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A Pain in the Back

Employers Wary of OSHA's Proposed Ergonomic Standards

Employers across the nation are waiting with trepidation to see whether proposed ergonomic regulations published by the Occupational Safety and Health Administration (OSHA) will become final in the next few months. The regulations are intended to reduce the number of musculoskeletal disorders (MSDs) occurring in the workplace. Common examples of MSDs include carpal tunnel syndrome, tendinitis, herniated spinal discs, and lower back pain. OSHA estimates that the regulations will prevent 300,000 injuries each year, but at an annual cost of $4.2 billion to American employers. Business organizations gauge the cost to be much higher, with some estimates coming in as high as $100 billion. Due to the broad scope of the coverage, the regulations will affect almost every Texas employer, regardless of size, with the exception of those employers in the construction, maritime and agricultural industries.

The regulations will initially apply to all manufacturing and manual handling jobs, and will expand to cover any job type at a company in which a covered MSD occurs. Manufacturing jobs include those jobs in which employees perform the physical work activities of producing a product and in which these activities make up a significant amount of the worktime. This includes such positions as assembly line workers, piecework assemblers, product inspectors, meat packers, machine operators, garment workers, commercial bakers, and cabinet makers. Manual handling jobs are jobs in which employees perform forceful lifting/lowering, pushing/pulling, or carrying. Examples of such jobs include nursing assistants, package sorters, deliverymen, baggage handlers, warehousemen, garbage collectors, and even grocery store baggers. Finally, coverage will expand to cover any job type in which the employer has even one worker with MSD symptoms related to the work. Such

triggering symptoms can be as serious as a herniated disk requiring surgery, or as innocuous as stiff or tingling muscles that linger for several days after an employee strains himself while performing a normal job duty.

The Ergonomics Program

What does an ergonomics program entail? The proposed standard identifies six elements common to a complete ergonomics program. They are:

1. Management Leadership and Employee Participation;
2. Hazard Information and Reporting;
3. Job Hazard Analysis and Control;
4. Training;
5. MSD Management, and
6. Program Evaluation.

Employers with manufacturing and materials handling jobs must implement the first two elements for those positions even when no MSD has occurred. When a

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covered MSD or persistent MSD symptom is reported in any position, a covered employer must adopt all six elements for that job type, unless it uses the Quick Fix Option discussed later.

The first element, **"Management Leadership and Employee Participation,"** requires employers to take several steps. First, it must assign the task of setting up and managing the ergonomics program to a person or group. Next, it must provide the necessary authority, resources, information and training to the person or group in charge. It must examine the existing policies and practices to ensure that they encourage reporting and participation in the ergonomics program. Employers must communicate periodically with employees about the program and their concerns about MSDs. Finally, employers must also allow employees to participate in the development, implementation and evaluation of the program.

The second element, **"Hazard Information and Reporting,"** requires employers to establish a method for employees to report MSD signs and symptoms and to get prompt responses. Employers must also evaluate employee reports of MSD signs and symptoms to determine whether a covered MSD has occurred. Finally, employers must periodically provide information to employees explaining how to identify and report MSD signs and symptoms.

The third element, **"Job Hazard Analysis and Control,"** requires employers to analyze problem jobs to identify and eliminate "ergonomic risk factors". If the factors cannot be eliminated, they must be materially reduced and the employer must monitor the position on a regular basis to determine whether further changes are necessary to prevent an MSD from occurring again.

Under the fourth element, **"Training,"** employers must provide training to employees so they know about MSD hazards, the ergonomics program and measures for eliminating or materially reducing the hazards. Employers must provide training when a problem job is identified, when new hazards are identified, and at least once every 3 years.

The fifth element, **"MSD Management,"** requires employers to work with employees to prevent their MSDs from getting worse. This can include providing employees with access to a health care professional and accommodating any work restrictions imposed by that professional for up to six months. This is perhaps the most controversial element of the proposed regulations. Under the proposed system, employers will have to ensure that employees who are working under restricted duties receive wages sufficient to maintain 100% of the after-tax earnings the employee was making prior to the MSD. Employers will also have to ensure that employees who are relieved of work completely receive wages sufficient to maintain 90% of after-tax earnings. This is a roundabout way of saying employers will be responsible for making up the difference between an employee's previous wage and any workers' compensation or disability payments made to the employee. Furthermore, the employer must maintain any benefits it provides, such as health insurance, seniority, retirement and savings plans, as if the employee did not have any work restrictions.

The final element, **"Program Evaluation,"** requires employers to periodically, and at least every three years, evaluate the ergonomic program. This will include consultations with employees in problem jobs and study of past results to ensure the program is materially reducing MSD hazards.

OSHA has proposed a "Quick Fix" mechanism allowing employers, under some circumstances, to correct an isolated MSD problem without having to implement a complete ergonomics program.

