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Ron Lehman, Commissioner Representing Employers

In This Issue

From the Dais - Winter 2005

Dear Texas Employers,

As 2005 unfolds, there are many reasons to be optimistic about doing business here in Texas. While other states struggled through budget deficits and job losses, Governor Perry and the Texas Legislature had the foresight and the tenacity to ensure that despite tight budget constraints, dollars were devoted to spurring growth and economic prosperity. In 2003, our Leadership managed the budget without raising taxes, instituted tort reform to add predictability and minimize the risk of frivolous lawsuits and put the focus on economic development through the creation of the $300 million, deal-closing Texas Enterprise Fund.

Unemployment rates have declined by more than a percentage point since this time last year, thanks to the addition of 137,700 new jobs created by Texas employers since January 2004, and unemployment insurance (UI) claims fell more than 13% during 2004. These are very encouraging trends.

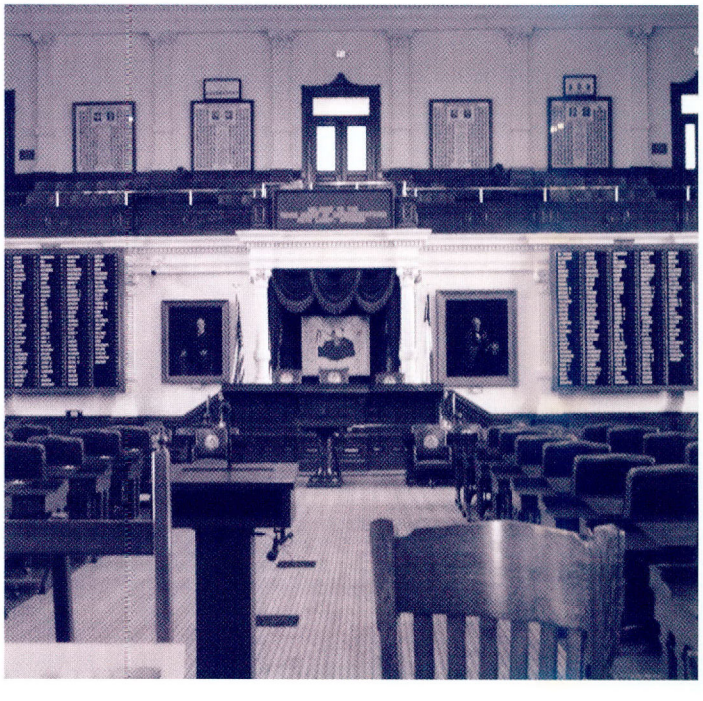
Two years ago, the 78th Texas Legislature also gave the Texas Workforce Commission (TWC) the authority to finance shortfalls in the Unemployment Compensation Fund - the fund from which UI benefits are paid to former employees who are out of work through no fault of their own - with alternative borrowing options, including bonds. Rather than borrowing from the federal government at a higher interest rate, TWC sold bonds to finance the gap in the Fund. This action accomplished three important things: First, we avoided raising taxes by about $1 billion. Second, by borrowing the money through the bonding option over a five-year period, Texas employers saved $300 million in interest owed. Third, large fluctuations in your state unemployment tax rates have been minimized and tax rates have now stabilized for two years in a row, 2004 and 2005.

At TWC, we are working hard to minimize your unemployment insurance costs. In addition to lowering the tax burden, TWC is taking an aggressive approach to eliminating fraud, waste and abuse in all of the programs the agency administers. Beginning in late 2003, the agency initiated a comprehensive project to strengthen fraud detection and enforcement activities. These efforts are paying off by promoting greater integrity and controls in the UI system and giving the agency additional tools to pursue prosecution of those who try to cheat the system. We pledge our continued efforts to keep your taxes as low as possible.

We also realize that the best way to keep your unemployment insurance rates low is to help unemployed Texans find a job. To that end, TWC took a series of steps to accelerate the process of helping employers find workers more quickly, and workers find jobs more quickly. We raised the measures on workforce boards, we increased the number of work searches required of claimants, and we developed WorkInTexas.com, a comprehensive online job resource that is a fast, easy and effective way to recruit qualified job applicants, no matter what your field. Even if you aren't hiring currently, take a minute to browse the site. WorkInTexas.com is free, has the largest database of workers in Texas, and is backed by people who are just a telephone call away.

Legislative Outlook: Workforce and Economic Development

The 79th Session of the Texas Legislature began in January, and lawmakers will be dealing with many issues of great importance to Texans in general and to Texas employers in particular in the coming months. While school finance, reducing



property taxes and reforming the state's workers' compensation system are complex and challenging issues that have already taken center stage, some of the most important legislative proposals to the long-term economic vitality of the state involve workforce and economic development.

Thanks to actions taken in previous legislative sessions, there have already been some tremendous success stories. As Governor Rick Perry likes to say, businesses choose Texas because the word is out that taxes are low, the workforce is skilled, and Texas is wide open for business and job creation. In the past year, Texas has attracted nine of the 20 largest capital investments in the nation and has been named the state with the number one business climate by Site Selection Magazine. In just the 18 months since its creation, more than $180 million has been allocated from the Texas Enterprise Fund to close deals with employers that will create thousands of new jobs and pump more than $6 billion into the Texas economy. Many believe that this is just the beginning.

