4th Quarter 1995

TexasBusinessToday

Chairman Bill Hammond

Texas Workforce Commission

TEC to be Merged into the New Texas Workforce Commission

Texas, the home of 8.7 million workers and more than 350,000 employers, has taken a bold step toward addressing the needs of 2lst-century businessess and employees alike. With the Texas Workforce Commission (TWC) leading the way, a dynamic new employment and training strategy is taking shape. According to Governor George Bush, the TWC was created "because we recognize Texas must do a better job of training people for jobs which exist, helping move people from welfare to work, and keeping pace with changing technology."

The TWC was created by the Texas Legislature in 1995 to bring employment, employment-related educational programs, and job training under one roof. This measure will result in the consolidation of 24 training, education, and employment assistance programs now spread between eight agencies. The commission will also administer the state's unemployment compensation insurance program.

TWC will completely absorb the Texas Employment Commission over the next two years, using its infrastructure as the new superagency's core. Programs from the Texas Education Agency, the Department of Commerce, the Department of Human Services, the Department of Criminal Justice, the State Occupational Information Coordinating Committee, the Department on Aging, the Higher Education Coordinating Board, and the Governor's office will consolidate into a Workforce Development Division. Unemployment Insurance and other existing TEC programs will remain.

In the coming year, innovation and activity will focus TWC's Workforce Development Division on the challenge of integrating programs and employees into one management system. Legislators want to know if consolidated training and education strategies will move our economy away from low-paying service jobs and toward higher-skilled positions with lifetime advancement and retraining potential.

Chairman Bill Hammond, the Commissioner representing employers, Jo Betsy Norton, the Commissioner representing the public, and David R. Perdue, the Commissioner representing labor, will oversee agency operations and decide unemployment insurance appeals cases. The legislation which created the agency also created the position of executive director. This individual will be selected by the three commissioners and will direct the agency's day-to-day activities.

The legislation which created the TWC also calls for a different local level service delivery strategy. Local boards will plan, coordinate, and monitor employment, training, and education spending in their areas, similar to Private Industry Councils under the Job Training Partnership Act. The philosophy of local administration is that those closest to the labor market are in the best position to set policy and implement programs that build on area strengths and address market weaknesses. Local boards will not operate the programs, but will concentrate on strategic planning and monitor the programs they select to deliver services.

*(see **TWC**, page 3)*

the Hammond Report

Dear Texas Employers,

As Commissioner Representing Employers, I am your newly appointed representative on the Texas Workforce Commission, the agency that has assumed responsibility for the unemployment insurance and workforce development programs from the Texas Employment Commission and several other state agencies.

As Employer Commissioner, my highest priority is providing direct information and assistance to you and the Texas business community. I am also your advocate on contested unemployment compensation cases appealed to the Commission.

I believe that TexasBusinessToday, our quarterly newsletter, provides valuable information on a wide variety of workplace issues, ranging from understanding the agency and the law, to taxes and the appeals process.

Your federal and state unemployment tax dollars are the primary funding mechanism for the unemployment insurance system, as well as for the entire range of programs dealing with job training and workforce development. You should not have to pay more unemployment taxes than necessary, and what you learn from this publication may help you keep your unemployment compensation taxes low.

My staff and I are here to help you with any problem you cannot solve at the local or regional level. We are also in the process of scheduling a number of Texas Business Conference seminars around the state in an effort to keep you informed and up to date on various employment law issues. The Conferences will begin in early 1996; you will receive an invitation approximately six weeks before we come to your area. Schedules and registration forms will appear in this and future issues of TexasBusinessToday. I look forward to being of service to you and invite you to call us toll-free at 1-800-832-9394 with your questions or suggestions for future articles.

Sincerely,

Chairman Bill Hammond
Commissioner Representing Employers

TBC Seminar Schedule

Projected 1996 Dates

January 31	Corpus Christi
February 15	Beaumont
February 28	Abilene
March 27	Amarillo
April 11	Odessa
April 26	Tyler
May 15	San Antonio
June 13	Waco
June 28	McAllen
July 18	Houston
August 8	Austin
August 23	Ft. Worth
September 12	Dallas
September 25	El Paso

Texas Business Conference

We are now taking advance registration for Corpus Christi, Beaumont and Abilene. Fees are $45 per person (non-refundable) and includes refreshments, facilities and materials. *For additional information, call 1-800-222-4835.*

Seminar choice: _____

Please print:

_____
First Name Initial Last Name

_____
Name of Company or Firm

_____
Street Address or P.O. Box

_____
City State ZIP Telephone

Make checks payable, and mail, to:

Texas Business Conference—TWC
Texas Workforce Commission
101 E. 15th Street, Room 466
Austin, Texas 78778-0001

