First Quarter 1998

TexasBusinessToday

Chairman Bill Hammond

Texas Workforce Commission

Protesting An Unemployment Claim Notice

- Do not miss a protest or appeal deadline. A late protest means the employer forfeits appeal rights, including the right to protest benefits or charge-backs to the employer's account.

- What if a claim notice arrives when I am away from the office for an extended time? If you are going to be unavailable when a claim notice might arrive, designate a trusted person to check your mail for you and file a quick response that will preserve your appeal rights.

- What if you do not recognize the name of the claimant? Search all of your records thoroughly, ask others within your company, or call TWC for help. Never delay your response just because you cannot locate records. If nothing else, respond timely with, "We are unable to locate records on this claimant, but we wish to preserve our protest rights. More information will follow later."

- Take prompt action if a protest or appeal deadline is near. Simply mail, fax, or hand-deliver a quick written response stating, "We protest. More information will follow later."

- Be as specific and fact-oriented as possible. Your protest can help the claims examiner determine what questions to ask the claimant during the claim investigation. You can attach additional sheets on your letterhead if needed. Be careful to include only what you can prove with either eyewitnesses or credible documentation.

- When protesting a claim, document your case. If you fired the claimant for a policy or warnings violation, attendance problems, or customer complaints, submit copies of the policy, attendance records, warnings or complaints.

- Be consistent with your explanations! Explain the situation correctly the first time. If you give one account on the protest and something else at the hearing, conflicting statements may lose the case for you.

- Consider other types of claims or lawsuits when responding to a claim. Many plaintiffs' lawyers use UI claims as a strategy to determine how good their clients' cases are. They may use evidence discovered during the claim and appeals process in other claims or lawsuits. Employers who want to defend against UI claims and other claims and lawsuits should take care how and under what circumstances they reply.

- Find out about the claim. Call the local office, identify yourself as the employer in the case and ask for copies or printouts of the statements of fact the claimant has made. This kind of documentation can be extremely valuable in preparing your claim protest or appeal, or in preparing for an Appeals Tribunal hearing. If the claimant changes his or her story at the appeals hearing, let the hearing officer know the specifics.

- Make sure that TWC has your correct address. If the address is incorrect, note the correct address. If you want subsequent mailings to go to a particular address, note that in your protest. Failure to let TWC know of an address problem will work against you if you miss a hearing or miss an appeals deadline because you did not receive notice or ruling.

- How to file the protest: As long as you protest in writing, you may file by mail, by fax or by hand-delivery to any TWC office. Recommended: Mail a copy by certified mail, return receipt requested, and fax a copy to any TWC office.

- Respond to calls from the claims examiner. A call from a claims examiner indicates the examiner thinks there may be a good reason to disqualify the claimant and that evidence from your company can finish the case. Put the examiner in touch with your firsthand witnesses, the ones who have personal knowledge of the situation that preceded the claimant's discharge or resignation.

- Follow up. If you do not get a ruling within two weeks of filing your protest, call your nearest TWC office or local workforce development board workforce center and ask them to check the computer. Be prepared to give the claimant's name and social security number.

Appealing the Initial Determination

- Appeal on time and in writing. You have only 14 calendar days from the date TWC mailed the decision to you to file. If you want a hearing sooner, appeal immediately. If you want as much time as possible to prepare for the hearing, wait until the 14th day. Try to appeal within 10 days. Your appeal can be as simple as, "We disagree. We would like an appeals hearing to discuss the matter." Save your energy and preparation for the appeals hearing.

  If you file a late appeal, the Appeals Tribunal will have no choice but to dismiss it. If you file late due to late receipt or non-receipt of the initial determination, or because of misinformation from a TWC representative, highlight that fact in the first paragraph of your appeal. That can get you a hearing on the timeliness problem, where you can prove the receipt or misinformation problem.

- Make a copy of your appeal and carefully note when you sent it. If you send it by certified mail, request a return receipt. Whether you mail, fax or special deliver it, keep receipt documentation.

- Use the time between your appeal and the appeals hearing to get copies of the claimant's statements to TWC. This will help you know how to rebut the claimant's contentions. Research the case. Line up your witnesses and find out what they know. Assemble your documentation. Outline your presentation. Practice presenting the case. Decide who will be the primary representative during the hearing. Decide what questions you will ask the claimant during cross-examination.

- If you do not get a notice of hearing within four weeks of filing your appeal, call any TWC office and check on the appeal status. Do not let up until you get a clear answer!

- If you cannot participate in the hearing, call in and let the hearing officer know. Document the call and make sure the hearing officer or receptionist makes a record of your call. If you have a good reason for missing the hearing, simply file a timely written appeal. State the problem. TWC will schedule a new hearing, where you can show you had good cause for missing the first hearing.

- Good cause to miss a hearing includes business emergencies; traffic accidents; illness of a major witness; and a witness being out of town and unable to call from a remote location, on a prearranged business trip,or on a prearranged vacation. Calling the hearing officer to notify them you will not be able to participate will help you prove good cause for missing the first hearing.

- You must fully document what you are trying to show. If you fired the claimant for a policy or warnings violation, attendance problems or customer complaints, you should submit copies of the policy, attendance records, warnings or complaints.

- Follow the instructions on the hearing notice *exactly* regarding evidence. Send copies of any documents you wish to enter in to the record to both the claimant and the hearing officer prior to the hearing. If you fail to do that, you run the risk of being unable to use such documents on your behalf. Send the copies to the claimant by certified mail, return receipt requested.

- Call in on time for the appeal hearing. Follow the instructions exactly. Note that you have to make the first call. State that you are calling in for a particular hearing, and make sure the person answering the phone takes your phone number correctly. Get that person's name and record the time.

- Have all your witnesses ready. Tell your company receptionist to watch for the hearing officer's return call and to give that call priority. If the hearing officer fails to call around the time the hearing is due, call the toll-free number on the hearing notice again to be sure they know you are still waiting. Document that call as well.