Now, Governor Perry is asking the legislature for $300 million to fund the Emerging Technologies Fund, a new initiative to foster innovation, research and job creation in emerging high-tech industries. The targeted industries include semiconductor manufacturing, biotechnology, nanotechnology, environmental sciences and advanced energy. It is proposed that $150 million would be dedicated to developing collaborative efforts between institutions of higher education and the private sector, creating "Regional Centers of Innovation and Commercialization." $75 million would be dedicated to match research grants awarded by federal or private sponsors while $75 million would be used to help make Texas public universities world leaders in technology research.

The Governor is also proposing that the Skills Development Fund, the highly successful program used to support customized training for employers, be doubled to $50 million over the next two years. Since the inception of this program in 1996, nearly 2,500 employers have received customized training for more than 139,000 Texas workers.

Bills Relating to Unemployment Insurance of Interest (UI) to Texas Employers

There are a number of other bills that have been introduced that relate to the state's UI program that merit the attention of Texas employers. They include:

- **SB 788** - WAITING WEEK REFORM - would remove an incentive to remain unemployed by making the "waiting week" noncompensable. Current state law requires TWC to pay for the first seven days of unemployment benefits (the "waiting week") after the worker has collected benefits for three consecutive weeks of unemployment. However, this discourages people from returning to work during the fourth week because those who remain unemployed will receive benefits both for this week and the waiting week. While the total amount of benefits a worker would be eligible to receive would remain the same, the starting point for receiving benefits would be delayed. Many other states have already adopted similar provisions.

- **SB 789** - REDEFINE "IMPROPER BENEFIT" - would make it possible for TWC to recover overpayments, regardless of their cause. Currently, the Texas Unemployment Compensation Act (TUCA) prevents TWC from recovering overpayments when they are created solely as the result of agency error. In 2003, such errors created several million dollars in overpayments that the agency had to waive.

- **SB 790** - BENEFITS INTEGRITY - would improve the integrity of the unemployment compensation system by preventing workers who were fired for misconduct from using the wages earned in those jobs as part of their unemployment claim. Current law allows these workers to use those wages. Higher tax rates on all employers then reimburse the UI trust fund for the cost of those benefits.

- **SB 791** - CLOSE THE LAST EMPLOYER LOOPHOLE - would improve UI program integrity and trust fund solvency by requiring that a claimant's last employing unit be a legitimate, "covered" employer. Currently, if an individual finds short-term work with a non-covered employer (washing windows for a neighbor for example), and is "laid off", they can name that job as their last employer and qualify to receive unemployment benefits. Then, the entire burden of the UI benefits would go to the last "covered" employer regardless of the nature of the separation or the type of work the individual was most recently laid off from.

- **SB 1229** - OMNIBUS UI BILL - would make a number of changes to current law. For example, for an employee of a staff leasing company to be considered to have left their last work without good cause (and disqualified from receiving UI benefits), the staff leasing company (or a client acting on its behalf) would be required to give written notice and instructions to the employee to contact the staff leasing company for a new assignment *at the time the assignment concluded*. It would also redefine the "last work" and "person for whom the claimant last worked" as the person the claimant last worked for in six or more consecutive weeks and earned wages equal to at least six times the claimant's weekly benefit amount or a "covered" employer as defined by the TUCA or the unemployment law of any other state. It would also allow TWC to hire a private collection agency to seek repayment of otherwise uncollectable improper benefits and redefine "improper benefit" as any benefit or payment obtained by a person who is disqualified or ineligible to receive them.

- **SB 1230** - OPT-IN - is a contingency bill in the event that a change in federal law is passed to allow Texas to assume responsibility for funding the operations of the state's UI system. Under the current inequitable system, Texas received only 37 percent of the FUTA dollars that employers remitted to the federal government to administer this state's unemployment compensation system in 2002. The rest of the dollars were distributed to other states by the federal Department of Labor to subsidize their UI operations or were kept by the federal government. If Texas were given the responsibility to fund the operations of the UI system, the administrative tax on Texas employers would potentially decrease by 50%, resulting in a $280 million reduction in taxes in 2005.

- **SB 1231/HB 3250** - SUTA DUMPING - would prohibit State Unemployment Tax Avoidance (also called "SUTA dumping") schemes. Congress unanimously passed legislation in August 2004 requiring all states to pass laws imposing new penalties on employers seeking to reduce their UI taxes by moving workers from established business entities with high tax rates to newly established corporations - businesses with no record of layoffs - solely to take advantage of lower UI takes. This practice shifts these companies' tax burden to other employers while negatively impacting the solvency of state UI trust funds.

To monitor these and other pending bills or to contact your legislators, visit the Texas Legislature online at www.capitol.state.tx.us.

Let Us Hear From You

We have recently created a brief (just 12 questions) online survey for our readers. It's totally voluntary and confidential and takes just a few short minutes to complete. We'd like to know what your workforce needs and concerns are, and how we can serve you better in the future. If you're interested, I encourage you to take a few moments to visit http://www.surveymonkey.com/s.asp?u=46838926795 and share your insights with us.

As always, it is an honor and a privilege to represent you here at the Texas Workforce Commission, and I look forward to cheering your successes in the future.

