5% in 2008 According to New Kaiser Foundation Survey

According to a health benefits survey published in late September 2008, employer-sponsored health care premiums rose by 5 percent in 2008, a relatively modest increase attributable largely to savings realized by the adoption of plans with less generous coverage and higher deductibles for employees.

In spite of the slowdown in rising health insurance rates, premiums have more than doubled since 1999, according to an annual survey done by the Henry J. Kaiser Family Foundation and the Health Research and Educational Trust.

Some researchers believe that health insurance rates could rise in 2009 due to uncertainty in the national economy, causing the number of employers who offer coverage to drop. *Photo illustration*

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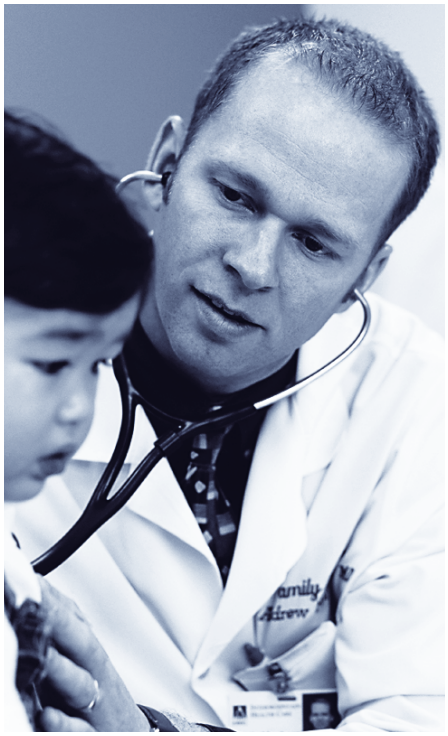
The annual Kaiser study is viewed by many as among the most comprehensive in the nation.

Other results include a finding that, on average, family plans now cost $12,680 annually, up from $5,791 in 1999. During that same time, workers' wages grew 34 percent, and general inflation increased by 29 percent. Employers' costs have risen by 119 percent, while workers' on average now pay $3,354 for a family plan, up from $1,543 in 1999, an increase of 117 percent.



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These rising costs have hit employers with fewer than 200 employees the hardest. In order to offer health insurance to their employees, many have turned to health plans with high deductibles because they tend to have lower premiums. According to the survey, the percentage of such small employers offering health insurance hit a low of 45 percent in 2007, but rose to 49 percent in 2008.

The survey also revealed that 35 percent of covered employees at companies with fewer than 200 employees face annual deductibles of $1,000 or more, more than doubling from 16 percent in 2006. Overall, 18 percent of workers face deductibles of over $1,000.

The survey of almost 2,000 employers was conducted during the first five months of 2008. At that time, 24 percent of workers said that paying for medical care and health insurance was a serious problem, ranking third behind paying for gas and getting a pay raise or finding a job that paid well. And, at the time the survey was taken during spring 2008, most employers indicated they were likely to offer health benefits in 2009.

## IRS Publishes Guidance on Taxability of the Personal Use of Employer Provided Vehicles

One of the most common fringe benefits provided to employees is use of a company owned or leased vehicle. The personal use of an employer-provided vehicle is a fringe benefit and, generally, fringe benefits are taxable unless specifically excluded by law. As such, taxable fringe benefits are subject to employment taxes and are included in the employee's Form W-2, Wage and Tax Statement. There are special rules to withhold, deposit, and report the employment taxes on these benefits.

If an employer provides a vehicle for an employee's use, the amount excludable as a working condition fringe is the amount that would be allowable as a deductible business expense if the employee paid for its use. Employees must substantiate their business use through adequate documentation to qualify as an excludable working condition fringe.

The general way to determine the value of a fringe benefit is to determine the fair market value of that benefit. The fair market value is the price an employee would incur to buy or lease the benefit in an arm's length transaction. There are special valuation rules an employer can use to determine the value of an employer-provided vehicle:

1. The Vehicle Cents-Per-Miles Rule – The employer multiplies the miles the employee drove for personal use by the standard rate;
2. The Commuting Valuation Rule – the employer multiplies the number of times the employee used the vehicle for commuting times $1.50 if the employer meets all the requirements for using this method, or
3. The Automobile Lease Value Rule – The employer uses the annual lease value to determine the value of the employee's personal use of the vehicle.