The "Quick Fix"

Fortunately, OSHA has proposed a "Quick Fix" mechanism allowing employers, under some circumstances, to correct an isolated MSD problem without having to implement a complete ergonomics program. In order to use a Quick Fix, employers must promptly make the fifth element, "MSD Management," available to the injured employee. Employers must also consult with similarly situated employees about the physical activities and conditions of the job, observe the employees performing the job to identify whether any risk factors are present, and ask the employees for recommendations for eliminating the MSD hazard. Employers must make Quick Fix changes to the job within 90 days and check the job within the next 30 days to determine whether the changes have eliminated the hazard. Employers must also keep a record of the Quick Fix changes

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and provide the hazard information to employees in the problem job type within 90 days.

If the Quick Fix changes made by the employer do not eliminate the MSD hazards within 120 days of the original MSD, or if another covered MSD is reported in that problem job within 36 months, the employer must implement a complete ergonomics program.

Record Keeping

Under the proposed regulations, employers that had 10 or more employees at any time during the preceding calendar year must maintain records relating to MSD problems and resolutions for, in most cases, three years. Some records, such as job hazard analysis and ergonomic program evaluations, can be replaced by updated records prior to the end of three years. Other records, such as individual employee's MSD records, must be kept until three years after the individual has left the company. While employers with fewer employees are not required to maintain these records, prudent employers will document their efforts any time they are required to comply with any part of these rules.

Public Reaction

At this point, readers may be considering whether this is an opportune time to invest in ergonomics consulting companies. The proposed rules and their elements are even more complex than they appear. While the rules are only 10 pages long in the *Federal Register*, OSHA also found it necessary to publish a 390 page "Preamble" to the rule explaining what those 10 pages meant.

Employers and business organizations such as the United States Chamber of Commerce and the National Federation of Independent Business have testified strongly against these proposals at OSHA's public hearings. Small businesses in particular are concerned that the rule's "one size fits all" approach places the same administrative and financial burdens on organizations with 10 employees that it places on those with 5,000 employees. Small businesses typically cannot afford to designate one person as the "health and safety officer" in charge of understanding and implementing this complex set of rules.

Commenters are also concerned that the agency is extending greater protections to workers than Congress has ever been willing to do. For example, the OSHA standard will cover many more employees than the Americans with Disabilities Act (ADA) covers. The OSHA standard could require an employer to provide very expensive assisting equipment to a worker with lower back pain, even when the injury does not rise to the level of a disability and the ADA does not apply. Furthermore, the Americans with Disabilities Act does not require employers to provide accommodations that pose an undue hardship on the business, yet the proposed rules would require businesses to provide wage replacement pay to affected employees, even when the extra costs could bankrupt the business.

Employers are also concerned that the system treats similarly situated employees differently. For example, consider employees "Tom" and "Bob", who work for a company that subscribes to workers' compensation. If Tom cannot work for six months because his job requires him to repeatedly lift heavy items and he herniates a disk as a result, he will not only receive workers' compensation, the employer will have to supplement his income to bring his after-tax earnings up to 90% of their previous level. On the other hand, if Bob accidentally breaks his leg on the job and cannot work for six months, he will receive workers' compensation only, because a broken leg is not generally considered a "musculoskeletal disorder" under OSHA's rules. As a result, employees will come to recognize that some work-related injuries are more valuable than others.

Finally, businesses are concerned that the proposed system will encourage employees to engage in fraud and abuse. For example, employees who injure themselves in non-work related activities will be tempted to say otherwise in order to gain the substantial financial benefits of the OSHA rules. In addition, once an employee is on light duty or completely relieved of duties, there is little incentive for him to return to full status. Finally, the rules provide no sanctions or penalties for employees who fraudulently claim to have suffered from a work-related MSD.

Conclusion

OSHA's official comment period has closed, and it appears that the agency intends to adopt the rule before the year's end. However, some industry leaders are working with members of Congress in continued opposition to the rule. Worried employers may want to consult with their Congressmen to share their concerns.

Mark Fenner
Attorney at Law

Observations from the Dais

Individual employers have brought numerous cases of unjust enrichment under the Texas Payday Law to my attention. Agency statistics indicate that employers lost several hundred such cases during a recent one-year time frame.

Under the current Texas Payday Law, an employer must obtain written permission from an employee in most circumstances in order to make a payroll deduction. This is true even if the employee has stolen from the employer, been overpaid accidentally, or failed to return funds or property issued by the employer. All too often employers fail to obtain signed, written payroll deduction authorizations for such purposes from their new employees. Employers learn too late that employees routinely refuse to sign such authorizations once they have been unjustly enriched. While its important to make sure you obtain written authorizations from your employees, it's also important to question the necessity of a law that tolerates theft and irresponsibility by employees.

The solution to this problem is simple. An employer should be allowed to deduct from an employee's paycheck to recoup funds when that employee has stolen, been accidentally overpaid, received and not repaid an advance or failed to return employer-issued property. If the employee feels the deduction was improper, he or she could then file a wage claim with TWC and require the employer to provide proof that an unjust enrichment has occurred. If the employer is able to produce such proof, the deduction should be allowed to stand. Our current system is backwards because it does not allow the employer to make a deduction unless they had the foresight to obtain advance written permission. This means the employee obtains a windfall and the employer has little recourse, short of potentially expensive civil litigation, to recoup funds or property that have been wrongfully obtained.