Sincerely,

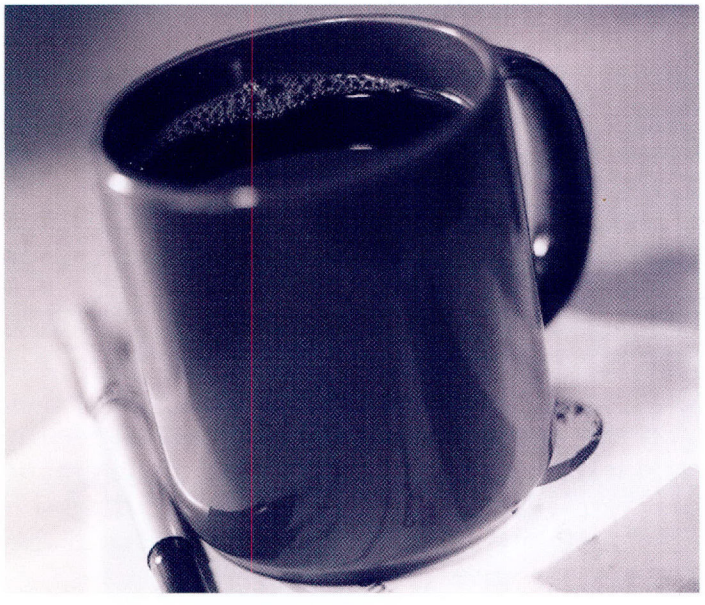
Ron Lehman
Commissioner Representing Employers

The TWC Appeals Policy and Precedent Manual: What is it and Why Should Texas Employers Know About It?

Learn About This Important Guide to UI Claim and Appeal Decisions

One of the most useful (and least well known) resources for employers to consult when responding to unemployment claim notices, preparing for appeal hearings, or even when considering what personnel actions to take, is the Appeals Policy & Precedent Manual (AP&P, or precedent manual) used by the Texas Workforce Commission. Consisting of important cases designated as precedents over the years by the three member Commission, the precedent manual helps guide claim examiners, Appeal Tribunal hearing officers, and the Commission in deciding how individual cases should go. A working knowledge of the precedent manual will help any employer manage its UI claims better.

In an effort to help employers better acquaint themselves with this essential resource, this article will highlight some of the more important and frequently-cited precedent cases. In this issue, we emphasize a few of the most important precedent cases in several different areas in which employers are likely to have unemployment claims; each precedent case is presented in summary format – for the full text as it is found in the precedent manual, see the online version at http://www.twc.state.tx.us/ui/appl/app_manual.html.



Discharge for Attendance Problems

Appeal No. 2770-CA-76. Since the final absences for which the claimant was fired were due to claimant's personal illness, no misconduct disqualification is possible.

Appeal No. 947-CA-77. Even though the claimant was absent due to personal illness, her failure to give proper notice of the absences was misconduct.

Appeal No. 660-CA-76. Absence without notice for two days in a row was misconduct, even without a clear policy to that effect.

Appeal No. 87-08030-10-050587. Missing work due to being in jail, when the arrest and jailing were for an offense shown to have been committed by the claimant, was misconduct.

Appeal No. 2622-CA-76. A claimant who was arrested and detained in jail for three weeks was not discharged for misconduct, since the charges were later dropped.

Discharge for Inappropriate Conduct

Appeal No. 3366-CA-75. A claimant who was fired for calling a supervisor a vulgar name in response to the supervisor having done the same was not fired for misconduct.

Appeal No. 3697-AT-69. (Affirmed by 405-CA-69). Using profanity toward a coworker in response to provocative questions about the claimant's personal life was misconduct, since the claimant could easily have asked a supervisor to address the problem.

Appeal No. 243-CA-76. Disqualification cannot be based on an act of misconduct that occurred three months prior to the claimant's termination, because it was too remote in time from the discharge to have been the real reason for the termination.

In TEC v. Hughes Drilling Fluids, 746 S.W.2d 796 (Tex. Civ. App.–Tyler 1988, writ granted), the

Court of Appeals held that an "at-will" employee who continued to work for the employer after being notified of a drug testing policy accepted that policy as part of the terms and conditions of employment. The policy was reasonable and the claimant's refusal to submit to a urine sample amounted to misconduct.

Appeal No. 87-16061-10-091187. In response to a supervisor's explanation that the claimant had not been singled out for a reprimand, the claimant called the supervisor a liar. His insubordinate behavior constituted disqualifying misconduct.

Appeal No. 4622-CA-76. The claimant was discharged for having requested clarification of several conflicting instructions which she had been given by her supervisor within a short period of time. The claimant's action did not constitute a refusal to obey her supervisor's instructions and was thus not misconduct connected with the work.

Discharge for Dishonesty

Appeal No. 95-014287-10-101895. Falsification of an employment application by omission or misrepresentation of material information, generally speaking, constitutes misconduct connected with the work, no matter when such fact is discovered.

Discharge for Poor Work Performance

Appeal No. 96-003785-10-031997. The claimant, a cafeteria dishwasher, was discharged after warnings for poor job performance. Despite his claim that he performed the job to the best of his ability, the fact that the articles he washed were often still dirty indicated otherwise. Where the work is not complex, an employee's failure to pay reasonable attention to simple job tasks is misconduct.

In TEC v. Potts, 884 S.W.2d 879 (Tex. App.-Dallas 1994, no writ), the Court of Appeals held that a claimant who consistently misfiles orders or who fails to follow simple, written procedures engages in mismanagement and neglect. The fact that a claimant does follow procedures after being reprimanded demonstrates an ability to do the job and does not negate a finding of misconduct.

Appeal No. 1923-CA-77. Where a claimant exercised due care in the preparation of retail sales tickets and has never been warned of her performance in that regard, the claimant's occasional mathematical errors in preparing such tickets do not constitute misconduct connected with the work, as such errors do not reflect a lack of ordinary prudence.

Appeal No. 1781-CA-77. After the claimant had performed satisfactorily for one and a half years, the quality of her work deteriorated dramatically in spite of warnings. The unexplained deterioration in the quality of the claimant's work demonstrated misconduct connected with the work.