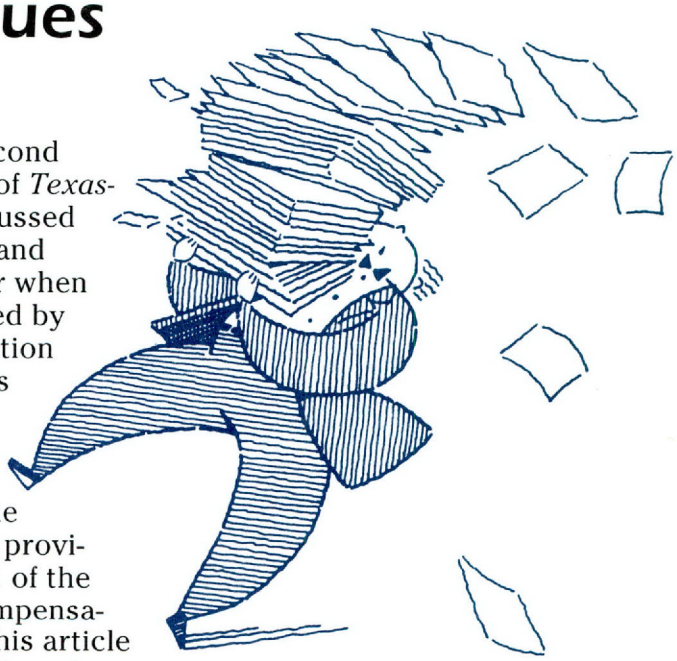
*(**TWC**, from page 1)*

TWC legislation became effective on September 1, 1995. Management audits by the Comptroller's staff are underway to recommend transition procedures and organizational structure. A transition committee of agency administrators and legislators will ensure minimal service disruption during the consolidation process. The Texas Council on Workforce and Economic Competitiveness will continue coordinating the development and delivery of the state's workforce programs. A legislative oversight committee will provide guidance and policy interpretation during the new agency's infancy. A skills development fund that community and technical colleges can use to develop customized training for employers is part of the plan.

The Governor will appoint an 11-member skill standards board to develop industry-recognized standards for major occupations. Initially, TWC will employ approximately 6,000 workers statewide; however, the federal block grant funding that legislators are considering could reduce the number of employees over time.

The Texas Workforce Commission is setting out to develop a diverse, dynamic Texas workforce that meets employers' technological and skill demands and puts individuals on the road to economic self-sufficiency.

The Injured Employee: Frequently Overlooked Legal Issues



An article in the second quarter 1995 issue of *TexasBusinessToday* discussed some of the issues and risks that can occur when an employer covered by workers' compensation insurance considers terminating an injured employee. Specifically, that article dealt with the wrongful discharge provisions of Section 451 of the Texas Workers' Compensation Act (TWCA). This article will cover some of the other termination risks that may arise when an employer is faced with either an off or on the job injury situation.

Unfortunately, Section 451 of the TWCA is not the only law that can apply to injury situations. Employers faced with an on or off the job injury should consider the possibility that the situation may also raise other statutory wrongful discharge issues. For example, even if the employer avoids a Section 451 action, an employee might have a claim under the Family and Medical Leave Act (FMLA - a federal statute which applies to employers who have 50 or more employees). Similarly, the Americans With Disabilities Act (ADA - federal law) and Texas Commission on Human Rights Act (TCHRA - state law) both of which apply to employers who have 15 or more employees, may also come into play. These laws should be fully examined when you are considering termination questions.

THE FAMILY MEDICAL LEAVE ACT *(for employers with 50 or more employees)*

The FMLA requires covered employers to provide 12 weeks of unpaid medical leave per year for employees. The leave applies to a variety of situations, including serious health conditions that make the employee unable to perform the functions of his job. The law defines a "serious health condition" as inpatient care, continuing treatment by a health care provider, or a period of incapacity.

*(see **Legal Issues**, page 4)*

(***Legal Issues***, *from page 3)*

There is a high likelihood that a serious injury will fall under the FMLA guidelines. Even non-work related injuries can fall under the FMLA. Employers, by law, cannot terminate an employee who is out on qualified FMLA leave. An employee who is illegally terminated may file a complaint with the United States Department of Labor or file a private civil lawsuit under the FMLA code. Damages can include lost wages and benefits, an amount equal to the lost wages and benefits as liquidated damages, reinstatement, attorney fees, expert witness fees, and other costs of the legal suit or action.

Employers should make sure that they recognize an FMLA situation so that the employee can be properly advised that FMLA leave is going to apply to those absences "caused by his on or off the job injury." An employer does not want to have to grant an additional 12 weeks of guaranteed employment under the FMLA after the injured employee has already been absent the maximum amount of time allowed under the employer's absenteeism or leave of absence policy. The purpose of an employer having a neutral absenteeism policy is to allow the employer to terminate an injured employee after a set amount of time has passed without having to worry excessively that they will lose a Section 451 workers' compensation wrongful termination lawsuit. If the employer does not apply FMLA leave concurrently with the neutral absence policy, the employee may get to stay on another 12 weeks beyond the time allowed under the neutral absence control policy (or permanently, if he recovers during those extra 12 weeks). One other interesting point about the FMLA should be made. Normally, an employer will want to require an injured employee to take accrued paid leave during an FMLA situation so that the employee does not tack paid leave on after the 12 weeks of unpaid FMLA has expired. However, FMLA regulations specifically indicate that because a workers' compensation absence is not unpaid leave, the provision for substituting accrued paid leave is not applicable to a workers' compensation absence.

Finally, like many federal employment law statutes, the FMLA contains a prohibition against retaliatory discharge. An employer may not discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

THE AMERICANS WITH DISABILITIES ACT

(for employers with 15 or more employees)

The ADA and the TCHRA may also throw a wrench into an employer's termination plans. Since the laws are very similar, all references here will be to the ADA. The ADA forbids employers from discriminating against employees who are qualified individuals with a disability. The key here is that the law only provides protection to disabled people who are otherwise able to perform the essential functions of their job with or without a reasonable accommodation by the employer. In many workers' compensation injury situations (and off the job injury situations), we are talking about employees who are off of work for a lengthy period because they are at least temporarily disabled. By definition, many of these employees will not be able to perform their essential job functions. (Employers should also keep in mind that not all job injuries result in medical conditions that qualify as "disabilities" under the ADA.)