I recently spoke with an employer who experienced firsthand the frustration that the current Payday Law allows. The employer had an office manager whose duties included signing payroll checks for the entire staff. According to the employer, this manager began issuing and signing extra payroll checks to herself. The problem was not discovered during a routine audit performed by an outside CPA. The employer finally discovered the error when providing the IRS with some requested payroll and tax information. The employer then deducted funds from the manager's last paycheck in an attempt to recover just a small portion of the unjust enrichment. The manager filed a claim with TWC and was able to prevail because the employer did not have written authorization to make the deduction. The employer turned all the information over to his local District Attorney, but to date no criminal indictments have been issued. The employer consulted with his own attorney and discovered that the expense of pursing the matter with civil litigation would probably be more than the amount of funds that had been misappropriated. The employer was understandably furious that a state agency would require him to pay the same employee that had allegedly been taking money from him for an extended period of time.

I encourage all employers to obtain signed, written payroll deduction authorizations from all of their new employees and to request existing employees to sign such forms before problems arise. This may also be a very good time for the employer community to start uniting together behind this issue before the Texas Legislature reconvenes in January 2001. Your voices are much more likely to be heard if you let your elected representatives know that the law needs to be changed. As your designated representative at the TWC, I stand ready to assist you with this issue.

Commissioner Representing Employers

SUMMER HIRING

OPPORTUNITIES AND CHILD LABOR LAWS

The influx of high school and college students into the summer labor market should help to temporarily alleviate the labor shortages many employers have been experiencing. For both employees and employers this opportunity will come with responsibility. This is especially true when dealing with younger workers. High school age workers will need to learn the importance of coming to work on time, of being respectful toward coworkers and supervisors, and of putting in a day's work for a day's pay. Employers will have to heed both state and federal child labor laws that regulate summer employment.

Recent statistics indicate that every year 70 adolescents die in the United States from work-related injuries. Another 200,000 teens are injured on the job. 70,000 of these injuries are serious enough to require emergency room treatment. To make sure none of your young workers become part of these statistics, please make note of the following laws.

AGE OF EMPLOYMENT

Generally speaking, children under the age of 14 may not work. There are a few exceptions to this general rule. For example, younger children employed in non-hazardous occupations who are directly supervised by their parent(s) may legally work for a business owned or operated by their parent(s). Children under the age of 14 may also work as newspaper delivery persons.

HOURS OF EMPLOYMENT

Children ages 16-17 are not restricted in the number of hours they may work per day or per week, or in the time of day they may work. Of course, applicable overtime must be paid to children who work in excess of 40 hours per week. The working hours of children ages 14-15 are very restricted. Federal law is even more limiting than state law when it comes to hours worked. Under federal law, while not attending school during the summer months, children may not work more than 8 hours per day or more than 40 hours per week. They may not work before 7:00 a.m. or after 9:00 p.m. Even greater restrictions on working hours apply if you continue to employ the child once the fall school semester begins.

PROHIBITED DUTIES AND OCCUPATIONS

If you plan to employ children this summer, you are encouraged to contact the TWC's Labor Law Department or to visit TWC's web site for an exhaustive list of prohibited occupations. One occupation that should be highlighted because it tends to surprise most employers is driving. With rare exceptions, children under the age of 18 may not drive motor vehicles for their employers. We recommend that all driving be done by adults.

There are a wide variety of occupations that state and federal law prohibit children from entering. While this article will not attempt to enumerate an exhaustive list, some of the more common prohibitions include:

A child who is 14 or 15 years of age may not be employed in:

a. Manufacturing, mining, or processing;
b. Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;
c. Public messenger service

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d. Occupations in connection with:
   1. Transportation of persons or property
   2. Warehousing and storage
   3. Communications and public utilities;
   4. Construction (including demolition and repair)
   5. Occupations prohibited for a child who is 16 or 17 years of age

A child who is 16 or 17 years of age may generally not work with: (Limited exemptions may be provided for apprentices and student-learners working under government specified standards)
a. Power-Driven Woodworking Machines
b. Power-Driven Metal Forming, Punching and Shearing Machines
c. Power-Driven Meat Processing Machines
d. Power-Driven Paper Products Machines
e. Circular Saws, Band Saws, and Guillotine Shears
f. Roofing Operations
g. Excavation Operations

A child who is 16 or 17 years of age may not work with:
a. Manufacturing or Storing Explosives
b. Coal Mining
c. Logging, Sawmill, Lath Mill, Shingle Mill, or Cooperage Stock Mill
d. Radioactive Substances or Ionizing Radiations
e. Power-Driven Hoisting Apparatus
f. Mining Other Than Coal
g. Bakery Machines
h. Manufacturing of Brick, Tile, and Kindred Products
i. Wrecking, Demolition, and Shipbreaking

PENALTIES
TWC is authorized to inspect a place of business where there is good reason to believe a child is or has been employed within the last two years. Offenses under the Texas Child Labor Act constitute Class A or B misdemeanors, depending on the provision violated. Furthermore, TWC may assess an administrative penalty against the employer not to exceed $10,000 per violation. The Attorney General of Texas may also seek injunctive relief in district court against an employer who repeatedly violates the Texas Child Labor Act.

Play it safe this summer. Stay in compliance with child labor laws and make sure you pass on the concept of safe working habits to your younger employees.