Chargeback After Employee Transfers

Appeal No. 8427-ATC-69 (Affirmed by 79-CAC-70). An administrative transfer of an employee from one company to another is a form of layoff and is a chargeable work separation, if the employee did not have the option of remaining with the original employer.

Case No. 172562 (2001). The employer sold its business. The claimant was offered comparable work with the new owner, but declined the offer. The claimant's rejection of the new company's affirmative job offer was a voluntary resignation without good cause connected with the work.

Importance of Warnings

Appeal No. 2027-CA-EB-76. A claimant's discharge for tardiness caused by a flat tire on the way to work was not for misconduct, since the claimant, who commuted to work from a nearby town, had advised his supervisor that he might be late from time to time due to transportation problems and this state of affairs had been expressly condoned by the supervisor. The claimant had never been warned about his tardiness.

Appeal No. MR 86-29-10-121986. The claimant was discharged after the employer received a letter from the claimant expressing her dissatisfaction with her job and pay. The letter suggested alternative solutions; however, the employer interpreted the letter as a demand for more money. The employer did not discuss the letter with the claimant before she was terminated. A poor attitude, which is not accompanied by a refusal to work or a prior warning that a poor attitude could lead to discharge, is not sufficient to establish misconduct.

Good Cause to Resign

Appeal No. 502-CA-77. Dissatisfaction with working conditions, under which the claimant had worked for two years, did not provide the claimant with good cause connected with the work for quitting.

Appeal No. 1089-CA-72. A claimant has good cause connected with the work for quitting after making a reasonable effort to resolve legitimate complaints with management.

Appeal No. 651-CA-72. A claimant does not have good cause connected with the work for quitting a job because his salary was not raised, if he is being paid the wage agreed on at the time of hire.

Ambiguous Work Separations

Appeal No. 2028-CA-77. A claimant who resigns after having been given a choice of resigning or being discharged, will be treated, for the purposes of the law of unemployment insurance, as having been discharged and the question of whether or not the claimant should be disqualified, due to the circumstances surrounding her separation, will be considered under Section 207.044 of the Act.

Appeal No. 3288-CA-76. Leaving work without notice in order to see a doctor and missing another workday without notice constituted a disqualifying voluntary quit on the claimant's part, since she failed to take reasonable steps to protect her job.

Appeal No. 2176-CA-76. The claimant had missed work due to illness on a number of occasions and assumed she was being fired when her manager finally told her he needed someone who was dependable. Her failure to seek clarification of her status meant that she had resigned without good cause connected with the work.

Appeal No. 3518-CA-75. After a manager agreed with a claimant's statement during a reprimand that the claimant could find better work elsewhere, the claimant should have cleared his status up before assuming he had been fired, and his failure to seek clarification was held to be a disqualifying resignation for personal reasons.

Evidence Needed for an Appeal

Appeal No. 658-CA-77. The sworn testimony of one party, based on her firsthand knowledge, should be given greater weight than exclusively secondhand, hearsay testimony offered by another party.

Appeal No. 87-07136-10-042887. A prior inconsistent statement by the claimant can help prove misconduct connected with the work on the claimant's part.

Appeal No. 2606-CA-75. The claimant alleged she had been advised by her doctor to quit, but failed to produce any evidence of such advice at two hearings and was disqualified for quitting for personal reasons.

In Mercer v. Ross, 701 S.W.2d 830 (Tex. 1986), the Supreme Court held that Section 201.012 of the Act, as to mismanagement, requires intent or such a degree of carelessness as to evidence a disregard of the consequences. Mere inability does not fit the definition, regardless of whether the inability inconveniences or causes costs to the employer.

Appeal No. 97-003744-10-040997. To establish that a claimant's positive drug test result constitutes misconduct, an employer must present: 1) a policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant; 2) evidence to establish that the claimant has consented to drug testing under the policy; 3) documentation to establish that the chain of custody of the claimant's sample was maintained; 4) documentation from a drug testing laboratory to establish than an initial test was confirmed by the GC/MS method; and 5) documentation of the test expressed in terms of a positive result above a stated test threshold. Evidence of these five elements is sufficient to overcome a claimant's sworn denial of drug use.

The foregoing cases are only a sample of the wealth of valuable guidance on unemployment insurance issues found in TWC's Appeals Policy & Precedent Manual. Success in defending against a UI claim can often depend upon being able to quote a relevant precedent case in a claim response or appeal letter, and every employer should be familiar with the most important precedent cases found in the Manual. By the same token, precedent cases can also give an early indication that a certain type of case may not be winnable at all, and the employer can then decide whether the case will be worth its time and attention. In the next issue, we will look at additional important cases in both general and specific areas of unemployment law.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

TBT Winter 2005 – Business Briefs

New Tax Deposit Rules for Small Businesses Unveiled: IRS Raises the Federal Unemployment Tax Act Deposits Threshold to $500

In late 2004, the Internal Revenue Service (IRS) announced that it would increase the minimum threshold for making quarterly Federal Unemployment Tax Act (FUTA) deposits to $500. This threshold increase is expected to reduce the paperwork burden for over four million small businesses nationwide.

The new rules, which went into effect on January 1, 2005, require employers to make quarterly deposits for federal unemployment taxes only if the accumulated tax exceeds $500. Since 1970, employers have been required to make quarterly deposits if the tax exceeded $100.

The maximum the IRS collects per employee from employers is $56 per year, if an employer pays their state unemployment taxes in a timely manner. The former $100 threshold required businesses with two or more employees to make at least one federal tax deposit annually. Raising the threshold to $500 will reduce the paperwork burden for employers with eight employees or less by eliminating the requirement to make FUTA tax deposits up to four times per year. For additional information, visit the IRS website at www.irs.gov.