There are specific requirements that must be met to use these special valuation rules. Information on the taxation of automobiles, the automobile valuation rules and the treatment of fringe benefits in general can be found by going to http://www.irs.gov, and typing "Publication 15-B, Employer's Tax Guide to Fringe Benefits" in the search box.

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# Texas Workforce Commission

PRESENTS

## *Putting America Back to Work*

January 15-16, 2009

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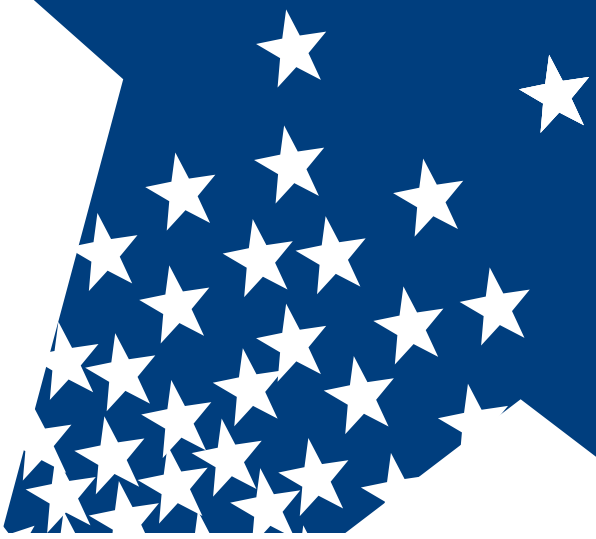

# Fall 2008

The Texas Workforce Commission has planned a dynamic conference for January 2009 to provide a forum for serious, long-term thinking on the major economic issues facing America. The conference will feature distinguished leaders discussing our economic challenges from a variety of perspectives. Four panels will address the policies that we need to put in place to address our serious economic challenges. The areas we will focus on include:

- The Texas Economic Model
- Lessening Our Dependence of Foreign Energy
- Rebuilding Our Manufacturing Base
- Challenges of Our Business Tax Structure

Participation in this event by Texas employers and stakeholders like yourselves will begin the process of developing long-term solutions to our current economic problems.

Consider joining us!

Tom Pauken

Tom Pauken, Chairman
Commissioner Representing Employers

TEXAS WORKFORCE SOLUTIONS

# Register Today!

Registration Fee: ❑$150 (Before December 1, 2008) ❑$200 (After December 1, 2008) Registration is limited to the first 400 registrants. Make checks payable to IAWP – TWC. Mail this form and check to: IAWP – TWC, ATTN: Joanne Brown, 101 E. 15th Street #206D, Austin TX 78778-0001. Call (512) 463-6389 with questions.
No refunds after December 1, 2008.

First Name _____ MI _____ Last Name _____

Title _____ Entity you represent _____

Business mailing address (Street or P.O. Box) _____

City _____ State _____ Zip Code _____

Phone _____ Fax _____ E-Mail _____

Hosted by the Texas Workforce Commission (TWC), Texas Business Conference (TBC), and the International Association of Workforce Professionals (IAWP).

Conference Hotel Information:
Omni Austin Hotel at Southpark
4140 Governor's Row
Austin, Texas 78744
(512) 448-2222
www.omnihotels.com/FindAHotel/AustinSouthpark.aspx

Special conference rate is $85.00 for a single plus tax if you make your reservation before the cutoff date of January 5, 2009.
Reservations: (512) 448-2222
Ask for the Texas Workforce Commission room block.

If you need special accommodations, please note them below.

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# Legislation to expand the Americans with Disabilities Act signed into law

Congress recently approved the ADA Amendments Act of 2008 in an effort to clarify that they intended for the Americans with Disabilities Act to be interpreted broadly. Both presidential candidates, Sen. John McCain of Arizona and Sen. Barack Obama of Illinois, supported the bill, and President Bush signed the measure into law on September 25, 2008.