Questions about the Texas and Federal child labor laws should be directed to the Texas Workforce Commission's Labor Law Department at 1-800-832-9243. The Labor Law Department's page on the TWC web site is found at www.twc.state.tx.us/ui/lablaw/lablaw.html

Aaron Haecker
Attorney at Law

Welfare Reform: An Update and Some Good News

For more than four years, Texas' and the nation's welfare system have been undergoing a dramatic transformation. Helping Texans move from welfare to work has been a special challenge for the Welfare Reform Division here at the Texas Workforce Commission and the 28 local workforce development boards around the state.

Here's some very good news: the hard work paid off in fiscal year 1999 as we learned that Texas ranked ninth in the nation for placing welfare recipients into jobs during the previous fiscal year. This high performance was recognized and rewarded through a $16.3 million bonus from the US Department of Health and Human Services. The greatest numbers of those placed in jobs were in the rural and border areas of Texas, which are particularly difficult to serve.

Between 1995 and the end of fiscal year 1999, Texas reached a major milestone: 383,641 Texans from 139,318 families left the state's welfare rolls – this is a 53% reduction in the welfare rolls! Based on the concept that individuals are ultimately responsible for their future and that of their families, Texas' welfare to work plan helps eliminate the barriers to employment that these Texans face. To encourage employers to hire recipients, there are tax credits, subsidized wages and other financial incentives. (If you'd like more information, contact your local workforce development board).

There's no question that we continue to face tough challenges in transitioning more Texans to self-sufficiency. However, through a lot of hard work and the willingness of thousands of Texas employers to help a neighbor enter the workforce, we've come a long way since September 1995.

IDEAS FOR LEGISLATIVE CHANGE IN 2001

Employers frequently offer us suggestions on how to improve Texas employment laws. We take those suggestions seriously and we regularly update you on ideas or actual pending legislation. Since the next session of the Texas Legislature will start in January 2001, its time to let you know what many of your business colleagues are thinking about.

UNEMPLOYMENT INSURANCE LAW

1. **Sixty day probation periods for new employees.**
Currently there is no minimum time an employee has to work for an employer before the employer's account becomes potentially subject to charges for unemployment benefits. This suggested change would protect employers' unemployment insurance accounts from the charges for any employee who worked for the employer for 60 or fewer days by excluding this time period from the definition of "employment".

2. **Recouping unemployment insurance wage payments.**
Currently the Texas Workforce Commission (TWC) recoups overpayments made to claimants by offsetting these amounts against those individuals' future claims for unemployment. An idea has surfaced that would allow TWC to collect these amounts through the full range of customary collection procedures used for employer taxes. Some collection techniques, such as using private collection agencies for recent overpayments, would also require a change in federal law.

3. **Use of unemployment Insurance Funds for Wage Subsidies.**
Currently claimants may refuse an offer of otherwise suitable work when the proposed pay is deemed to be too low. This change would encourage claimants to accept these positions by subsidizing the lower wage with unemployment insurance.

4. **Clarify "last work".**
Currently claimants must name the "last work" performed when filing an unemployment insurance claim. This means that if an employer fires an employee for misconduct or if the employee voluntarily quits for personal reasons, the former employee can go to work for one day for a sham employer - washing windows for a neighbor or family member, for example - and then be laid off for lack of work. This proposed change would clarify that "last work" must be work performed for an employer that has a valid tax account with the TWC.

TEXAS PAYDAY LAW

5. **Unjust Enrichment Cases.**
Currently the Texas Payday Law prohibits even otherwise lawful deductions if they are not specifically authorized by the employee in writing, unless the deduction is for payroll taxes or is ordered by a court. This proposed change would allow employers to take deductions without the employee's signature in cases of unjust enrichment. Examples of unjust enrichment would include theft, embezzlement and accidental payroll overpayments. If the employee filed a wage claim in response to an employer making such a deduction, the employer would bear the burden of establishing that the employee was unjustly enriched.

6. **Commission Review of Payday Law Cases.**
Wage claims under the Texas Payday Law cannot be administratively appealed beyond the hearing officer level. Currently a party's only other appeal option is to take their case to court. A suggestion has been proposed that would allow a wage claimant or an employer to appeal their case to the three-member Texas Workforce Commission. This appeal option is currently in place only for unemployment insurance claims.

GENERAL EMPLOYMENT LAW

7. **Workers' Compensation Reform.**
Section 451 of the Texas Labor Code prohibits employers from retaliating against employees for filing workers' compensation claims. Unfortunately, this allows employees to file Section 451 lawsuits against employers even when they have been off work on Workers' Compensation for years. This proposed change would create a rebuttable presumption that employers who terminate workers' compensation claimants who have been off work for six or more consecutive months are not doing so for retaliatory reasons.

Aaron Haecker
Attorney at Law

Your Technology Policies:

E-Mail, the Internet, Voice Mail, Telephone and Computer Network Systems Used by Employees

A recent survey by Rutgers University reveals that more than two-thirds of American employees use a computer at work daily. These workers spend an average of 35% of their workday using a computer and 23% of their working time on the Internet. In a separate study conducted by Nielsen/Net Ratings, it was found that Americans are spending twice as much time online at work than they do at home.