Small Businesses: Busy Creating New Jobs

A recent survey conducted by the National Federation of Independent Business (NFIB) reports that indicators of small business owners seeking to create new jobs are "exceptionally" strong according to William Dunkelberg, NFIB's chief economist.

A net 19% of the 574 companies surveyed in November 2004 plan to add jobs. ("Net" being the number of companies that plan to add jobs minus those cutting jobs.) On average, the small businesses surveyed expect a net addition of half an employee per firm. "This is a very strong reading, within shouting distance of the record 22% reached in 2000," said Dunkelberg. Fifty-one percent of the firms either hired or tried to hire workers during the three months preceding the November survey. However, of those companies, 76% found few or no qualified applicants.

"Availability of qualified labor" was named as the number one impediment to hiring by 11% of the business owners surveyed. Nonetheless, Dunkelberg writes that, "overall, it appears that the small business sector is in the process of creating a substantial number new jobs." For additional details, visit the NFIB website at www.nfib.com.

A Nation of Entrepreneurs: Self-Employment on the Rise, Especially for Women, Minorities

The entrepreneurial spirit is alive and well according to a new study released by the Small Business Administration's Office of Advocacy. Almost 10% of the nation's entire civilian labor force – over 12 million Americans – were self-employed in 2003. That number is higher than previously estimated because for the first time, it includes self-employed individuals who have incorporated their businesses to shield their personal assets in case of litigation.

Women and minorities reported the largest increases in self-employment. Between 1979 and 2003, the number of women who are self-employed more than doubled, to 3.8 million. Self-employment among African Americans also more than doubled to 710,000. Self-employment among Hispanics also underwent explosive growth, jumping 328% during that time period, to more than one million.

In Texas, the most recent available data show that self-employment increased by 7.8% between 2002 and 2003, from 826,814 to 891,016. Self-employment by women increased by 6.1%, from 278,538 in 2002 to 295,559 in 2003, and represented 33% of self-employed persons in the state.

To learn more about the Small Business Administration's Office of Advocacy's research or to obtain their newsletter, data, and analyses of small businesses of all types, call (202) 205-6533 or visit www.sba.gov/advo.

Now Available: QuickFile Version 5

QuickFile is a wage-reporting program that allows employers and their representatives to file their state unemployment insurance quarterly tax reports over the Internet. Since January 2005, employers and payroll providers who are authorized to file employer tax reports now have a new and improved version of QuickFile available to them. Once downloaded and installed on the user's computer, QuickFile reads and analyzes a file created by the user's payroll program. It validates information, identifies potential problems and allows the user to make corrections to the report prior to filing. After the payroll file is validated, the user can access the Internet and submit the report.

Previous versions of QuickFile only accepted data in ICESA or MMREF-1 format. The latest version of QuickFile, however, also enables employers to submit payroll data using spreadsheets in Comma Delimited and Fixed Length formats. Employers previously using the agency's EWRDS reporting software can now easily convert to the more efficient QuickFile program. For more information on QuickFile, visit the TWC web site at www.twc.state.tx.us/us/ui/tax/quickfile.html.

When Asking Job Applicants About their Criminal History, Be Sure To Get the Whole Story!

Texas employers may ask potential job applicants about their criminal convictions. (Avoid asking about arrests, since the Equal Employment Opportunity Commission (EEOC) and many courts consider that to have a disparate impact on minorities). However, only asking about prior *convictions* doesn't go far enough to give you all the information you need to have. Here in Texas, under the law of *deferred adjudication*, if the individual given such a sentence successfully satisfied the terms of their probation, no final conviction is entered on their record, meaning the person can legally claim never to have been "convicted" of that offense. However, they cannot claim never to have pled guilty or no contest to the charge (in order to receive deferred adjudication, they would have to plead one or the other).

Many employers make the mistake of firing employees for dishonesty when they later learn the worker received and completed deferred adjudication but indicated on their job application that they had never been convicted. Should such a termination lead to a claim for unemployment insurance benefits, chances are very good the employer would lose because the claimant was not dishonest and answered the question accurately. To avoid that happening, be sure to ask: "Have you ever been convicted, or pled guilty or no contest to a felony offense? If so, please explain."

Should the former worker later file an EEOC claim, the employer must be prepared to show how the criminal record was relevant to the job in question. For many employers (especially those involved in health care, education, delivery and installation work, etc.), that's a fairly easy thing to do.

Trend Alert: Universities Coming to the Corporate Campus

Employers, distressed that their employees lack critical knowledge and skills to perform effectively in a highly competitive, fast-moving marketplace, are looking to colleges and universities for help. Executives are inviting professors to come to the corporate offices to teach executives and managers. Supervisors are being trained in their work settings, as well as on campuses of universities and community technical colleges. While this practice is not new, the intensity and level of activity will grow substantially.

Current research suggests that more companies will utilize local educational resources in the employment environment much more aggressively in the years ahead. This approach will save employees time away from work, will enable the instructors to focus on issues faced in the specific company's circumstances, and will provide opportunities for one-on-one coaching to supplement the classroom work.

In a number of industries, leaders are discovering the impact of the long-term practice of hiring

from their competitors instead of bringing new people into the field, Their companies are now populated with highly competent older workers who are not as familiar with new technologies. Some of these older workers want to retire, often to shift to a different kind of work or a more flexible lifestyle. Younger workers have not been attracted and nurtured, so these companies face an age-gap in their workforces.