One should still exercise caution even if the injured employee cannot currently perform his essential job functions because the ADA specifically indicates that a reasonable accommodation may include flexible leave policies. This could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. Although it is not clear how much additional unpaid leave might need to be given in order for the employer to have complied with the reasonable accommodation requirements of the ADA, it is difficult to imagine that the law would require much more from an employer who had given the employee the full 12 weeks of FMLA, any accrued vacation

and sick leave, plus allowed the employee the entire time mandated by the employer's neutral leave of absence policy. In fact, long-term absences by their very nature indicate that the employee in question may not ever be able to again perform their essential job functions. The ADA is no longer a consideration if it is apparent from medical facts that the employee will never again be able to perform his or her essential job functions, with or without an accommodation from the employer.

In situations where it is not clear that the employee is totally disabled, the employer is faced with a whole range of issues. The most important point to make is that the employer cannot simply terminate the employee without exploring both the employee's medical condition and the requirements of the job. First, the employer must determine if the employee meets the definition of disability under the ADA. If the employee does meet that definition, the employer must also determine whether the employee can perform the essential job functions without an accommodation. If not, the employer must try to find out whether an accommodation exists for the employee and whether that accommodation is reasonable. A disabled employee can only be denied continued employment if no reasonable accommodation exists or if providing a reasonable accommodation would place an undue burden on the employer. Some examples of accommodation may include: (1) making facilities readily accessible to an individual with a disability; (2) restructuring a job by reallocating or redistributing marginal job functions; (3) altering when or how an essential job function is performed; (4) part-time or modified work schedules; (5) obtaining or modifying equipment or devices; and (6) reassignment to a vacant position.

The ADA also provides some guidelines to help an employer determine whether an accommodation would impose an undue hardship on the business. Some of the factors involved are: (1) the net cost of the accommodation; (2) the employer's financial resources; (3) the type of business involved, including the structure and function of the workforce; and (4) the impact of the accommodation on the operation of the facility.

Like the FMLA, the ADA also contains a provision prohibiting an employer from retaliating against an applicant or employee who made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing involving the ADA. The remedies available for ordinary ADA violations also apply to retaliation cases.

Potential damages for violating the ADA generally fall between the amount of damages possible under the FMLA and the amount of damages possible under Section 451 of the Texas Labor Code. ADA complaints must initially be filed with the EEOC. If found to be valid, the EEOC will attempt to mediate a conciliation agreement between the parties. Whether or not the complaint is found to be valid, the complainant may choose not to abide by the proposed conciliation agreement and may instead seek a "right to sue letter" from the EEOC. Available relief for a plaintiff includes hiring, reinstatement, promotion, back pay, front pay, reasonable accommodation, or other actions that will make the individual "whole". Attorney fees, expert witness fees, and court costs can also be recovered. Finally, the law also allows for large monetary damage awards for compensatory and punitive damages in cases where intentional discrimination is found to exist. Fortunately, the total amount of compensatory and punitive damages is limited based on the size of the employer. For example, damages against small employers (15 to 100 employees) may not exceed $50,000, while damages against the largest employers (500 or more employees) are capped at $300,000.

UNEMPLOYMENT CLAIMS

An unemployment claim is probably the last statutory issue to think about in an injury situation. While it may seem trivial to large employers, an unemployment claim may be incredibly important for small employers. Remember, small employers who

*(see **Legal Issues**, page 6)*

*(**Legal Issues**, from page 5)*

have fewer than 15 employees do not have to worry about getting sued under the ADA or the FMLA. However, they do have to worry about unemployment claims, and these claims can be very expensive for a small business that has a minimal profit margin. For example, a single unemployment claim could raise a small employer (let's say 5 employees) from the minimum unemployment insurance tax rate of .31 per cent to near the maximum tax rate of 6.5 per cent. Unemployment taxes are paid on the first $9000 of wages that are paid to each employee per year. This means that our small employer has a $45,000 taxable wage base. With a 6.5 per cent tax rate, this employer will pay almost $3000 per year in unemployment taxes. Since chargebacks affect the tax rate for three years, the employer could end up paying $9000 in taxes for a lost unemployment claim, depending upon subsequent claim experience and the number of employees. This might be more than the employer would pay to settle a nuisance wrongful discharge suit related to a workers' compensation claim.

Generally speaking, an employer will lose an unemployment claim if they terminate an employee for absences caused by injury, unless the employer can show that the final absence was a long-term one and can provide medical verification to support that fact. Providing this evidence to the Texas Workforce Commission (TWC, formerly the TEC, or Texas Employment Commission) to obtain chargeback protection on an unemployment claim can be risky if the injury was work-related. By stating that the employee was released due to the absences and injury, the employer is making an admission that might be used in another forum as evidence of wrongful discharge (such as in a Section 451 lawsuit) or might be used as evidence to impeach the employer's testimony. Governmental and nonprofit employers who have elected "reimbursing" status with the TWC have nothing to gain by arguing that the claimant was released due to a prolonged medically-related absence. These employers do not pay taxes and cannot have their unemployment insurance accounts protected in such a circumstance. They must reimburse the TWC for each dollar in unemployment benefits that is paid out to a claimant who separated from employment due to medically-related absenteeism. There is certainly no reason for a reimbursing employer to raise an argument that carries no advantage to them on the unemployment claim and which may carry a huge liability on a wrongful discharge claim.