And, America's employers are using computers in soaring numbers. About 75% of all American employers now use intranet systems to provide human resource-related services to their workers. Research conducted by Watson Wyatt Worldwide indicates that this is a dramatic increase from 1998 when only half of the country's employers used intranet systems.

Advances in detection software are also allowing employers to flush out the Internet junkies in the workplace. A survey released April 12, 2000 by the American Management Association (the AMA) reveals that nearly three-fourths of major American companies responding to the survey review and record their employees' e-mail messages, phone calls, computer files and Internet connections. By contrast, the AMA survey taken in 1997 revealed that only 35% of employers were monitoring their workers' communications. The AMA received 2,133 responses from human resources professionals at AMA client and member companies for this year's survey. (*2000 AMA Survey, Workplace Monitoring and Surveillance.)*

According to the survey, the review and storage of e-mail messages has increased from 15% in 1997 to 38% this year. Thirty-one percent of the responding employers indicated they review computer files, an increase from 14% in 1997. Fifty-four percent of the businesses responding said they monitor their employees' Internet connections.

Given this explosion of technology in the workplace, it is becoming increasingly important to have a policy covering these types of communications to set reasonable standards of conduct and to limit your potential legal liability. E-mail, the Internet, intranet systems and voice mail have all become efficient and in many cases, invaluable tools in the workplace. However, to date, there are almost no reported cases from courts anywhere in the country which provide clear guidelines to explain the balance between an employer's legitimate business interests in these types of employee communications and their employees expectation of privacy. In the absence of such legal consensus, your policy should be clear, well publicized, and straightforward to reduce or eliminate any employee's expectation of privacy. Electronic monitoring policies need to be clearly defined and provided to all employees through every available communication channel.

An Internet, e-mail or voice mail invasion of privacy claim would probably be brought on the common law theory of "intrusion on seclusion." An employee plaintiff's success in such a lawsuit would depend on whether the employee had a reasonable expectation of privacy. Such expectations are usually created by an employer, within the employee's workplace environment.

To minimize your employees chances of successfully asserting an invasion of privacy claim, you must adopt express, clear e-mail, voice mail, and Internet policies

informing your employees that they do not have a personal privacy right in any matters received by, created in, sent over or stored in your system. Whether or not you allow your employees to use company computers for personal business during their breaks, lunch hours, and before or after work hours is a decision only you can make.

The real issue should be "Are we getting our work done, and is the quality of that work what it should be?" Many employers have no objection to their employees using company resources so long as they get their required work done in a timely fashion and don't abuse the privilege. It's probably unrealistic to expect that employees will never look at a weather report or check the score from last night's big game on the Internet. And, let's face it: you need your employees to be comfortable enough with their computers to work effectively. Many times, actually using the computer is the only way to obtain that proficiency. However, most employers do not want their employees playing endless games of Solitaire or accessing pornographic adult sites during working hours.

As in all areas of employee conduct, an employer has the right to establish reasonable standards of behavior and stick to them every time, with everybody. Your policy should inform all employees that information on company-provided computers and e-mail is to be used for business purposes during working hours, that computer information and e-mail is the company's property, and that you may be monitoring such communications from time to time for business purposes.

This policy should be communicated to your employees not only through your employee policy handbook, but also in e-mail, voice mail and Internet instruction guides, and on-screen notices. Employees should also be required to sign and acknowledge your policy of telephone, electronic and computer network access.

As in any other area, developing, communicating and enforcing a consistent policy in an evenhanded manner should be a priority. Without a policy, you may have a very hard time disciplining employees who misuse a voice mail, e-mail or Internet system. Even if you allow some level of personal use of these systems, you will almost certainly want to prohibit inappropriate conduct, such as sending racist or sexist jokes to co-workers or running the Super Bowl pool over your system.

More than half of the employers surveyed in this year's AMA study indicated they have disciplined employees for their personal use or misuse of telephones, Internet access or e-mail. About 25% of the companies have fired workers for these violations. For example, Xerox Corporation, based in Stamford Connecticut, fired 40 workers in the fall of 1999 for what it deemed to be gross misuse of company Internet resources. According to Xerox company spokeswoman Christa Carone, the fired employees were spending "the majority of their days on inappropriate sites."

Many employers are also using "blocking" software to prevent telephone connections to inappropriate or unauthorized phone numbers. In an effort to control employee misuse of company telecommunications equipment, 29% of employers block Internet connections to inappropriate or unauthorized web sites.

Accessing employee voice mail can be analogized to telephone monitoring cases. It has long been established by courts around the country that employers may not listen to their employees personal phone calls any longer than absolutely necessary to decide if a conversation is personal in nature. Likewise, the safest advice for accessing messages left on an employee's voice mail system is to fast forward any voice mail messages that are of a personal nature.