Instructors who can facilitate the vigorous exchange of information and experiences among members of a diverse employee population will be in high demand. Also, these professional adult educators, many from the academic setting, will "upskill" the younger workers and retrain (often in new skills) the older ones.

There will be advantages for all concerned. The learners will gain knowledge, skills, time and convenience. The employers will gain a more competent workforce and opportunities to take advantage of the education resources in their communities. The educators will gain by greater engagement with the corporate community. By holding the classes on site at company facilities, the colleges reduce the need to build more classrooms. In addition, they can use the up-to-date equipment in manufacturing facilities so learners are prepared to become productive more quickly. (From "Herman Trend Alert," by Roger Herman and Joyce Giola, Strategic Business Futurists, copyright 2004, www.hermangroup.com).

Monitoring Employees' Use Of Company Computers And The Internet – Part 3

Why Companies Should Be Concerned

In parts 1 and 2 of this series found in the Summer and Fall 2004 issues of *Texas Business Today* (available online at www.texasworkforce.org), we looked at the issues of controlling and monitoring employees' use of laptops, PDAs, cell phones, and other small personal electronic devices and company computer systems. In part 3 of this series, we will examine abuse of company computers, networks, and the Internet - actions that can leave a company at real risk for an employee's wrongful actions. If an employment claim or lawsuit is filed, it is standard for plaintiff's lawyers and administrative agencies to ask to inspect computer records. Deleting computer files does not completely erase the files – there are many traces left on the user's computer, and forensic computer experts can easily find such traces and use them against a company. Tools exist to make data unretrievable, but one must be not only aware of the tools, but has to know how to use them.

An employee in a large semi-conductor manufacturing firm was recently arrested on charges of child pornography after a co-worker alerted company managers and the managers called law enforcement authorities. Upon detailed inspection, his office computer was found to have hundreds of illegal images stored on the hard drive. The company's quick action probably prevented what could have turned into legal problems for the employer itself. In a Central Texas county, a sheriff's department employee was fired after many sexually explicit images were found on his office computer. The department had no problem searching his computer, since it had a well-written policy regarding computer and Internet usage.

Focus on E-Mail

A good e-mail policy will let employees know that the company's e-mail system is to be used for business purposes only and that any illegal, harassing, or other unwelcome use of e-mail can result in severe disciplinary action. Let employees know that monitoring will be done for whatever purposes. If unauthorized personal use is detected, note the incident and handle it as any other policy violation would be handled. Whatever you do, do not allow employees' personal e-mail

to be circulated at random by curious or nosy employees. Such a practice could potentially lead to defamation and invasion of privacy lawsuits. Have your computer experts attach a disclaimer to all outgoing company e-mail that warns of the company's monitoring policy, lets possible unintended recipients know that confidential company information might be included, and disavows liability for individual misuse or non-official use of e-mail.

Court Action

A significant court case in the area of e-mail is *McLaren v. Microsoft Corp.* (No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *1 (Tex. App.- Dallas 1999, no pet.)). In that case, a Dallas state appeals court ruled that an employee had no claim for invasion of privacy due to the employer's review and distribution of the employee's e-mail. The court noted that having a password does not create reasonable expectation of privacy for an employee, and that since the e-mail system belonged to the company and was there to help the employee do his job, the e-mail messages were not the employee's personal property. In addition, the court observed that the employee should not have been surprised that the company would look at the e-mail messages, since he had already told the employer that some of his e-mails were relevant to a pending investigation.

Another court ruled in 2001 that an employer did not violate the federal law known as the Electronic Communications Privacy Act of 1986 (amended by the USA Patriot Act in 2001) when it retrieved an employee's e-mail sent on a company computer to a competitor company in order to encourage the competitor to go after the employer's customers (*Fraser v. Nationwide Mutual Insurance Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001). The employee had sent the e-mail, the recipient at the competitor company had received it, but the employer had not intercepted the e-mail while it was being sent, which is the only thing protected by the ECPA. On December 10, 2003, the Third Circuit Court of Appeals affirmed that part of the federal district court's judgment (Appeal No. 01-2921).

Policy Issues

An important note here: an employer can do anything with e-mail messages sent and received on company computers. This includes intercepting them during the process of transmitting or receiving, as long as it has notified employees that they have no expectation of privacy in the use of the company e-mail system, that all use of the e-mail system may be monitored at any time with or without notice, and that any and all messages sent, relayed, or received with the company's e-mail system are the property of the company and may be subject to company review at any time. For a detailed example of how such a policy might be worded, see the sample policy titled "Internet, E-Mail, and Computer Usage Policy" in the section of the online book *Especially for Texas Employers* titled "The A-Z of Personnel Policies." Here is the link: http://www.twc.state.tx.us/news/efte/internetpolicy.html.

In general, an employer may make its computer, e-mail, and Internet policy as strict, or as flexible, as it deems appropriate. The freedom to decide how far to go comes from the fact that the employer, after all, is the provider of the computer system and Internet access. With ownership comes the freedom to decide on policies, but there is also responsibility for the owners of a computer system regarding how the system is used or misused, as the case may be.

Evidence of Misconduct

If an employee is disciplined or discharged for violating computer or Internet policies, have your company computer experts collect both digital and printed copies of whatever e-mail messages or computer files contain evidence of the violations. The evidence can then be used to defend against various kinds of administrative claims and lawsuits, such as an unemployment claim or discrimination lawsuit. In order to show that a reasonable employee would have known that discharge could occur for such a violation, point to a copy of your policy and explain how it put employees, including the one who was discharged, on notice that termination could result from the problem in question. In the absence of a policy, explain how the termination incident was so serious that any reasonable employee would have known they could be fired for such a reason.