However, there are several reasons why an employer may choose to respond to an unemployment claim even if it is not intending to give information about the reasons leading to the actual termination. For example, the unemployment laws require that a claimant who files for benefits must be eligible to receive those benefits even if the reason for his work separation is not disqualifying. To be eligible, a claimant must be physically able to work in a job he or she is qualified to perform. The employer can elect to respond to an unemployment claim by simply mentioning any physical restrictions or limitations that the claimant is known to have. Since an employer's unemployment tax account is only charged with benefits actually paid to a claimant, an ineligibility ruling by the TWC may reduce or eliminate a tax or reimbursement chargeback to the employer.

Of course, sometimes an employer is contending that an employee was terminated for some act of misconduct that occurred before, during, or after the job injury. In this type of case, any employer is free to fight the unemployment claim and might even be able to use the TWC hearing as a means of obtaining inexpensive legal discovery in anticipation of a related wrongful discharge case.

One final point should be made. An employee cannot receive unemployment benefits while simultaneously drawing workers' compensation benefits. The workers' compensation benefits will cause the claimant to be disqualified. Again, an employer's tax rate will only rise if unemployment benefits are actually paid to the claimant. Therefore, an employer may

escape unemployment liability if a claimant is collecting workers' compensation benefits, even if it makes no effort to raise the job separation reason (long-term medical absences) as a defense to the unemployment claim. For this reason, when responding to an unemployment claim, an employer may choose to indicate that the claimant is currently drawing workers' compensation benefits. This same disqualification from unemployment benefits does not apply to employees who are merely receiving disability benefits under an insurance policy that is not part of an actual workers' compensation benefit program.

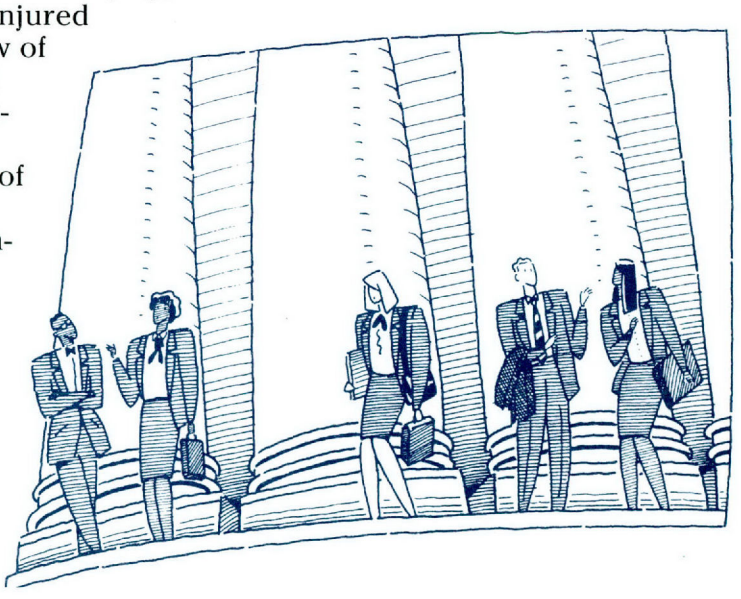
NONSUBSCRIBERS TO WORKERS' COMPENSATION

At least one non-statutory litigation risk can be involved in job injury cases. This risk applies only to employers who have elected nonsubscriber status under the TWCA. Texas is one of only a few states (Texas, New Jersey, and South Carolina) that still allow employers to operate without purchasing workers' compensation insurance for their employees. Some estimates indicate that 40 to 50 percent of Texas employers have elected nonsubscriber status.

Actually, the first risk for nonsubscribers is a statutory risk. The TWCA carries penalties of up to $500 per day for nonsubscribers who fail to adhere to certain regulations. Most nonsubscribers must file form TWCC-5 when they hire their first employee or when they cancel their existing workers' compensation insurance. The same form must be filed again each year. Nonsubscribers are also required to notify employees in writing that they are not covered by workers' compensation insurance.

The second risk for nonsubscribers is a personal injury lawsuit. Absent workers' compensation insurance, a worker may sue for damages for on the job injuries and the emotional distress caused by such injuries. The worker can recover such damages if a jury finds that the injuries were caused by the employer's negligence. Nonsubscribers are barred from raising several traditional defenses that are common to personal injury suits. A nonsubscriber cannot argue that the negligence of fellow employees caused the injury, or that the injured worker's own negligence caused the injury, or that the injured worker knew of the risk and therefore assumed that risk as part of the job. While any injured employee can sue a nonsubscriber for negligence and personal injury, common sense tells an employer that the risk of being sued goes up when the employer fires that employee or treats the employee poorly. Nonsubscribers may choose to pay the medical bills and lost wages of injured employees as a way of softening the financial blow of the injury and thereby lowering the desire of an employee to sue for damages. A nonsubscriber may also choose to purchase or offer other disability and health insurance packages to its employees as a means of paying for injuries and accidents. While this does not necessarily preclude personal injury lawsuits, it can certainly cut down on their impact by reducing the employer's out of pocket expenses. Also, as previously noted, being able to take financial care of your employees can go a long way in limiting their need to file such lawsuits.