The original bill, which became law in the early 1990s, required employers to make reasonable accommodations for their disabled employees. The new measure addresses Supreme Court rulings over the past few years that critics said restricted the law. In several cases, the court ruled that mitigating measures – such as prosthesis or medications – rendered a worker ineligible for coverage under the ADA. This bill prohibits the consideration of such mitigating measures in determining whether an individual has a disability.

**Legal Briefs**

The bill defines a disability as a mental or physical impairment that "substantially limits one or more major life activities. It also increases the number of covered activities, adds many diseases as well as bodily functions, and allows employees to sue if they are "regarded as" disabled.

"It's going to change the face of ADA litigation significantly," according to Victoria Zellers, a partner with Cozen O'Connor in Philadelphia. "Millions more Americans will meet the definition of disability under the statute. It's going to cost employers more to comply with this version of the ADA."

Employers may also find themselves in court more often: "There will be more ADA claims that make it to trial that won't be dismissed at the summary judgment phase," Zellers said.

For example, the lack of a specific definition of "substantially limits" could require courts to reinterpret the law. According to Neil Abramson, a partner at the law firm Proskauer Rose in New York, "At the center of the continuum, the question (of who is disabled) is probably straightforward. At the margins, it's more difficult. That will probably generate, at least in the beginning, litigation."

While the bill may present compliance challenges for employers, the final language was the result of lengthy and intense negotiations between lobbies that usually oppose each other. And, as is often the case with any compromise, nobody was totally satisfied. While the business community supported a bill that could increase lawsuits, the final language was less broad than originally proposed.

"This bill represents a truly remarkable collaboration of disability, civil rights and employer groups that generated strong bicameral and bipartisan support in Congress," said Jay Timmons, executive vice president of the National Association of Manufacturers in a statement. "The bill strikes the right balance between protections for individuals with disabilities, and the obligations and requirements of employers."

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In addition to the National Association of Manufacturers, the U.S. Chamber of Commerce and the Society for Human Resource Management were among the business groups that entered into a coalition with disability advocates to move the legislation through Congress.

Bottom line: Human resources departments, managers and supervisors will have to be vigilant in ensuring that all documents and language in employee personnel files pertain only to work performance so that they do not become the basis for disability lawsuits.

## U.S. Department of Labor Takes Legal Action Against Houston-based CEMEX to Secure More than $5 Million in Overtime Wages; Lawsuit Seeks Back Wages for 2,000 Ready Mix Drivers in Eight States

The U.S. Department of Labor (DOL) has filed a lawsuit against Houston-based CEMEX Inc. for allegedly failing to properly pay back overtime wages amounting to more than $5 million to about 2,000 ready mix drivers from eight states in violation of the Fair Labor Standards Act (FLSA). The DOL filed the suit against CEMEX following an investigation by its Wage and Hour Division in Houston covering the three-year period from September 2005 through September 2008.

The investigation found the company failed to pay overtime wages on piece rate and incentive bonus pay for hours worked in excess of 40 in a workweek, for which nonexempt employees are entitled to premium pay. In the case of employees paid on a piece rate, and/or entitled to receive an incentive bonus, all remuneration must be included into the regular rate of computing the overtime premium. In both instances, an employer is entitled to a sum equivalent to one-half the regular rate of pay multiplied by the number of hours worked in excess of 40 for the week.

Affected employees of CEMEX, a provider of cement and concrete products, worked in Texas, New Mexico, Arizona, California, Florida, Georgia, North Carolina, and South Carolina.

FLSA requires that covered employees be paid at least the federal minimum wage, currently $6.55, for all hours worked, plus time and one-half at their regular rate of pay for hours worked over 40 in a seven-day work week. The regular rate should include most commissions, bonuses, and incentive pay. Employers must also maintain accurate time and payroll records. Effective July 24, 2009, the minimum wage will increase to $7.25 per hour.