Participating in the Appeals Hearing

Be prepared for the unexpected. If the claimant says something unexpected, get an appropriate witness to a telephone. If the witness is not at the office that day, tell the hearing officer how they might contact the witness. If the problem is an unexpected need for certain documents, ask the hearing officer for a "continuance" so you can send copies to the claimant and the hearing officer. If the continuance is denied, register your objection so it will be on the record for your appeal to the Commission. Explain why you think the evidence is important enough to continue the hearing on another date.

Let the hearing officer know if the claimant gives conflicting or wrong information. In addition to bringing it up at the hearing, mention it in your appeal letter to the Commission.

Your demeanor during the hearing is important. In general, stay calm and present an organized case.

You can get time to prepare an appeal for the Commission by waiting until the 14th day to file. If you think 14 days is too short for a good appeal, simply state, "We disagree. More information will follow later." Then take an additional week or two to research and write your appeal. Commission appeals take four to six

APPEALING TO THE COMMISSION

- Appeal on time! A late appeal must be dismissed. If you are appealing late due to late receipt or non-receipt of the Appeals Tribunal decision, or due to misinformation from a TWC representative, highlight that fact in the first paragraph of your appeal to the Commission. That gets a hearing on the timeliness problem at which you can prove the receipt or misinformation problem.
- Be brief and specific. Help the Commissioners understand your case by highlighting your specific points of disagreement with the hearing officer's ruling. An item-by-item outline is best.
- Bring up new evidence. If after the hearing you discover new evidence, mention it in your appeal to the Commission. You might just get a rehearing!
- If criminal charges are pending against the claimant, mention that in your appeal to the Commission and ask the case be held pending trial. Let the Commission know of the outcome.

Responding to the claim and handling appeals with the above cautions in mind will decrease your chances of losing an otherwise winnable claim and help you protect your company from unwarranted chargebacks. If you need more assistance, please check the employers section on TWC's World Wide Web site at http://twcdirect.twc.state.tx.us/employer.htm.

Special Things You Need to Know About the Law of Unemployment Claims

"Inability" is not misconduct. Neither is "incompetence." Do not use those terms in responding to a claim or testifying at an appeal unless the claimant truly had no ability to do the job. Instead, show how the claimant failed to do the best he or she could.

- Personal illness is not misconduct. Tending to the illness of one's minor children is not misconduct. Failure to give proper notice of an absence can be considered misconduct.
- You will need to show how the claimant, before discharge, either knew or should have known their job was in jeopardy. Show evidence of written or verbal final warnings or of policies warning of dismissal for certain violations.
- Show the claimant was not singled out for discharge.
- Show the discharge occurred when it did due to a specific act of misconduct that happened close to the discharge. Too much time between the final incident and discharge can work against you.
- If you discharged the claimant, show that you followed whatever progressive disciplinary policy you have in your company.
- If possible, point out that before discharge, you confronted the claimant with the reason for discharge and gave them a chance to explain their side of the story. If you told the claimant an incorrect reason for discharge, be prepared to explain how you did so to avoid anticipated violence or defamation charges, or to spare the claimant's feelings.
- If the claimant quit, be prepared to demonstrate how a reasonable employee would not have resigned under the same circumstances.
- Try to get the departing employee to explain his or her reasons for leaving in writing.
- If it is clear the claimant quit without any pressure to resign, do not waste time talking about misconduct or poor work performance issues.
- If a claimant offered two weeks' notice of resignation, and you accepted the notice early, the work separation remained a resignation. Just make sure to tell the employee something like, "We're accepting your notice early," or "You can make today your last day," instead of, "We're terminating you early."
- If the claimant quit because of alleged problems with working conditions, rebut the allegations one by one. If the claimant failed to complain to anyone in authority, point that out. Show how you investigated and dealt with complaints from the claimant.
- If the claimant quit because of a pay cut of 20 percent or more, there is a good chance they will get benefits. Benefits may be denied if you show that at the same time, the job was favorably changed to become easier or better, such as an increase in company benefits, decrease in commute, transfer to a management track, etc.
- If the claimant quits and alleges you violated wage and hour laws, be prepared to offer evidence about the pay agreement, the hours worked and the amount of pay.

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weeks to process, so a week or two after filing should not be too late to submit additional comments.

At the appeals hearing, present testimony from firsthand witnesses. Firsthand testimony is by far the strongest evidence. Affidavits or secondhand testimony are not worth much in the face of a credible claimant's denials. Hearing procedures allow witnesses to participate by phone, which should make testimony from even the busiest witnesses more practical.

If there are criminal charges pending, let the hearing officer know that in your testimony.

From the Commissioner

Dear Texas Employer,

In 1996, Congress passed historic welfare reform legislation placing time limits on receiving benefits, and requiring many recipients to do something in exchange for their welfare check. It appeared that the "something for nothing" era was finally over. However, now that many welfare recipients are actually going to work, some naysayers are criticizing the Texas Workforce Commission for placing them in "low-skill, low-paying, low-potential" jobs. This argument is unfair and flat wrong: no matter how you analyze it, a job, any honest job, beats welfare dependence.

Honest work not only brings in money, but creates higher levels of self-esteem and pride; these create motivation to seek better and better paying employment as time goes on. Children see their parents have dignity and respect and as being independent from government handouts.

It's time for a reality check and a brief history lesson. In 1995, Texas passed welfare reform legislation (a full year before the feds got around to it) and it's working well. The Texas Legislature created the Texas Workforce Commission to bring 28 job training and welfare programs from 10 agencies under one roof. The Legislature also created 28 Local Workforce Development Boards which will ultimately implement welfare reform locally.

Since then, over 183,000 men, women, and children have left the welfare rolls. While our state's healthy economy undoubtedly helped people find jobs, even a casual observer cannot overlook the fact that state time limits on cash assistance have helped speed the process along. The three-year maximum time limit for many able-bodied welfare recipients is making a difference. It is also clear that many welfare recipients are willingly joining the workforce. The truth is that Texas has been and continues to be a leader in helping people move from government dependence to self-sufficiency.

But welfare reform is about more than just cold statistics. At its heart, it's about real people and how we treat the less fortunate. However, even considering the welfare versus work debate from a financial angle, it's apparent that a job is far superior to welfare. For example, a single parent with two children is eligible to receive government cash assistance, Medicaid benefits, and food stamps of approximately $10,000 per year.