Aaron Haecker
Legal Counsel to
Commissioner Bill Hammond



Online Information for Employers Continues to Increase

In the second and third quarter 1995 issues of *TexasBusinessToday*, articles explaining the **hi-T.E.C. BBS** (electronic bulletin board service) and the Internet introduced employers to the world of online information that is readily available, sometimes with nothing more than a local phone call, to anyone with a computer, a modem, and software to run the modem. This article will detail some of the more useful sites that employers can use to access business, government, and legal information.

hi-T.E.C. BBS

This BBS contains the largest collection of employment law articles oriented toward employers that is available in the public (free) domain. To access it, have your modem call either (512) 475-4893 (direct access for the Austin area) or (800) 227-8392 (dial-out access via the Window on State Government - enter /go dialTEC from the main menu), choose "e" for "Especially for Texas Employers", "e" again for "Employment Law Articles for Employers", and "l" for "Library of Employment Law Articles". Employers with Internet access may use the following Telnet address: hi-TEC.TEC.state.tx.us. World Wide Web access is at the following address: http://www.tec.state.tx.us. In addition, most Internet Gophers will provide access to the BBS; the link is always listed under Texas state government sites.

Currently, the BBS offers the following files for downloading:

ADA4ERS.DOL	The ADA: Your Responsibilities as an Employer
ALLUNEED.2NO	Employment Law Issues in Texas
AVOIDTHE.SE!	The most avoidable ways to lose a TEC/TWC case
CHILDLBR.DOL	Federal Child Labor Laws in Non-Farm Jobs
COEMPLOY.ERS	Co-employment: single and joint employers
CONSULTA.NTS	Independent contractor issues for consultants
CONTRCTL.ABR	Independent contractors/contract labor
DOL-LAWS.DOL	Laws enforced by U.S. Dep't of Labor
DRUGTEST.DOT	Drug tests & DOT regs - what you need to know!
DRUGTEST.ING	Legal issues and cases for drug testing
EXEMPT-F.LSA	Do's and don'ts on exempt employees' salaries
FARMKIDS.DOL	Federal Child Labor Laws in Farm Jobs
FARMWORK.DOL	Farm Workers and the Federal Wage and Hour Law
FMLA-BAS.ICS	FMLA - Family and Medical Leave Act Basics
GARNISH.DOL	Federal Wage Garnishment Law
GENERAL.DOL	Federal Minimum Wage and Overtime Pay Standards
GOVTBBSL.IST	List of state & federal government BBSs
HARDPROB.LMS	Some of the Worst Problems for Employers
HELPSOUR.CES	Publications and organizations for employers
HI-TEC.BBS	Announcing the employers' window on this BBS
HIRE&FIR.E	Hiring & Firing as It Relates to Unempl. Comp.
HOLIDAYS.DOL	How Federal Wage & Hour Law Applies to Holidays
INFOHIGH.WAY	Internet & Other Ways to Get Online
INFOHIGH.WY2	Internet update - new sites for businesses
INJURED.EES	Injured Employees - What Employers Need to Know
JOBAPPLI.C'S	Job Applications and Interviews
JUROR.ASC	Job Protections for Jurors
KEEPRECO.RDS	Recordkeeping requirements under the FLSA
KIDWAGES.DOL	Young Workers at Special Minimum Wages
LOVE.ASC	Article on romances in the workplace
MIGRANT.DOL	Migrant & Seasonal Agricultural Worker Protection
MISCEL-L.AWS	Miscellaneous employment laws of Texas
MISCOND.UCT	Misconduct - what TEC/TWC says it really is!
NOTE2EMP.ERS	Basic information about TEC/TWC for employers
OSHA.ZIP	All OSHA fact sheets in one file
OSHA3131.DOL	OSHA Bloodborne Pathogen Rules
OSHBASIC.DOL	OSHA Basics as explained by U.S. DOL
PENALTY.TAX	Tax penalty information for employers
PHONEL.IST	Important phone numbers for employers
POLYGRPH.ASC	Polygraph Testing and the Law
POSTER.ASC	Free Workplace Posters for Employers
REFERENC.ES	References and Background Checks
SEARCHES	Searches at Work - Legal Issues to Consider
SECRETS.ASC	How to protect trade secrets
TAXRATES.ASC	Tax rates - how they are calculated
TBT-1STQ.95	Texas Business Today, 1st Quarter 1995 issue
TBT-2NDQ.95	Texas Business Today, 2nd Quarter 1995
TBT-3RDQ.95	Texas Business Today, 3rd Quarter 1995
TBT-4THQ.95	Texas Business Today, 4th Quarter 1995
TBTINDEX	Back Issue Index for Texas Business Today
TECISNOW.TWC	TEC Becomes the Texas Workforce Commission!
TEMP-EMP.EES	Temporary employees - the basics
TERMINAT.ASC	Article on wrongful terminations
TRAINING.PAY	Pay for time spent in training & meetings
UITAX.ASC	Unemployment taxes - basic questions
USERRA.TXT	Uniformed Services Employment and Reemployment Act
WAGEHOUR.LAW	Wage and Hour Law Basics
WARN.ASC	Employers' Obligation to Warn of Layoffs
WORKERS'.CMP	Wrongful discharge issues in workers' compensation

World Wide Web

More and more business-related information is available on the World Wide Web (WWW) every week. Many companies have their own Web sites on the Internet that supply information about the company and its offerings, illustrated with attractive graphics and sometimes even sound and animation. Many Internet service providers also supply Web home page design services for other businesses. There are many, many good WWW sites to contact when searching for business information, but the sites listed below are especially good in the areas of human resources and employment law. Many of these sites are available via Gophers, but many Gophers are converting to Web sites, and most new business information is published on the Web rather than on Gopher sites.