Enforcement actions are being stepped up and this is clearly a very good time to make sure that all employees are being paid properly: The DOL's Wage and Hour Division concluded 30,467 compliance actions and recovered a record $220 million in back wages for more than 341,000 employees in fiscal year 2007. Back wage collections in fiscal year 2007 represent a 67 percent increase over back wages collected in fiscal year 2001. The number of workers receiving back wages has increased by 58 percent since fiscal year 2001.

For more information about the FLSA, visit the DOL's Web site at www.wagehour.dol.gov or contact the Texas Workforce Commission Employer Commissioner's hot line at 1-800-832-9394.

## Be Sure to Have Your Firsthand Witnesses Ready to Testify!

Here in the Employer Commissioner's Office of the Texas Workforce Commission (TWC), we are often asked by employers why they lost an Unemployment Insurance (UI) claim involving a former employee. After speaking with them about the facts in their case, we are able to decipher the reasons and provide general information to help them win these cases in the future.

In an effort to further assist employers, we implemented a case study to determine the top reasons why employers lose these claims. After examining thousands of actual UI cases that were on dockets here at the TWC, we determined that almost one-quarter of the cases we reviewed were lost because the employer provided no firsthand testimony.

TWC precedent cases dictate that a party's sworn denial of wrongdoing or misconduct carriers more weight than hearsay evidence provided by the other party. Twenty four percent of UI cases that are lost by employers are lost because they did not provide witnesses with firsthand testimony when the claimant denied the allegations. Employers should always ensure that the firsthand witnesses to the misconduct are interviewed by the TWC claims investigator, and are available to testify at any telephone appeals hearing. This includes any witness, employee or otherwise, that saw or heard the incident that caused the claimant to be discharged. This could be a co-worker who found the claimant sleeping in the break room, or a customer who was present when the claimant was shouting expletives in the workplace environment.

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# How do unemployment claims affect an employer?

Unemployment Insurance (UI) claims all have some effect on an employer, but the effect will be small or major, depending upon the circumstances. The main determinants of how a UI claim will affect a given employer are:

1) the type of employing unit involved;
2) the type of worker involved;
3) the date of the initial claim;
4) the length of time worked by the claimant prior to the initial claim;
5) the amount of wages reported for the claimant prior to the initial claim;
6) whether the employer was the only base period employer;
7) the amount of benefits paid to the claimant;
8) the nature of the work separation; and
9) the number of employees the company has.

## Types of Employing Units

While anyone who pays a worker for personal services is an "employing unit" under the law, not all employers are liable for unemployment taxes. By the same token, not all money paid for personal services falls under the definition of "wages that are subject to reporting and UI taxation." For example, a person or company that engages an outside attorney to provide occasional legal advice is an "employing unit", but does not thereby become an "employer" liable to report the attorney's fees to TWC as wages and pay UI tax on such earnings. Likewise, some organizations are exempt from wage reporting and tax liability by virtue of special exemptions in the law. Organizations that are liable for wage reporting and UI payments either pay quarterly UI taxes (determined by applying the employer's tax rate to the first $9,000 of each employee's earnings in a calendar year) or have reimbursing status (they reimburse TWC dollar for dollar for any UI benefits paid out that are based on wages reported for the claimant). The following list indicates the most common categories of employing units and whether they are or are not liable for wage reporting and UI tax or reimbursement liability:

**An Overview**

1) Customers/clients of independent contractors: such employing units do not report the money they pay to the independent contractors, owe no UI tax on such payments, and have no financial involvement in any UI claims that might be filed by such workers.

2) Some employing units are too small or pay insufficient wages to be liable under the UI system. For example, a private-sector employing unit that pays less than $1,500 in wages in a calendar quarter is exempt (for household/domestic employers, the threshold is $1,000 in a calendar quarter). A tax-exempt nonprofit organization with fewer than four employees is also exempt from liability. During the period of nonliability, such employing units are treated like the employing units in the first category.

3) Some employing units have some exempt and some nonexempt employees. For the exempt employees, they are treated just like the employing units in the first category above. For the nonexempt employees, they are treated like any other liable employer – see below. Some organizations, such as churches, have nothing but exempt employees and are nonliable. For a complete list of UI exemptions, see the Texas Labor Code, Chapter 201, Sections 201.042-.078, starting at http://tlo2.tlc.state.tx.us/statutes/docs/LA/content/htm/la.004.00.000201.00.htm #201.042.00 (put the entire address all on one line in your browser).