A. Sample E-Mail, Voice Mail, Internet Policy

XYZ Corporation respects the privacy of its employees. However, an XYZ employee may not expect such privacy rights to extend to the use of XYZ-owned systems, property, equipment or supplies or to work-related conduct. This policy is intended to notify all XYZ employees that no reasonable expectation of privacy exists in connection with your use of XYZ's systems, property, equipment or supplies. XYZ employees are prohibited from withholding information maintained within company supplied containers, including but not limited to, computer files computer databases, desks, lockers and cabinets. The following rules also apply to the use of XYZ property:

1. XYZ's Right to Access information. While XYZ employees have individual passwords to e-mail,

continued Your Technology Policies

voice mail and computer network systems, these systems are at all times accessible to and by XYZ and may be subject to unannounced, periodic inspections by XYZ for business purposes. This policy applies to all telephone, electronic and computer net work systems which are accessed on or from XYZ's premises, used in a manner which identifies the employee with XYZ, accessed using XYZ computer equipment and/or via XYZ-paid access methods. XYZ employees may not use secret passwords and all system passwords must be available to XYZ at all times. XYZ maintains back-up copies of e-mail and voice mail, and these records, as well as the usage records of XYZ computer network systems may be reviewed by the company for legal, business or other reasons.

2. Use is Restricted to XYZ business. XYZ's employees are expected to use company e-mail, voice mail and computer network systems for XYZ business (during working hours), not for personal reasons. Personal reasons include, but are not limited to, non-job-related communications, research or solicitations, or soliciting for political or religious causes, outside organizations or other commercial ventures.

3. Prohibited Content. XYZ employees are prohibited from using XYZ's telephone, electronic or computer network systems in any manner that may be offensive or disruptive to others. This includes, but is not limited to, the transmission of racial or ethnic slurs, gender-specific comments, sexually explicit images or messages, any remarks that would offend others on the basis of their age, political or religious beliefs, disability, national origin or sexual orientation, or any messages that may be interpreted to disparage or harass others. No telephone, electronic or computer network communications may be sent which represent the sender as from another company or as someone else, or which try to hide the sender's identity. Inappropriate or excessive personal use of XYZ's property or telephone, electronic or computer network systems will result in disciplinary action, up to and including termination.

Because it is so important to reduce or negate an employee's expectation of privacy, it is very wise to obtain the express written consent of each employee allowing you to review and monitor messages, files and the usage of these systems.

B. Sample E-Mail, **Voice Mail**, Telephone and Computer Network Systems Use Acknowledgment Form:

I acknowledge that all telephone and electronic communications systems and all information received from, transmitted by or stored in these systems are and will remain XYZ's property. I also acknowledge that these systems are to be used only for job-related purposes (during business hours), not for personal purposes. I understand that I have no personal privacy right or any expectation of privacy in connection with my use of this equipment or with the receipt, transmission, or storage of information in XYZ's equipment.

I agree not to access a file, use a code, or retrieve any stored communication unless I am authorized to do so. Further, I agree to disclose messages or information from telephone or electronic communications systems only to authorized individuals. I acknowledge and consent to XYZ's monitoring my use of this equipment at its discretion, at any time. XYZ's monitoring may include printing out and reading all telephone and e-mail leaving, entering, or stored in these systems. I further agree to abide by XYZ's policy prohibiting the use of telephone and electronic communication systems to transmit offensive, lewd, racist or sexist messages.

I understand that violation of this policy can lead to disciplinary action, up to and including immediate termination.

_____ _____

Employee Signature Witness

_____

Date

Renée M. Miller
Attorney at Law

These sample statements, policies and forms are merely guidelines. Every employer's policies must be tailored by individual circumstances. Before implementing any policies, management should consult with legal counsel to ensure compliance with appropriate federal and state statutes and case law to reduce the possibility of arbitration or litigation.

Congress Repeals Social Security Earnings Limit

In a rare display of bipartisan agreement, Congress recently unanimously passed legislation eliminating the Social Security earnings penalty for workers between the ages of 65 and 69. President Clinton signed this measure into law on April 7, 2000, but the change is retroactive to January 1. Until now, these individuals' Social Security benefits were cut by $1 for every $3 they earned in excess of $17,000 per year.

The new law does not affect younger retirees (aged 62 to 65) who will still forfeit $1 for every $2 they earn over $10,080, or Americans over the age of 70, who have always been allowed to work as much as they desire without losing any benefits.

This new law, with its unanimous and bipartisan support, may be an indication of changing attitudes toward older people and work. For example, in 1964, 43% of all American males between the ages of 65 and 69 worked. However, by 1985, only 25% were working, a decline of about 40% in just two decades. During this same brief period, the employment rate for males in the next younger age group – 60 to 64 – dropped by almost one third, from 79% to 55%.

These trends stopped in the mid-1980's. The number of men in their 60's who were still in the workforce began stabilizing and then increasing; the same was true for older women. The era of earlier and earlier retirement seems to be over.

There are a number of reasons for this change. The concept of mandatory retirement has been eliminated for the vast majority of industries and professions, and the nation is enjoying record-breaking low unemployment, increasing the demand for workers of all types and skills. And, many Americans are living longer and enjoying better health than ever before. A number of surveys suggest that most baby boomers (who will be retiring during the next several decades) hope to continue working past the age of 65, even if only part time.