If this same single parent accepts a minimum wage job at $5.15 per hour, working a 40-hour week, they will earn $824 per month, or approximately $10,000 per year. They are eligible for an Earned Income Tax Credit of $3,656 per year. For the first year of employment, Medicaid would pay approximately $2,472 per year (for the children only at $206 per month), and they could receive Child Care of $5,980 (two children multiplied by $2,990). They are also eligible for about $2,088 in Food Stamps annually. Now our minimum wage single parent has an annual income in excess of $24,000.

No one is suggesting that a person can get rich making minimum wage, but it is preferable to welfare in every respect. Welfare dependence is bad for families and a terrible investment for taxpayers. Study after study has shown that children whose families are on welfare compared to low income working families do badly on every measure. Welfare dependence triples the level of behavioral and emotional problems, and doubles the probability a young girl will have children out of wedlock or that a boy will wind up in jail.

Welfare dependency makes it less necessary and less worthwhile to work. And, this promotion of idleness encourages crime and irresponsibility. In some areas, entire generations have grown up without positive role models or solid roots, without hope or self-esteem. The damage which has been done in the name of compassion is extraordinary.

While critics argue that former welfare recipients too often wind up in restaurant, janitorial, clerical, or construction jobs with limited opportunities, think of how many high school graduates (perhaps even you or your family members) have used low-paying jobs to pay for their college educations. Many enterprising workers can, and do, advance from

minimum wage jobs into management. At the very least, an employee who shows up on time daily with a good attitude can gain real-world experience, establish job references, and build a solid work history to help them get better jobs in the future.

The government that has helped clothe and feed thousands of Texans without a steady income is now helping many of those same people become self-sufficient. However, individuals who are leaving the welfare rolls cannot depend on government to provide career advancement. For any employee, that type of success depends on personal initiative, responsibility, and ability, not the government.

All we are saying at the Texas Workforce Commission is that former welfare recipients need to get a job, then get a better job, and then get a career. We also need to remember that work is better than welfare. Always.

Sincerely,

Chairman Bill Hammond,
Commissioner Representing Employers

More New Unemployment Insurance Cases

The employer Commissioner's office has continued to press for unemployment insurance precedents that will be favorable for employers. Several excellent precedents have been decided in the last six months.

CASE NUMBER ONE: The claimant in this case worked as a home health aide. During her last week of work, she notified the employer that she was dissatisfied with the assignment that she had been given. Typically the employees of this employer were sent to the homes of various elderly clients to assist with basic living needs.

The claimant was dissatisfied with this particular client because the client was asking her to perform tasks outside the scope of her duties and because a relative of the client had threatened her when she refused to comply with the extra requests. The claimant told the employer she wanted a new assignment and that she would not continue to work for the current client.

The claimant did stop working for the client and three days later the employer offered her an assignment with a new client. The claimant declined the new assignment because it would have required her to ride a bus. She then filed an unemployment claim. Historically, the Commission has ruled that the actual separation from employment occurs when someone stops working on an assignment, unless a new assignment is offered on the next working day. Therefore, both the local office claims examiner and the hearing officer ruled for the claimant, reasoning that her poor treatment at the hands of the client warranted the payment of unemployment benefits. The employer appealed and the Commissioners reversed. The Commissioners noted that the claimant worked in an industry where employees are routinely sent out on assignments. Once the assignment ends, both parties have an expectation that the employment relationship will continue and that the employee will be reassigned to a new client within a short period of time.

Therefore, even if some time passes between assignments, during which an employee is not performing services or receiving wages, the employment relationship continues. The actual separation from employment occurs when one party takes affirmative steps to end the relationship.

To date the Commissioners have not extended the rationale of this case to the temporary industry as a whole. With regard to the actual disqualification ruling in this case, the

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claimant effectively resigned by refusing a subsequent suitable assignment with another client. Her refusal was based on personal reasons (not wanting to ride a bus) and thus did not constitute good cause connected with the work for quitting.

CASE NUMBER TWO: While most cases involve work separation issues, the Commissioners occasionally have the opportunity to rule on questions that arise after an unemployment claim is filed. In Texas, employees who file for unemployment are required to accept suitable offers of work. Refusal to accept such offers can result in a disqualification from the date on which the offer is refused.

In this case, the claimant worked for the employer as a dental assistant. She was laid off due to lack of work during her maternity leave. After filing an unemployment claim, the same employer offered her work as an office assistant. The claimant's wages and hours would have been the same as in her previous position. The claimant declined the offer, arguing that the work was not suitable because the duties would not be similar.

The local office claims examiner ruled for the claimant. The employer appealed, but the determination was upheld by the hearing officer. The employer filed an appeal to the Commissioners. The Commissioners reasoned that the job offer was suitable because it was related to the field in which the claimant had been trained and because the new job would have added to the claimant's knowledge of the dental profession. In addition, the Commissioners pointed out that the similar pay and hours also made the work suitable. This ruling is helpful because it makes it clear that unemployment is only intended to tide someone over until new work can be found.

CASE NUMBER THREE: In this case the claimant worked as meat wrapper for a grocery store. The claimant's performance was not adequate, so the employer offered to transfer the claimant to a cashier or deli worker position. The claimant's wages would not have changed.

The claimant declined the offers and resigned without notice. Both the claims examiner and the hearing officer ruled in the claimant's favor, concluding that the proposed transfer was a significant change in the hiring agreement that gave the claimant good cause to quit.

The employer appealed to the Commission. The Commissioners reversed the hearing officer's decision. The Commissioners concluded that the claimant had an obligation to try out the offered positions since the pay was similar. Also, the Commissioners pointed out that it is reasonable for an employer to transfer employees between positions, at its discretion, until a satisfactory fit is found.

This decision is good for employers because it places a great deal of emphasis on encouraging workers to remain employed, rather than seeking unemployment benefits because of changes that occur in their job description.

CASE NUMBER FOUR: This case involved a technical, jurisdictional issue. Ordinarily, an employer who fails to timely respond to a claimant's initial Application for Unemployment Benefits loses the right to file appeals from any TWC rulings regarding that claim. Here, the employer failed to timely respond to a claim.