http://www.tec.state.tx.us - see hi-T.E.C. BBS section

http://galaxy.tradewave.com/galaxy/Business-and-Commerce/Business-Administration - a good general place to start a business information search

http://www.directory.net - Open Market's Commercial Site Index, another good place to start

http://www.magicnet.com/benefits - BenefitsLink, a source of employee benefits information

http://www.hrhq.com - H.R. Headquarters, Personnel Journal's excellent Web site

http://www.haledorr.com - Labor & Employment Bulletin Directory

http://www.venable.com - although this is a Maryland law firm site, back issues of the firm's useful labor law newsletter are available for free public browsing, and there is a searchable index

http://www.law.utexas.edu - University of Texas School of Law library, including decisions of the Fifth Circuit Court of Appeals in New Orleans

http://www.kentlaw.edu/lawnet - Guide to Legal Resources, an excellent legal information search site - choose the "business resources" listing for an extensive variety of links to business and legal sites

http://www.dol.gov - U.S. Department of Labor's WWW site with links to wage and hour, OSHA, and other information databases

Anyone searching the Internet will soon notice that things can change rapidly. A link that works this month might change the next. However, the techniques for successful searching do not change. It is always a good idea to both write down any useful links or sites you find, as well as use your Web browser to record that site in your "hotlist" file for future reference. Similarly, record any useless sites you encounter to minimize time wasted there in the future. It is a good idea to do "screen prints" of especially complicated pages to make it easier to find the information for subsequent visits to those sites. Using the search tools located on most Web pages will usually bring up a whole list of useful documents or links to other sites that contain the information you need. Above all, keep in mind that when the "front door" to a site seems closed, i.e., there seems to be no way to access a site, there may well be back or side doors that will get you to the destination you want. In other words, try using different links to find the destination site; not all Web sites list all the other good sites. Sometimes, you must bounce from one site to another before finding what you need. It is a small price to pay for the mountain of information that is there for the taking. Good luck, and good searching!

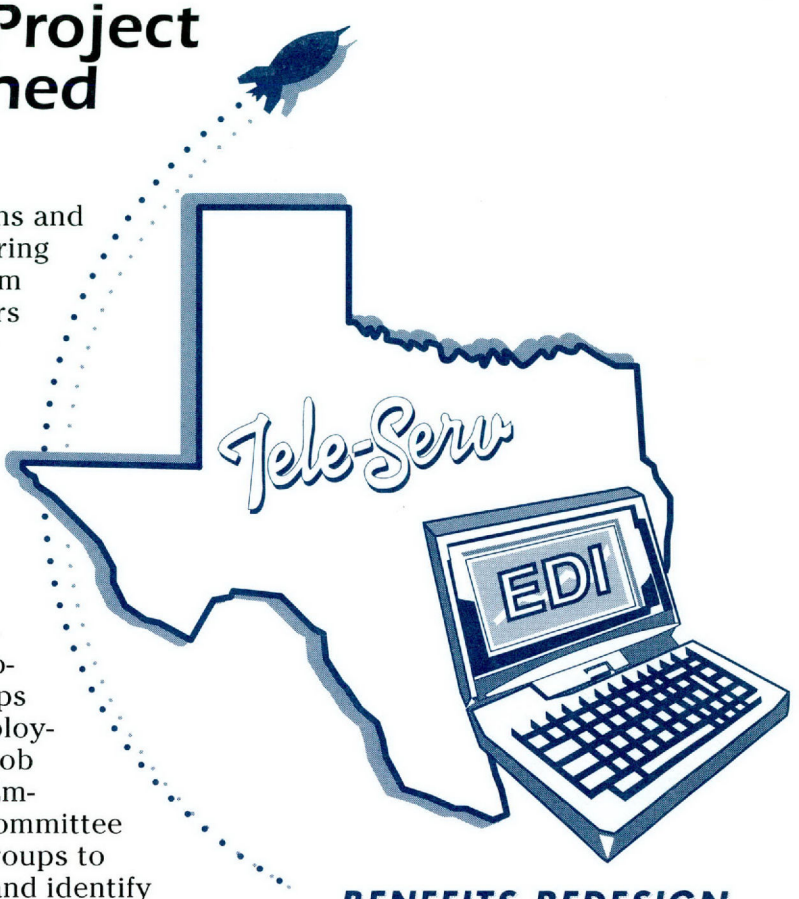
William T. Simmons
Legal Counsel to
Commissioner Bill Hammond

Benefits Redesign Project Successfully Launched

The Texas Employment Commission (which will be absorbed by the Texas Workforce Commission by September 1, 1996) has launched one of the most dramatic and wide-ranging service delivery improvement efforts in recent memory with its Benefits Redesign project. The Benefits Redesign project is an internal initiative to re-engineer the total unemployment insurance benefits service delivery framework and improve customer service for both employers and claimants. Employers' federal employment taxes provide the administrative dollars which fund our agency, and we are committed to get the most effective and efficient use of these dollars.

The Benefits Redesign project is timely, since the current Benefits system is old and outdated. The current processes and technology are not responsive to the changing needs of customers. Current operations consist of extensive manual tasks that are time and labor intensive, and slow to achieve results. The goal of the Benefits Redesign proj-ect is to exceed employer expectations by providing convenient and easy access to services, and prompt and comprehensive responses to requests.

The project began in 1994 with an analysis of current operations and by gathering input from customers to determine how TEC could improve service. TEC conducted focus groups with employers and Job Service Employer Committee (JSEC) groups to discuss and identify improvements in areas such as correspondence, quarterly wage reports, and communications. This information was used to design the way in which future operations should work. Three key initiatives of the Benefits Redesign project include Electronic Data Interchange (EDI), Tele-Serv, and the new Benefits Redesign system.