Get Your New Employees Up to Speed Quickly: Some on the job training tips

Every employer dreams of hiring new workers who are already experienced in the type of work they'll be doing. However, especially in today's tight labor market, that simply isn't always possible. Here are a few basics of on the job training to help get your new workers up and running as quickly as possible.

First, never assume that a new employee is familiar with the procedures or equipment of the job they've been hired for, regardless of what their resume says they've done for another employer in the past. Procedures and equipment vary wildly from company to company, sometimes even from branch to branch of the same employer. Many types of equipment require safety training without which employees are at risk, and the company puts itself in danger of violating OSHA standards and regulations. New employees should always be thoroughly warned and trained about hazardous equipment.

Second, before beginning a new employee's on the job training, meet with supervisors and other key employees to decide exactly what the new employee is going to be doing. Write these functions down and 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. There is no federal or state law requiring a private sector employer to translate job descriptions, policies or instructions into a language other than English. However, if you realistically expect to have enforceable policies or job descriptions, it is extremely helpful to make sure that your expectations are explained to the new worker in a language that they understand and comprehend.

Third, if at all possible, assign an experienced employee to work with your new hire 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. Many employers feel that the best case scenario is to have the employee who is leaving the position be in charge of training the new worker (unless the employee was fired or has quit with negative feelings toward the company). If an employee is leaving on good terms and quitting with two to three weeks notice, often a smooth transition can take place by having that employee work with the new hire for as much of that notice period as possible.

Finally, if you are hiring large number of employees at the same time, you may with to consider a more formal orientation and training program.

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LEGAL BRIEFS Summer 2000

A Unanimous Texas Supreme Court Refuses to Create a New Exception to the At-Will Employment Doctrine

Here's some good news for Texas employers and the at-will employment doctrine. In a 9-0 opinion, the Texas Supreme Court recently refused to impose a legal obligation on employers to act with "good faith and fair dealing" in their relations with employees. The court held that such a duty cannot be forced on employers because there is no "special relationship" between an employer and its workers. ***City of Midland v. O'Bryant***, No. 97-0954, Texas Supreme Court (April 6, 2000).

While this was the first time that the court specifically addressed this issue, the ruling conforms with the state's at-will employment doctrine. Basically, the at-will doctrine means that the employment relationship is indefinite in duration: employees are free to quit and employers are free to fire at any time, "for any reason or no reason at all," as the court said. The high court ruled that imposing a duty of good faith and fair dealing on the City of Midland would permit the plaintiffs to make an "end run" around existing laws regulating the employment relationship. The five plaintiffs had already filed and voluntarily dismissed two lawsuits brought under the Americans with Disabilities Act.

Judge Priscilla R. Owen, reversing the state appeals courts' decision, wrote "a court created duty of good faith and fair dealing would completely alter the nature of the at-will employment relationship, which generally can be terminated by either party for any reason, or no reason at all, and we accordingly decline to change the at-will nature of employment in Texas."

The court stated that its ruling applies to both private and government employers, "inasmuch as both types of employers are subject to applicable laws, regulations, and contractual agreements." Additionally, the court said that the holding applies whether or not the employment relationship is governed by an express agreement. The court reasoned that a common-law duty of good faith and fair dealing is unnecessary when there are express contractual limits on the parties' rights.

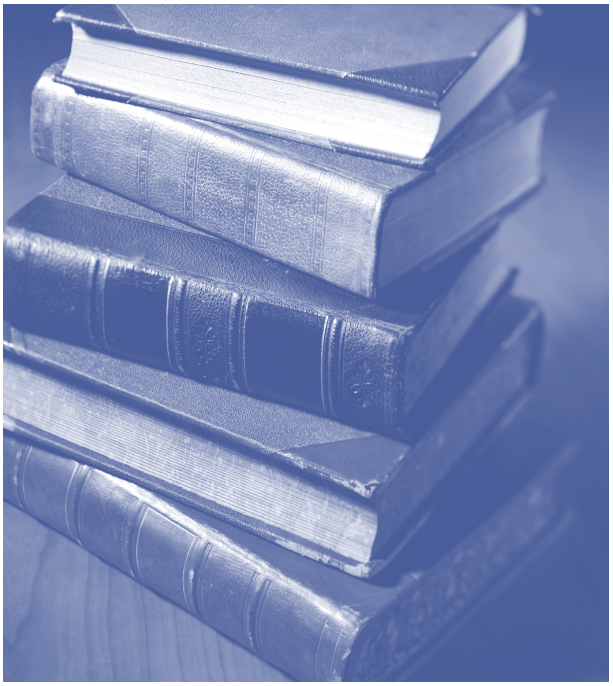
The Facts

The case was brought by five police officers, four of whom were disabled, who were employees of the City of Midland. The City informed the officers that their duties were going to be reclassified as civilian positions and they were given three choices: 1. They could stay in their jobs and be reclassified as civilians; 2. They could transfer to other positions in the police department and keep their status as police officers; or 3. They could transfer to other civilian job positions. However, if the officers chose to accept the civilian job positions, both their benefits and pay would be cut. The City of Midland asserted that it was facing budgetary constraints, and the job reclassifications were simply a cost-cutting measure.