However, the issue being decided by the Commission involved whether the claimant was entitled to additional wage credits (the amount of wage credits awarded to a claimant to determine unemployment benefits can ultimately affect an employer's tax rate). The Commission concluded that since both claimants and employers are allowed to raise wage credit issues any time during a claim year, an employer should always be allowed to appeal rulings relating to this issue, regardless of whether the employer timely responded to the initial claim.

CASE NUMBER FIVE: This case involves another attempt by the Commissioners to clarify how the TWC analyzes situations in which an employer accepts an employee's resignation prior to the intended effective date of that resignation.

In this case, the claimant gave the employer 30 days' written notice. Four or five days into the notice period, the employer accepted the claimant's resignation and she was released from her duties. The claimant was paid for the en-

tire thirty-day period. Both the local office claims examiner and the hearing officer ruled in the claimant's favor.

They concluded that the employer's early acceptance of the resignation constituted a termination and that the employer had failed to show that the termination was for a specific act of misconduct connected with the work.

The employer appealed. The Commissioners decided that early acceptance of a resignation notice does not shift the nature of a job separation from a voluntary quit to a discharge, even when more than two weeks notice is given, so long as the employee is paid for the entire notice period. The Commissioners' conclusions were identical to another recent precedent that involved a slightly different fact scenario. In the prior case, the employer accepted a three-week notice the very day it was given.

Again, the employee was paid for the entire notice period. The Commissioners ruled that the nature of the job separation did not change from a voluntary quit to a discharge.

CASE NUMBER SIX: This case involved the issue of drug testing. The Commission dealt with this controversial subject in an extensive manner back in the 1980s. Precedents formulated in those years established that an employer could prove misconduct if it produced a drug testing policy, initial and confirmatory test results, consent form and chain of custody documentation.

In this case, the local office examiner and the hearing officer both ruled in the claimant's favor. They concluded that the employer failed to prove misconduct because actual concentrations of the drug in question was not provided to the Texas Workforce Commission.

On appeal, the Commissioners disagreed with this analysis. The Commissioners held that it is not necessary for test results to show actual concentration amounts of the drugs being used. Instead, it is sufficient for a test to show a result above a stated test threshold. For example, it would be sufficient for a test result to state that a claimant tested higher than a cutoff threshold of 15 nanograms per milliliter.

CASE NUMBER SEVEN: This case refined TWC's position regarding remoteness issues. Generally speaking, no misconduct will be found by TWC if the misconduct occurred much earlier than the actual discharge date. There are several existing precedents that deal with this point. Basically, the Commission feels delays of weeks or months tend to condone or excuse misconduct.

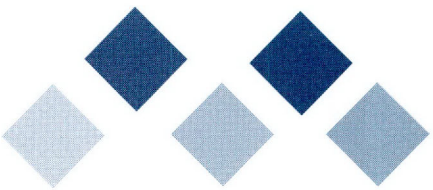
This recent case involved a governmental employer, but its premise is equally applicable to private sector employers that employ extensive grievance procedures. The claimant fought at work with another employee. This was a terminable offense under the employer's policy. The employer allowed the claimant to continue working while an investigation was conducted, while the results of the investigation were reviewed by management and while a grievance hearing was held. The claimant was terminated after the grievance hearing results were announced.

Approximately four months passed between the date of the fight and the date of termination. The local office examiner disqualified the claimant. The claimant appealed and a hearing officer reversed, citing existing Commission precedents dealing with remoteness.

The employer appealed to the Commissioners. The Commissioners reversed the hearing officer and disqualified the claimant. The Commission noted that while a great deal of time elapsed between the act of misconduct and the termination, that time was essentially beneficial to the claimant. The claimant was aware of the investigation and was allowed to work until the investigation and hearing were completed.

The investigation afforded the claimant due process rights many employees do not receive. Therefore, the Commission excused the remoteness issue and ruled for the employer. This case should greatly benefit public employers, unionized employers and large private employers that use a similar grievance process.

Aaron Haecker Legal Counsel to Chairman Bill Hammond



Business Briefs

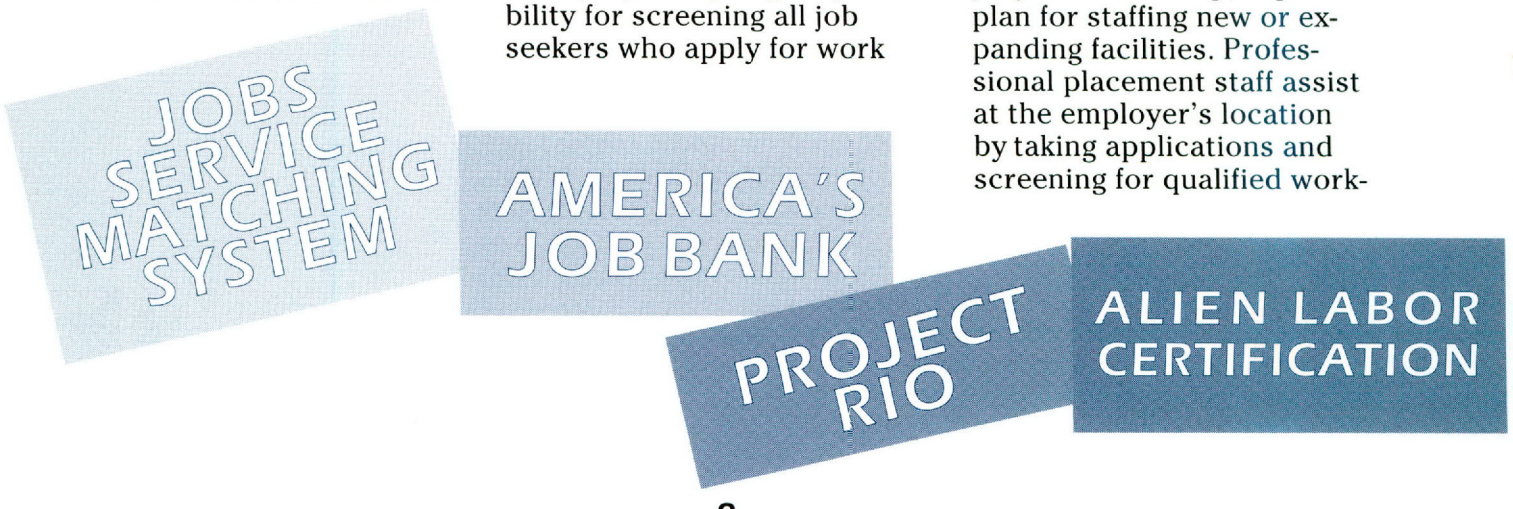
While many Texas employers have dealt with the Texas Workforce Commission (TWC) when a former employee files an unemployment claim, you may be unfamiliar with the services the agency provides to employers. Known as Employment Services (ES), the agency administers a wide array of potentially beneficial programs for employers. These include the Job Service Matching System, Testing, On-site Recruitment, Project RIO, the Agricultural Service Program, and Alien Labor Certification.