BENEFITS REDESIGN PROJECT

EDI

Electronic Data Interchange is a big bonus for Texas employers. EDI allows the transmission of data in a computer-processable format - meaning one computer can "talk" to another, as the systems transmit information electronically. EDI can eliminate labor intensive and expensive tasks associated with paper, postage, and mail handling.

The agency already uses EDI to receive employer wage reports. Paper or magnetic tape can take up to five days for information to arrive and then be manually entered or loaded onto the agency's system. With EDI, employers transmit wage information directly into the agency's computer system and the data are available the same day.

The Benefits Redesign project plans to introduce EDI for unemployment insurance chargebacks. Currently, when the agency mails a claimant his or her first unemployment

insurance warrant, we also mail a letter notifying the employer of a potential chargeback. The employer reviews the information and mails its response. An agency employee then data enters the the employer's response information manually. This system currently generates over one million documents yearly. With EDI, chargeback notices and employer responses will be transmitted instantly. EDI can reduce or eliminate postage costs as well as the potential for human error.

The project's pilot program will involve San Antonio's H-E-B grocery stores and its service agent, the Gibbens Company. According to Unemployment Insurance Division Director Mike Sheridan, EDI will eventually transmit other employer information, including Notices of Initial Claim and fraud surveys.

Tele-Serv

Tele-Serv

Tele-Serv is an automated telephone system that provides the general public access to services via the telephone. Tele-Serv enables callers to hear informational messages or enter data by using the telephone keypad. Tele-Serv provides general unemployment inquiry information, status of claim, and certification claim filing.

TEC improved the certification filing process with Tele-Serv. Tele-Serv asks more specific questions and validates claimant information so that only accurate information is captured. This makes determinations more consistent, timely, and accurate, and generates only valid and eligible payments. When filing certification by phone, claimants must listen to the fraud statement and verify that they understand and accept the conditions. Today, claimants often sign the statement without reading it. Tele-Serv also eliminates processing and data entering extensive paper forms, which in turn reduces errors.

Tele-Serv is currently operational in the Austin, Abilene, Dallas, Midland, Longview, San Antonio and Houston areas and will be available statewide by the end of the year. In the future, the agency plans to expand the use of Tele-Serv to provide employer account information and request for chargebacks.

Benefits Redesign System

The agency is using state-of-the-art technology to build a new Benefits computer system. The new Benefits Redesign system has features to enable and support improved operations. All types of on-line information will allow agency employees to quickly respond to employers' requests for information. Automated claim investigation will result in higher quality decision-making and determinations the first time. The system will not only help prevent and minimize overpayments, but also provide more effective collection. Expanded use of magnetic tape for mass layoff situations will lessen the impact on employers. Further, employer correspondence and notices have been redesigned to be more user-friendly, clear, and informative. In the future, it will also be easier and faster to implement changes on a statewide basis to comply with new laws and regulations.

With the Benefits Redesign project, the agency is focusing on providing benefits to our customers. Division Director of Unemployment Insurance, Mike Sheridan, explains it best by saying, "Our customers should always come first! Our Benefits Redesign Project will enable the Texas Workforce Commission not only to make customer service a top priority, but to make quality customer service a reality."

Sam Dixon
Benefits Redesign

Training and Meetings— Compensable Work Time?

Special Problems Under the Wage and Hour Laws

(This is the first in a series of articles dealing with the issue of "hours worked".)

Past issues of *TexasBusinessToday* have dealt with the basics of wage and hour law as found in the Fair Labor Standards Act (FLSA) and the Texas Payday Law; see the first and second quarter 1994 issues, or else download the file "wagehour.law" from the hi-T.E.C. BBS as explained in this issue. Employers who have dealt with the FLSA know that one of the most important things is to determine what must be included in the category of "hours worked" for purposes of calculating an employee's pay, including overtime. This article focuses on the issue of time spent in meetings and training.

The general rule is found in the wage and hour regulations at 29 C.F.R. 785.27, which states the following: Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

(a) attendance is outside of the employee's regular working hours;

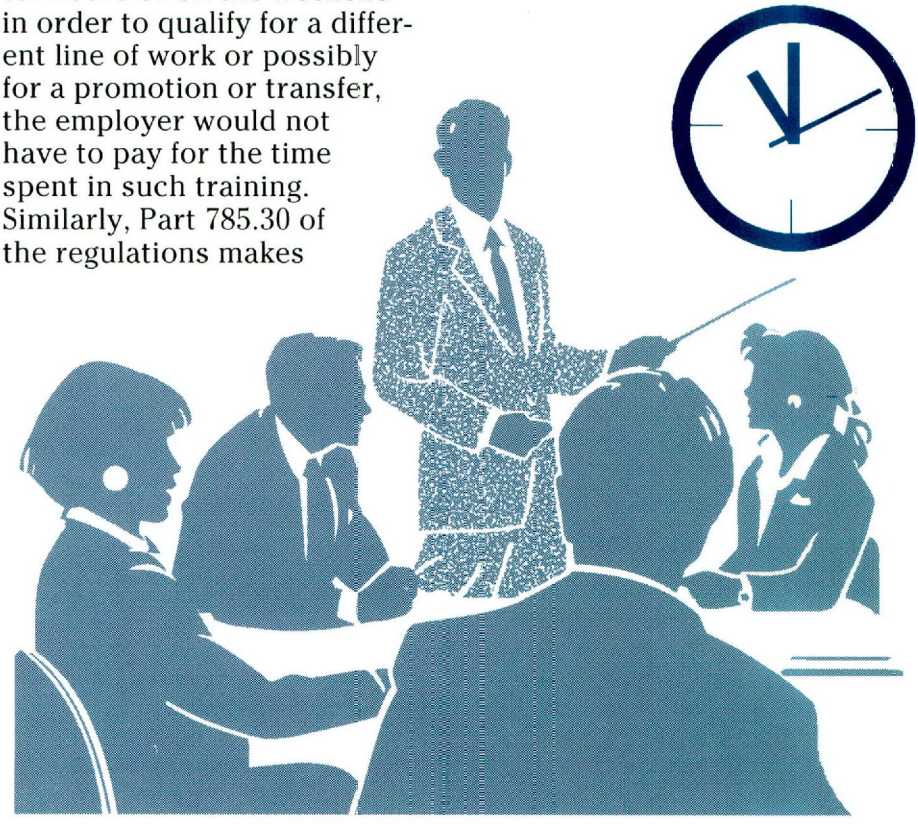
(b) attendance is in fact voluntary;