The five officers sued the City of Midland, alleging that it was unlawful to require them to demonstrate greater physical capabilities than they had in the past. For some reason, the officers voluntarily dismissed this case. The City then reclassified the five officers in civilian jobs. In response, the officers filed a second lawsuit, this time asserting discrimination, retaliation and that Midland had breached its "duty of good faith and fair dealing." That claim was dismissed by a trial judge. However, the question of whether the City had a duty of good faith and fair dealing to its employees eventually made its way to the state's highest court.

Legal Analysis

The Texas Supreme Court began its unanimous opinion by pointing out that not every contractual relationship creates a duty of good faith and fair dealing. In an earlier lawsuit involving insurance carriers,



the court held that such a duty exists only if there is a "special relationship" between the parties. In that case, the court held that insurance carriers owe a duty of good faith and fair dealing to their insureds because the very nature of such a contractual agreement would allow "unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims."

The court went on to say that, "if an insured suffers a loss, he cannot simply contract with another insurance company to cover that loss. ***By contrast, an employee who has been demoted, transferred or discharged may seek alternative employment." (emphasis added***)

The court ruled that a "special relationship" does not exist in an employer/employee relationship for two reasons: 1. In Texas, employment is "at will;" and 2. Insurance contracts are "much more restrictive than employment agreements."

The court also pointed out that in Texas, there is only one recognized public policy exception to the common law at-will doctrine in the state, recognized more than a decade ago in ***Sabine Pilot Service, Inc. v. Hauck*** (which held that employees may not be fired for refusing to perform illegal acts for which there are criminal penalties). The court reasoned that if they adopted another exception for breach of a duty of good faith and fair dealing, it would "tend to subvert those statutory schemes (which are adopted to govern employment relationships) by allowing employees to make an end-run around the procedural requirements and specific remedies the existing statutes establish."

The Midland police officers sued for discrimination and retaliation under the Texas Labor Code. However, the court held that because the officers failed to exhaust their administrative remedies, those claims were properly dismissed. In the eyes of the court, the officers were effectively asking to be excused from the administrative requirements by "creating a common law cause of action for the same actions of the City on which they based their suit under the Labor Code." The court refused to recognize a claim for breach of the duty of good faith and fair dealing under these facts, and upheld the dismissal of the officers' claim.

While the officers lost on most of their claims, two of them will get a new hearing on their claims for reinstatement, another issue at the trial court level.

The Bottom Line

This was a welcome and helpful ruling for Texas employers: the Supreme Court wisely recognized that employees could use good faith and fair dealing claims to circumvent administrative requirements to resolve employment-related disputes. To rule otherwise would have created a much broader exception to the at will employment doctrine than ever before.

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Helpful Labor and Employment Law Websites

Name	Website
Findlaw Labor and Employment Law	www.findlaw.com
Hieros Gamos Labor Law	www.hg.org/employ.html
Legal Engine	www.legalengine.com
LII Labor Law Materials	www.law.cornell.edu
Law News Network Employment Law Center	www.lawnewsnetwork.com/practice/employmentlaw/
Online Law Library	www.fplc.edu/ollie.htm
Nolo Legal Encyclopedia	www.nolo.com/encyclopedia/index.html
WWW Virtual Law Library	www.law.indiana.edu/law/v-lib

(The above sites will help you find just about every law in the country – and every federal and state court decision that's available on the Internet. And, they're free!)

Labor and Employment Forms Sites

Forms	Website
FMLA Forms	www.dol.gov/dol/esa/fmla.htm
IRS Forms (W04, SS-4, etc.)	www.irs.ustreas.gov/prod

Government Agency Sites

Agency	Website
Americans with Disabilities Act	www.usdoj.gov/crt/ada/pubs/ada.txt
US Department of Labor (DOL)	www.dol.gov
DOL Employment and Training Admininstration	www.doleta.gov
Federal Mediation and Conciliation Service	www.fmcs.gov
DOL – ELAWS – Employment Laws Assistance For Workers and Small Business	www.dol.gov/elaws
DOL – Office of Federal Contract Compliance	www.dol.gov/dol/esa/public/ofcp_org.htm

continued Helpful Labor and Employment Law Websites

DOL – Wage and Hour Division	www.dol.gov/dol/esa/public/whd_org.htm
Equal Employment Opportunity Commission (EEOC)	www.eeoc.gov
Immigration and Naturalization Service	www.ins.usdoj.gov
Occupational and Safety Health Administration	www.osha.gov
National Labor Relations Board (NLRB)	www.nlrb.gov
DOL – Pension and Welfare Benefits Administration	www.dol.gov/dol/pwba
DOL – Veterans Employment and Training Service	www.dol.gov/dol/vets
Texas Workforce Commission	www.twc.state.tx.us
Texas Workers' Compensation Commission	www.twcc.state.tx.us
Texas Comptroller of Public Accounts	www.cpa.state.tx.us

Other Useful Labor and Employment Sites

Name	Website
ADA Document Center	janweb.icdi.wvu.edu/kinder/
ADA Technical Assistance Program	www.adata.org/
ERISA Information from BenefitsLink.com	www.benefitslink.com/erisa/index.html
HR Internet Guide	www.hr-guide.com
Layoff Updates	www.hrlive.com

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