JOB SERVICE MATCHING SYSTEM (JSMS) - This computerized job matching program assists Texas employers with their recruitment needs. TWC staff memabers accept and solicit openings from employers to be screened against applications currently on file. Applications are then entered into the computer using keywords to describe skills, knowledge, abilities, specialties, machines used, and interests. Job orders are coded using the same structure. The benefits to employers of JSMS are that the job orders are exposed to more job seekers, customers get faster service through overnight or immediate file search, and the full file provides better qualified job applicants. All job openings are given first-day service, and the placement staff maintains contact with the employer until the employment need is met. For many employers, this service is a ready source of qualified workers.

TESTING - If an employer wants job applicants screened for their clerical proficiency, validated Department of Labor tests can be used. The local TWC office can arrange a clerical skills test for employers who wish to have their applicants tested.

JOB SERVICE - Many Texas employers consider the TWC office a support for their human resources department, and allow TWC to assist their company in the search for qualified professional and technical workers. Through the use of reverse referral procedures, TWC can save employers time and money by accepting responsibility for screening all job seekers who apply for work at their firms. Even though they have an individual or department responsible for human resources (HR), TWC assists these HR representatives in the employee selection process. Frequently more workers apply for employment with a company than are needed to fill available job openings. These workers complete company application forms and many are subsequently interviewed by the HR staff. This activity takes up valuable staff time which results in added costs to the company. TWC's trained placement staff can do this initial screening, decreasing the number of workers a company's HR department will have to interview. All job seekers are screened, and only those workers who meet the qualifications for the job will be referred. Employers' orders can be directly accessed by the public, if desired, through America's Job Bank (AJB) or Job Express. These are also avenues to recruitment, both locally and nationwide.

ON-SITE RECRUITMENT - TWC assists employers with job site recruitment tailored to their particular needs. TWC staffers work with employers to develop a special plan for staffing new or expanding facilities. Professional placement staff assist at the employer's location by taking applications and screening for qualified work-



ers. TWC staffers coordinate recruitment efforts in their office or other local sites throughout the state. Information on job recruitment advertising and data on the local labor market is available. If an employer's facility is under construction, the local office may arrange for a mobile office to travel to the job site for on-site recruitment. The mobile office is especially effective for recruiting workers when distance and other factors make effective service difficult.

PROJECT RIO (Reintegration of Offenders) - This is a statewide plan to help Texas parolees successfully reintegrate into the community by offering a linkage between training and services with the state prison system to training and job opportunities in the local community. Texas employers who hire ex-offenders are eligible for valuable tax credits through the Work Opportunity Tax Credit. The project is unique in that it coordinates ex-offender services provided by the Texas Department of Criminal Justice and TWC. An ex-offender who obtains employment is three times less likely to return to prison than one who remains unemployed. By reducing recidivism and placing these individuals in a position to pay taxes, the state saves valuable tax dollars. Since Project RIO's inception in October 1985, 72 percent of all enrolled ex-offenders have secured employment.

AGRICULTURAL SERVICE PROGRAM - This program is a federally mandated initiative to serve and meet the specific needs of the agricultural industry. The purpose of the initiative is to enhance staff and local office services to meet the unique needs of agribusiness and agricultural workers, serving all areas of the state. During 1996, more than 20,000 agricultural employers were served through conferences, seminars, and employment related services. The staff in Agricultural Services also participated in 10 economic development projects related to agricultural and rural development. Agricultural Services staff developed and hosted six Agricultural Labor Management Training conferences with more than 400 attendees. These conferences are a cooperative effort between the state and federal government and the private sector to keep the public informed on pertinent issues and laws, regulations, and mandates that impact both agricultural employers and workers.

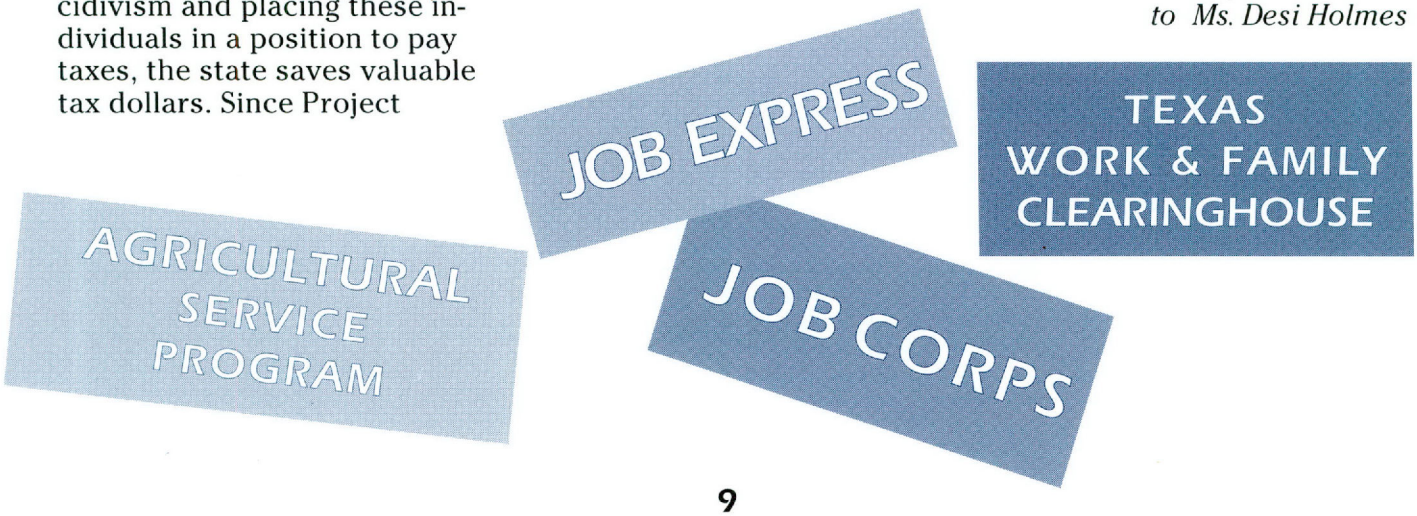
ALIEN LABOR CERTIFICATION - This unit assists employers who wish to bring foreign workers into the United States. It is federally funded through a contract with the U.S. Department of Labor. Before bringing foreign workers into the United States, employers must demonstrate their attempts to recruit U.S. workers by listing the opening with the State Employment Security System and by other specified means. TWC assists in this process, as well as providing prevailing wage information as required by federal statutes.