4) Private taxed employers report their employees' wages, pay quarterly UI tax on such wages (up to the first $9,000 of each employee's earnings in a calendar year) and have potential financial involvement (chargeback liability) in any UI claims that might be filed by such workers.

5) Reimbursing employers report their employees' wages, pay no quarterly UI tax on such wages, and have potential financial involvement (reimbursement liability) in any UI claims that might be filed by such workers.

6) Taxed group account employers are in a large pool of similar governmental employing units and are treated like private taxed employers, except that any chargebacks are pooled and result in a pooled (shared) UI tax rate.

7) Nonprofit organizations can elect either private taxed employer or reimbursing employer status.

## Type of Worker Involved

As noted above, some workers (independent contractors and employees whose services are exempt from the

| Determination of Base Period Wages | | | | | |
|---|---|---|---|---|---|
| Calendar Quarter 1 | Calendar Quarter 2 | Calendar Quarter 3 | Calendar Quarter 4 | Lag Quarter | Quarter In Progress When Claim Is Filed |
| ✓ | ✓ | ✓ | ✓ | X | X |

definition of "employment") will not involve their employing units financially in a UI claim. All other types of workers have the potential to involve their employing units financially, depending upon whether a particular employing unit reported wages for the claimant during the base period of the claim. Here is a summary of the potential claim liabilities:

1) Independent contractors – no wage reporting; no tax, chargeback, or reimbursement liability

2) UI-exempt employees – no wage reporting; no tax, chargeback, or reimbursement liability

3) All other workers* – wage reporting; tax liability if the employing unit is not a reimbursing employer; potential chargeback/reimbursement liability depending upon the base period

None of the three categories above affects the right to file an unemployment claim. Any worker who is no longer performing services for pay can file an unemployment claim. Of course, whether the claimant can actually go on from there and draw benefits depends upon whether the claimant meets the monetary eligibility, work separation, and continuing eligibility requirements under the law.

* The term "all other workers" includes anyone who is not either (a) accurately classified as an independent contractor or (b) an employee whose services are specifically exempted under the UI law. Since there are so many names applied to workers who perform services for pay, it would be impractical to list them all. To illustrate, such a list would include, but not be limited to, probationary employees, new hires, trainees, trial employees, introductory employees, day labor workers, casual employees, temporary employees who are not acquired through a staffing firm, "1099 employees," "contract labor" workers who are really only misclassified employees, regular employees, full-time employees, part-time employees, PRN (as needed) staff, "permanent" employees, and seasonal employees. The legal presumption in Texas is that all services are in "employment," and are subject to wage reporting and taxation or reimbursement liability, and the burden of proof is on the employer to show that a particular worker is not in employment.

However, the term "all other workers" does not include employees of independent contractors, because those workers are employed by the independent contractor, and any UI claims they might file will involve the independent contractor. It also does not include temporary staff assigned by a temporary staffing firm or leased employees assigned by a professional employer organization (PEO, also known as an employee leasing firm), since such employees are employed by the staffing firms that assign them to clients, and any unemployment claims they might file will be the responsibility of those firms.

## Date of the Initial Claim

The initial claim filing date determines two very important things: the benefit year during which the claimant may file weekly claims and the base period of the claim. The base period in turn determines the wages that will be used to compute the claimant's weekly and maximum benefit amounts and which employers will have potential chargeback or reimbursement liability for any benefits paid to the claimant. Above is a chart showing what the base period looks like. Only base period employers have potential financial involvement in a UI claim; nonbase period employers have no such liability.