Education of Employees Regarding Computer Security

The Internet, while a resource of unprecedented power and importance for businesses in the information age, is teaching us some hard lessons: the need for vigilance, the dangers of uncontrolled access to information systems, and security concerns. While it is a complicated subject, employ-

ers and employees can largely protect themselves from cyber-trouble by learning and applying a few important measures:

- Give employees only the amount of Internet and network access that they need to do their jobs, and monitor at selected times the usage that does occur in order to ensure that it is in compliance with the company's policy.
- Get a qualified IT expert to install good virus and firewall protection for every computer used within the company.
- Get assistance from an IT expert to ensure that employees' operating systems are configured to display the file extension for any file shown in a folder, directory, or list of e-mail attachments.
- Train employees to never open an attachment in an e-mail unless they 1) know who the sender is; 2) are expecting a particular attachment at a particular time; and 3) have filtered the message and the attachment through whatever virus protection software is in place. Even then, if the extension is anything at all unfamiliar, such as ".com", ".pif", ".bat", ".scr", ".exe", ".dat", ".vbs", ".hta", or the like (the extensions most often associated with virus-laden attachments), the attachment should not be saved or opened without consultation with a company-approved IT expert.
- Educate employees about the dangers of identity theft, which can result from, among other things, careless disclosure of personal data of themselves or others. Reports of "phishing" scams, whereby computer users are fooled into accessing what appears to be a genuine commercial Web site, but is really a bogus site set up to gather personal information that can then be used to set up fraudulent credit accounts, have risen astronomically in the past year. Let employees know that legitimate companies never ask their customers to submit confidential personal data via e-mail and that if they need to contact a commercial site, they should type the Web address of the real site into the browser's address field themselves, instead of clicking on the link supplied in the e-mail. "Phishers" are skilled at rerouting Web links and at disguising the true address behind such a link.

Conclusion

For business owners, technology makes things both easier and harder. Every company has to ensure that its electronic resources are used properly and not abused by employees. The more you as employers know about computers and the Internet, the better off, and safer, your company will be.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Hiring and Retaining Older Workers: A Vital Part of Your HR Strategy

An article on employee retention in the Fall 2004 issue of *Texas Business Today* (available online at www.texasworkforce.org), cautioned employers not to be lulled into complacency by recent stability in the workforce. It encouraged employers to prepare for impending labor shortages by implementing strategies to retain good employees. The article also suggested various recruitment and retention strategies.

Texas employers may want to consider another important strategy: taking advantage of the valuable knowledge and skills of older workers. Three major trends are converging to make older workers critical to future economic success here in Texas:

1. **The job market is creating jobs faster than the growth in the pool of available workers.** This disparity will intensify IF the 77 million baby boomers who will become eligible to retire in the next decade actually do so. The federal General Accounting Office (GAO) warns that the projected decline in labor force growth could create shortages in skilled worker and managerial occupations, with adverse effects on productivity and economic growth. Within the current decade, the U.S. Bureau of Labor Statistics projects a shortfall of 10 million workers in the United States.

2. **Texas is rapidly aging.** During the current decade, the overall growth in the Texas population is projected to be 14.2%; however, there

will be a 29.5% increase in the 60 year old-plus population. Many of these individuals are generally healthier and better educated than previous generations.

3. **Traditional notions about retirement age and retirement in general are changing.** The trend toward earlier retirement came to a halt in the mid-1980s. Since then, labor force participation rates for persons aged 55 and older have increased. Thirty percent of all persons over age 55 participated in the national labor force in 2000, and this percentage is expected to rise to 37% by 2015. By 2015, older workers will comprise nearly 20% of the total labor force. Older workers, however, are much more interested in non-traditional forms of employment, including working fewer hours with more flexible schedules.

The Texas Department of Aging (now part of the Texas Department of Aging and Disability Services) recently conducted a benchmark survey of older Texans. The survey found that 21.5% of Texans age 60 and older are employed either full- or part-time. Of the respondents who are not working, 10.4% said they are currently looking or plan to look for a job in the future. Of those that are or want to work, the most frequently cited reason is needing money, followed by enjoying work.

So what do these trends mean for Texas employers? Obviously, they have implications for the work environment, employee recruitment and retention efforts, and retirement and health benefits.

Work Environment: Employer attitudes and an individual's sense of self-efficacy affect whether older people continue working. Subtle forms of age discrimination cut short the productive years of older adults. Negative work climates that devalue older employees often prompt older workers to retire while they still have much to contribute. Research shows that older workers are not significantly impeded from continued work by physical, health, or cognitive obstacles. Myths about older workers - low productivity, absenteeism, and a greater likelihood of accidents - cheat employers of valuable workers.

Recruitment and Retention Efforts: So far, employers have taken little action to retain older workers and extend their careers. The Society for Human Resource Management (SHRM) recently surveyed human resource professionals about the impact of an aging workforce. The results indicate that HR professionals and their organizations lack immediate concern over the issue. The majority of HR professionals who responded indicated that they did not believe that changes in workforce age were forcing changes in recruiting, retention, and management policy and practices.

A study conducted by the U.S. GAO confirms SHRM's findings. The GAO found that policies and practices to retain and extend the careers of older workers are not widespread among private employers nor do they involve large numbers of workers at individual firms. Employers cite several reasons for not implementing programs, but the most prevalent is that they simply have not considered doing so. They did find, however, that some public and a few private employers are providing a variety of options, such as innovative and flexible job designs (e.g., flex-time, part-time or part-year schedules, and job-sharing).