Several additional programs provide services to employers and include JOB CORPS, TEMPORARY AID TO NEEDY FAMILIES, JOB TRAINING PARTNERSHIP ACT PROGRAMS, the WORK OPPORTUNITY TAX CREDIT, and the TEXAS WORK & FAMILY CLEARINGHOUSE.

For additional information on all of these programs, please contact Desi Holmes of the Employment Service Unit at (512) 936-3059.

Renée M. Miller
Legal Counsel to
Chairman Bill Hammond

Special thanks
to Ms. Desi Holmes

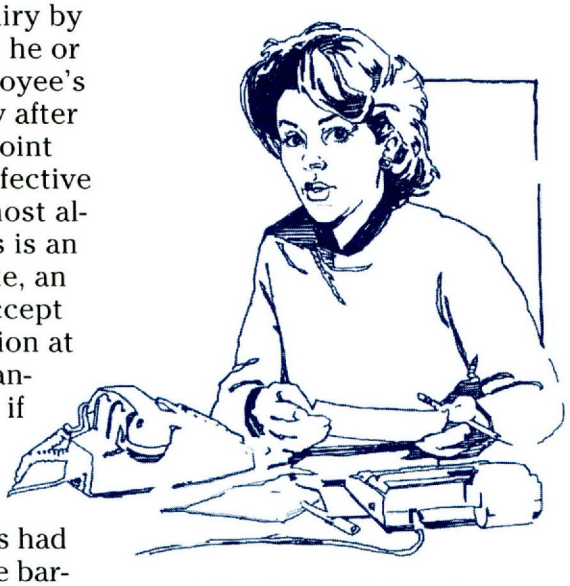


Accepting an Employee's Resignation: Issues & Answers

A large number of calls to our office deal with the issue of when and how to accept an employee's resignation. There are a variety of legal issues that can be affected by how an employer deals with this subject.

The most common inquiry by an employer is whether he or she can accept an employee's resignation immediately after it is given, or at some point prior to the intended effective date. The answer is almost always "yes". Since Texas is an at-will employment state, an employer can legally accept an employee's resignation at any point in time. The answer could be different if the employee and employer had entered into an employment contract or if the parties had signed a union collective bargaining agreement. Breaching a contract could result in monetary damages or other legal remedies.

The second most common question is whether an employer owes any money to an employee beyond the date and time at which the resignation has been accepted and services are no longer being rendered. Hourly wage employees are only paid for hours actually worked. Therefore, these employees generally do not need to be paid beyond the hour in which they last perform services for the employer. This same rule applies to salaried non-exempt employees (people who are paid overtime for hours worked in excess of 40 hours per week). A different rule applies to salaried exempt employees. Federal wage and hour law frowns on making partial-day deductions from an exempt employee's salary. Therefore, if you accept an exempt employee's resignation in the middle of a workday, the employee will have to be paid his salary through the end of that day, even if he is instructed to leave work immediately.



Another common inquiry deals with how acceptance of a resignation may affect an unemployment claim. The Texas Workforce Commission (TWC) has struggled with this problem for a number of years. Over time, TWC has developed a body of precedent cases to deal with this issue. In general, TWC recognizes that the expectation for a two-week resignation notice is fairly standard in most industries and occupations. Therefore, TWC has ruled that if an employee offers a notice of two weeks or less and the employer decides to accept the notice immediately or at any time during the notice time frame, the work separation will be viewed as a quit case.

This means that if the employee files for unemployment, he or she will bear the legal burden of proof to show they had a good work-related reason for quitting before they can be entitled to collect unemployment. The rules change somewhat if the employee given more than two weeks' notice of resignation. For example, if an employee gives a three-week notice of resignation and the employer accepts the notice immediately, TWC has the option of analyzing the work separation as a termination. If the Commission elects this option, the employer has the legal burden to prove that the employee was terminated for some act of misconduct. Failure to prove misconduct means that the employee is qualified to collect unemployment.

Since misconduct is rarely proven in such circumstances, employers should avoid immediately accepting lengthy resignation notices unless they feel the cost of a possible unemployment claim is worth not risking having a holdover employee in the office for an extended period of time.

Recently, the Commission had the opportunity to rule on some variations of the above fact scenarios. For instance, the Commission was presented with the case

of an employee who resigned giving more than two weeks notice. However, the employer accepted the notice during the two-week time frame preceding the effective date of the notice. The Commission held that regardless of how much advance notice is given, a resignation accepted within the final two weeks before the stated effective date of the notice will not change the resignation to a termination.

Two additional cases were decided by the Commission in the last few months. In both cases the claimants gave more than two weeks advance notice of resignation. The employers accepted the notices earlier than the intended effective dates and prior to the last two weeks involved in the notices. However, each employer paid the claimants from the date on which the notices were accepted through the stated effective date of the notices.