As an example, if an employer hires an employee in February, and lets the employee go after 30 days, and the claimant files an initial claim prior to April 1, then the base period would not include the first quarter of that year (the quarter in progress), nor the fourth quarter of the preceding year (the lag quarter), but would consist of the fourth quarter of the year before the year preceding the current year, and the first three quarters of the year preceding the current year. Since the employer did not report wages during that base period, it will have no financial involvement in the claim. The same would apply if the claimant waited until April, May, or June to file the initial claim – in that case, the base period would omit the second quarter of the current year, the first quarter of the current year, and consist of the four quarters of the preceding year. If the ex-employee files an initial claim after June 30 of the current year, then the employer could be a base period employer, but its chargeback liability would be limited due to having paid only 30 days' worth of wages (see the next topic).

## Length of Time Worked Prior to the Initial Claim

The length of time worked by the claimant prior to the initial claim is important to an employer's potential

financial liability because it helps determine whether the employer falls into the base period of the claim. Generally, if an employee works a short period of time, and files a UI claim fairly soon after losing that short-term job, the employer will not fall into the base period of the claim. The longer the employee works for the employer, the greater the chance is that a subsequent UI claim will involve the employer in the base period. In addition, since an employer's chargeback liability is directly proportional to the amount of wages it reported during the claimant's base period, the longer the employee works, the more wages will be reported, and the higher the potential chargeback liability will be. That is why, as a general matter, it is better to separate a clearly unsuitable employee from the company as soon as it becomes clear that the employee will not work out in the long term.

## Amount of Wages Reported for the Claimant Prior to the Initial Claim

This factor is very closely related to the length of time worked by the claimant prior to the initial claim. The higher the wage amount for the claimant during the base period is, the higher the potential chargeback liability will be.

## Whether the Employer was the Only Base Period Employer

Chargeback/reimbursement liability also depends upon whether an employer was the only employer that reported wages for the claimant, or was one of two or more base period employers. An employer's chargeback liability percentage is directly proportional to the amount of wages it reported for the claimant during the base period, measured against the total wages reported by all employers during the base period.

As an example, if employer A paid 100 percent of the base period wages, it will have 100 percent of the chargeback/reimbursement liability. If A paid one-third of the wages, it will have one-third of the liability.

## Amount of Benefits Paid to the Claimant

This factor, along with an employer's chargeback percentage as explained above, determines the amount of the actual chargebacks. To determine the amount, TWC multiplies the chargeback percentage by the amount of benefits the claimant ultimately draws. If the claimant draws half of the potential maximum benefit amount, each base period employer's liability will be half of what it could have been, had the claimant drawn the maximum potential amount.

## Nature of the Work Separation

The nature of the work separation goes directly to the issue of whether the claimant will be qualified or disqualified for UI benefits. If the work separation was disqualifying, the claimant will not be able to draw UI benefits, which of course will affect the employer's financial liability for the claim. The first thing TWC does in every UI claim (after determining monetary eligibility) is determine the issue of whether the work separation was voluntary or involuntary, and then whether it was qualifying or disqualifying.

A voluntary work separation is one that was initiated by the employee, and an involuntary work separation is one that was initiated by the employer. The burden of proof on the work separation issue depends upon who initiated the work separation.

In a case involving a voluntary work separation, the claimant will try to prove that he or she had good cause connected with the work to quit, and the employer must be prepared to show that continued work was available when the claimant left and that a reasonable employee would not have quit for such a reason. In a case with an involuntary work separation, the employer has the burden of proving two main things: that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and that the claimant either knew or should have known that discharge could occur for such a reason.

## Number of Employees

For private taxed employers, the number of employees is important because it determines the size of the employer's taxable wage base, which is generally the number of employees multiplied by $9,000 (the figure could be lower if some employees do not earn at least that much in the calendar year). A small company will have a small taxable wage base and will experience a proportionally higher impact from a single UI claim than a larger employer with more employees and a higher taxable wage base.

For details on how TWC calculates UI tax rates for private taxed employers (the vast majority of employers in Texas), see this Web page: http://www.twc.state.tx.us/ui/tax/uitaxrates.html.

## Conclusion

It should be clear from the above information that there are many factors that determine how a given UI claim will impact a particular employer. While some are more under the control of employers than others, all of them are important to understand.

Each claim has the potential to affect an employer's financial bottom line, and an employer interested in controlling its labor costs will pay attention to every detail.

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