Private Pension Systems: Defined-benefit retirement plans encourage workers to retire at or before the specified normal retirement age. Defined-benefit plans provide the maximum benefits when taken at the earliest possible age of eligibility. Although benefits are reduced for retiring early, they often have a greater actuarial value than if the individual had retired at the normal retirement age. Thus, employers often structure their defined-benefit plans to encourage older workers to retire early. Today, about half of all U.S. workers with pension coverage have defined-benefit plans.

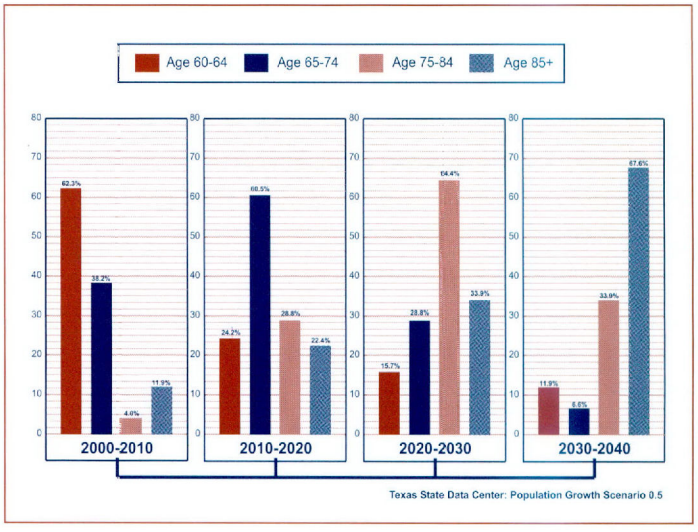
Conclusion

Texas employers that prosper in the coming decades may want to consider adopting HR strategies to recruit, train and retain an older workforce. Texas employers will need to:

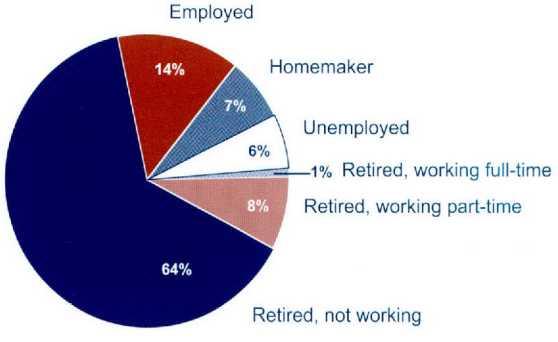
- Understand the benefits of hiring, training and retaining older workers.
- Recognize and re-balance faulty negative perceptions that aging workers are less productive or absent more often than their younger co-workers.
- Realize that nontraditional workers - independent contractors, on-call workers, and outsourced employees - and use of compressed work weeks, job sharing, flex-time and telecommuting will help tap into the older workforce.
- Design benefit plans that encourage continued employment of older workers.
- Create supportive environments that foster positive attitudes towards and implement policies to assist family caregivers.

For further information: The Texas Department on Aging published a policy paper, Workforce and Older Texans, available at http://www.dads.state.tx.us/news info/publications/policy papers/WorkforcePolicy.pdf. Much of the above information will appear in the Employment and Caregiving chapters for the soon-to-be-released *Aging Texas Well: State of our State on Aging* report. Contact karl.urban@dads.state.tx.us for more information.

Percent Growth by Age Group and Decade in the 60-Plus Population



Employment Status of Older Texans



Source: Texas Department of Aging and Disabilities Services

Upcoming Texas Business Conferences

Ron Lehman, the Commissioner Representing Employers at the Texas Workforce Commission, invites you to attend an upcoming 2005 Texas Business Conference. In today's complex business environment, anyone who manages workers must learn how to adopt and implement real world strategies to reduce the legal risks that can come with having employees. We have planned an informative, full-day conference that translates the "legalese" of federal and state employment law into easy to understand language that makes sense in the everyday business setting. Participants not only learn about many of today's most challenging employer/employee legal issues, they may be able to save money in the future by avoiding costly pitfalls when operating their business and managing their employees.

A dynamic, experienced group of speakers will be discussing these matters of ongoing concern to you as a Texas employer. Helpful written materials will also be provided for you to take back to use in your workplace. Seminar topics are selected based on what the thousands of employers who call the Commissioner's office each month tell us that they need to know and the input provided by former conference attendees.

Registration is $85.00 per person and is non-refundable. Seminar topics include, among others:

- Urban Legends of Texas Employment Law and the Basics of Hiring
- Texas and Federal Wage and Hour laws
- Employee Policy Handbooks: Creating Your Human Resources Roadmap
- Employee Privacy Rights
- Handling Employee Medical Issues
- Unemployment Insurance: Stay in the Game and Win

The upcoming schedule:

- Arlington - April 8, 2005
- Lubbock - April 22, 2005
- Austin - June 3, 2005
- Corpus Christi – July 22, 2005
- Laredo - August 12, 2005
- Wichita Falls - September 16, 2005
- Alpine - October 14, 2005
- Del Rio - November 18, 2005
- San Angelo - December 2, 2005
- McAllen - February 24, 2006

For additional information, call 1-512-463-6389 or visit the TWC's website at: www.twc.state.tx.us/twcinfo/theforms/theform.html

Continuing Professional Education Credit (6 hours) is available for CPA's.

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Employee Privacy Rights, Handling Employee Medical Issues and Unemployment Insurance: Stay in the Game and Win. To keep costs down, lunch will be on your own. The registration fee is $85.00 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend.

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

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