The Commission ruled that since the claimants were in no worse position than if they had worked out their entire notice period, the cases should be viewed as voluntary quits. The Commission still has not had the opportunity to rule on a case in which an employer accepts a notice early and pays the claimant up to the last two weeks of the stated notice period. Based on the previously discussed cases, one would hope the Commission would still find this type of case to constitute a voluntary quit.

There are other unresolved issues that could affect the outcome of unemployment insurance cases. For example, the Commission has never issued a precedent case that analyzes how a retraction of a resignation should be handled. For example, an employee might give a four-week resignation notice. The employer takes no action to accept the notice. A week later the employee advises the employer he is retracting the notice. Three weeks later the employee shows up for work and the employer tells him to leave, citing the earlier effective date of the original resignation.

Is this a quit or a discharge? Would the case be decided differently if on the date the employee attempted to retract, the employer informed him that a decision to accept the notice had already been made? What if the employee attempted to retract during the last two weeks of the notice period? Would that factor preclude the right to retract without the employer's acquiescence?

Since these questions remain unanswered, a prudent employer wishing to have a unemployment claim viewed as a quit case should promptly advise an employee that their notice has been accepted. Remember that you can advise an employee that their notice is accepted while still allowing an employee to work out their notice period. This would be especially important if the employee has given more than two weeks advance notice.

Other legal issues can come up when dealing with resignation issues. For example, many employees quit because they feel they are being illegally discriminated against or harassed. They may file an EEOC claim and/or lawsuit and allege a constructive discharge. In other words, they can contend that the employer created or allowed an intolerable and discriminatory working environment that forced them to resign. A "resignation" under these circumstances would do little to protect the employer from legal liability. Resignation notices may also require special treatment when an employment contract is involved. Some employment contracts require the parties to the contract to give a specified amount of notice before the contract can be terminated.

Failure to give the appropriate notice can lead to liquidated damages spelled out in the contract or other damages determined by a court. Be sure to closely review the terms of your contract if an employee attempts to give you notice. The employee's notice may or may not comply with the contract and you may have certain legal rights in this situation.

In summary, employers should examine all the potential legal issues that can arise when a resignation notice is given and accepted. Attention to detail could save you time and money.

Aaron Haecker
Legal Counsel to
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Smoking in the Workplace: A Burning Issue

Increasing numbers of employers are adopting policies for their workers that either prohibit smoking in the workplace outright or at least severely restrict such activity. The most common reasons for such bans are promoting healthier living for smokers, reducing health risks from "secondary smoke" for non-smokers, and cutting insurance costs. Other less frequently-stated reasons include keeping office space cleaner and cutting down on excessive break time. Whatever the reasons, however, it is clear that companies planning to adopt smoking policies must keep a wide range of issues in mind.

First, companies must look to city, state, and federal law to see whether they contain any mandatory guidelines. Many cities have passed ordinances restricting smoking in public places, and definitions of public places sometimes include significant areas of what many might consider private property. Texas law also prohibits smoking in certain public places, such as public transportation, public schools, movie houses, and elevators. Federal law does not address the issue of smoking in the private workplace, except for narrow restrictions on smoking in areas where danger of fire or explosion exist. Finally, private limitations on smoking often come from landlords or insurance carriers.

Second, companies should be aware of potential future regulation. OSHA is considering adopting regulations on workplace smoking. The U.S. Department of Health and Human Services has a goal of smoking bans in 75 percent of American workplaces by the turn of the century.

The U.S. Surgeon General recently encouraged more legislation to limit smoking in the workplace in order to encourage more smokers to quit and protect non-smokers from secondary smoke. The National Institute for Occupational Safety and Health recommended that tobacco smoke be regarded as an occupational carcinogen for purposes of regulation by OSHA, that concentrations of smoke be held to an absolute minimum in workplaces, and that employers should adopt all available means to minimize employees' exposure to tobacco smoke.

While no such legislation is pending in Texas, it is certainly foreseeable in the near future in light of the state's effort to reduce health care costs in general.

Third, smokers and non-smokers alike are filing more and more claims and lawsuits involving smoking issues. Courts generally reject claims of discrimination by smokers when the smoking limits are based on safety considerations and applied evenly to all workers. Suits asserting a constitutional "right to smoke" have been unsuccessful.

By the same token, non-smokers have been generally unsuccessful in persuading courts to ban smoking in various places, since the courts prefer to leave such bans to lawmakers and individual companies. Several states have ruled that hypersensitivity to tobacco smoke is a compensable disability under workers' compensation statutes. Concerning unemployment compensation, Pennsylvania recently ruled that an employee who quits due to a ban on smoking in the office is not qualified for benefits. On the other side of the coin, a Massachusetts court ruled that an employee who was fired for advocating smokers' rights on talk shows can sue her former employer.

Finally, employers must be sensitive to smokers and non-smokers alike when designing a workplace smoking policy. A company should give at least 30 days' advance notice of any changes. The policy should apply to all employees. It should note that its purpose is not to prescribe personal habits, but rather to maximize comfort for everyone. It should set out well-defined limits, such as designated smoking areas or times. The policy should encourage employees to work disputes out themselves, but should also let employees know how to seek help when voluntary means fail.

Some companies ask whether it is legal to screen out job applicants who smoke. While there is no Texas or federal statute or regulation prohibiting an employer from doing that, such companies, before taking such a step, may want to consider what the real goal of such a policy is. The vast majority of companies that think about screening out all smokers do so because they do not want employees spending time on smoking breaks, or sneaking smokes in the restrooms or stairwells, or smoking before or after normal office hours.

It is possible, of course, for an employer to accomplish all those things without having to worry whether a new hire happens to be a smoker. For example, breaks are up to an employer to decide. If a company has a policy of allowing one break in the morning and another in the afternoon for a standard shift, it does not have to allow smokers any additional breaks. Also, an employer may use its disciplinary policy to discourage people from smoking in particular areas of the building or at particular times. In other words, a company can have as restrictive a policy on smoking as it deems appropriate; that way, it can consider smoker and non-smoker applicants alike on their individual strengths.

The bottom line for employers is that the question is no longer whether it is a good idea to regulate workplace smoking. Study after study has shown that tobacco smoke in workplaces harms smokers and non-smokers alike, and health and safety agencies at every level of government are unanimous in calling for legislation and employer policies to limit smoking in the workplace. The real question for employers is how far to go and how soon to do it.

Fortunately, Texas employers attempting to deal with these issues have an excellent resource available in the Office of Tobacco Prevention & Control in the Texas Department of Health; the phone number is 1-800-345-8647. That office offers employers free materials, including sample smoking policies, and consultation to help businesses address workplace smoking problems. It also advises employers on how to conduct employee tobacco education programs and help smokers quit.

Another good resource is the American Cancer Society, which has a toll-free number, 1-800-ACS-2345 (800-227-2345), at which employers can request free resources, including sample policies, to help create smoke-free environments at their workplaces.

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Chairman Bill Hammond

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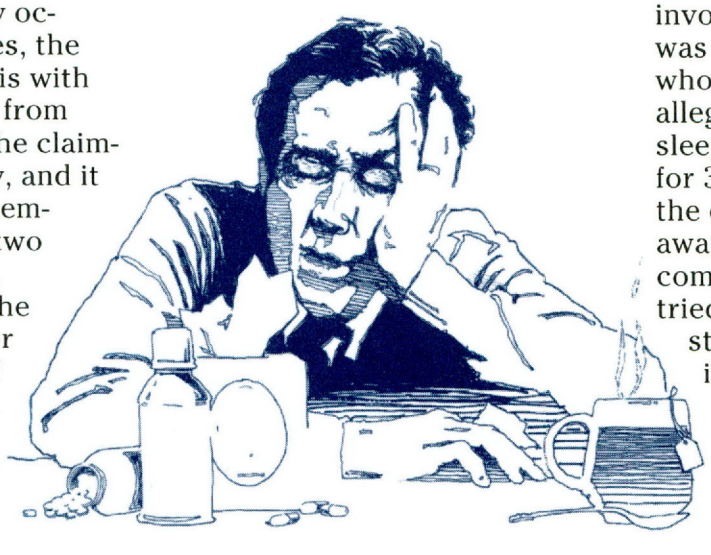
Sleeping on the Job
A Wake-Up Call to Employers

The Commission often deals with unemployment appeals involving claimants who were fired for sleeping on the job or related troubles. Employers can run into problems with such cases; some of the problems are avoidable, but some are not. As with any other unemployment claim dealing with a claimant who has been discharged, the employer must be able to prove two main points. First, the employer must show that the discharge resulted from a specific act of misconduct connected with the work which happened close in time to the discharge. Second (and this is where most employers fall down), the employer must show that the claimant either knew or should have known he could lose his job for such a reason.

Sleeping on the job can certainly be considered misconduct connected with the work. In addition to satisfying the above two points, though, an employer must prove that the incident actually occurred. In most cases, the only way to do that is with firsthand testimony from someone who saw the claimant sleeping on duty, and it is even better if the employer can present two firsthand witnesses, both of whom saw the claimant sleeping for whatever amount of time the nap lasted. Claimants will only rarely admit wrongdoing, and in this kind of case, the most common excuses are "I was only closing my eyes for a few seconds" and "all I did was put my feet up for a minute." Employers sometimes spin their wheels trying to prove someone was actually asleep, when another tactic might be better, i.e., arguing that the claimant was taking an unauthorized break or somehow goofing off while he was supposed to be on duty. Keep in mind, "loafing" on duty can also disqualify a claimant. If all an employer can prove is loafing, the employer should go with that and show how the claimant had been warned in the past.

TWC has had some interesting appeals in this area. In one case, a bulldozer operator was fired for being found on his machine asleep once too often. The employer lost because the evidence showed only that the claimant frequently had to wait long periods for instructions and would use the time to "doze" off while his machine was idling. The employer was aware of this going on, but had never warned the claimant about it and had no policies concerning the matter. In another case, the claimant had told the employer he was feeling too sick to come to work, but was threatened with discharge if he failed to appear. He came in, but was found asleep on duty in the middle of the night. His job was to sit in a car and watch over the employer's car lots at night. The employer lost because it turned out that the claimant was still under medical care for a job injury and was taking two different medications at the time he fell asleep. The Commission reasoned that the claimant had given proper notice that he felt sick, and that it should not have surprised the employer that a sick person on medications might fall asleep at night. There was no indication the claimant was not using his best efforts to remain awake, and there had been no prior incidents or warnings.



Probably the most outrageous case in this area (decided several years ago while the agency was still called "TEC") involved a security guard who was fired after his supervisor, who was not at the hearing, allegedly saw the claimant sleeping in his guard booth for 30 minutes. At the hearing, the claimant stated he was aware the supervisor had come to his guard booth, tried to enter the locked door, stood at the window watching him, and waited out in his vehicle. He admitted having his head covered in his arms during this time, but said he was

actually "praying," had his eyes half-open, and saw all this. Nonetheless, he made no move to look up, acknowledge the other's presence, or ascertain his business. One wonders whether this security guard would have bestirred himself to action if he had noticed a team of saboteurs laying explosives around the employer's facility and his guard booth–hmmm... Amazingly, despite the claimant's admissions, the employer lost, 2-1, because the supervisor did not testify in person. (Important reminder: in any unemployment claim, an employer should always be prepared to present firsthand testimony from eyewitnesses!)

Employers concerned about this topic would do well to review their policies. Is all sleeping on the premises prohibited? If so, that should be in the policy. Some employees sleep during breaks. If an employee violates the policy, a warning should be given just as for any other policy violation. If an employee claims a medical reason for being sleepy or sleeping, the employer has the right to require medical documentation of such a fact. Remember to keep such information strictly confidential.

In addition, employers dealing with TWC claims should be prepared with witnesses and documentation about the reasons for discharge. Copies of warnings should be submitted. Eyewitnesses should be available to talk with the claim examiner and hearing officer. Employers should emphasize the final incident causing the discharge and should be as specific as possible. Any employer who observes these points should be able to sleep well at night!

William T. Simmons
Legal Counsel to
Chairman Bill Hammond

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