(c) the course, lecture, or meeting is not directly related to the employee's job, and

(d) the employee does not perform any productive work during such attendance.

Part 785.28 explains that attendance is not truly voluntary if it is required by the employer, or if the employee is led to believe that nonattendance would somehow adversely affect his employment, as would be the case with most meetings called by the employer. Part 785.29 notes that "training is directly related to the employee's job if it is designed to make the employee handle his job more effectively, as disinguished from training him for another job, or to a new or additional skill."

For example, if an employee attends a training course on his or her own after hours or on the weekend in order to qualify for a different line of work or possibly for a promotion or transfer, the employer would not have to pay for the time spent in such training. Similarly, Part 785.30 of the regulations makes clear that "if an employee on his own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job." The important thing there would be that the employer did not instruct the employee to attend such classes or otherwise make the course a condition of the job. In fact, Part 785.31 goes so far as to state that if the employer offers for the benefit of the employees a training course "which corresponds to courses offered by independent bona fide institutions of learning", an employee voluntarily attending



such courses would not be entitled to pay for time spent in such training even if the courses are directly related to the job or provided free of charge by the employer.

However, employers should be careful to distinguish between training that is voluntary or not necessary for a job and training that the employer is required by law or regulation to furnish to its employees. A good example of this is found in the child care industry. State regulations require child care facilities to see to it that employees receive at least 15 "contact hours" of training each year. The U.S. Department of Labor (DOL) takes the position that such training is compensable. DOL explains that since the obligation is on the employer to get the employees trained, the training is not really voluntary and thus represents hours worked. Of course, if a child care worker voluntarily attends additional training beyond the minimum requirement outside working hours, such time would not normally be compensable. Employers in that industry are allowed to apply time spent in mandatory staff meetings devoted to child care issues toward the 15-hour requirement. Since DOL also prohibits employers from making employees pay for the minimum standard training courses, child care organizations would want to take advantage of their right to specify the times and places where compensable training will take place. That means that employers can notify employees that if they decide on their own to go to some expensive training at some out of the way location, neither the time nor the course would be paid. Finally, if a child care teacher has already satisfied the training requirement for the year, no additional training is necessary within that year if the worker is hired by another child care facility.

The converse of the child care training situation is true for continuing education requirements related solely to the ability of an employee to practice a particular profession, as long as the training is of general applicability and is not designed to fit a specific job with a specific employer (see DOL Opinion Letter WH-504, October 23, 1980). Such training is "portable" and allows the person to find work in that profession with any employer. To extend the child care industry example, state regulations require the facility to employ a certified administrator. To be certified, an administrator must have at least 20 hours of training each year (10 additional hours are necessary for the PAC, the Professional Administrator Certificate). Once the training has been received, the person so certified may hold that position with another facility without the need for additional training. A similar requirement applies to attorneys, physicians, CPAs, and other professionals, who must take whatever training they can find to satisfy their professions' continuing education requirements, but who can then practice their professions with any employers or on their own. In all of these situations, as long as the employer does not require the employee to attend a specific course, the time spent in such training is not compensable. Of course, most administrators would probably qualify for the executive overtime exemption in any event.

William T. Simmons
Legal Counsel to
Commissioner Bill Hammond

DEPARTMENT OF LABOR IN TEXAS

Employers with specific problem situations relating to training or meeting time questions would be well advised to contact DOL at one of the following regional offices:

Albuquerque - West Texas from Midland to El Paso - (505) 766-2477
Dallas - Panhandle, East Texas and Fort Worth - (214) 767-6294
Houston - includes Beaumont and Southeast Texas - (713) 750-1682
San Antonio - includes Austin, Central Texas, and South Texas - (210) 229-4517

Legal Briefs

A Florida state judge recently ruled that the families of three workers who were shot to death and two employees who were wounded by a former co-worker during a workplace rampage may seek punitive damages from the Allstate Insurance Company. The surviving families and the two injured employees allege that Allstate gave the assailant a good letter of recommendation when he left the company which failed to reveal that he was fired for repeatedly bringing a pistol to work. The letter also indicated that his separation was unrelated to job performance. (Jerner v. Allstate Insurance Co., Fla CirCt, No. 93-09472, order 8/10/95).

The consolidated lawsuit arises from the tragic January, 1993 shootings in the office building where the victims worked for the Fireman's Fund Insurance Companies. Paul Calden, the gunman, worked for the company several years earlier. The victims included Fireman's human resources director as well as Calden's former supervisor. After the slayings, Calden fatally shot himself.

Calden was a low-level manager who left Allstate in November, 1989 after allegedly violating company policy by bringing firearms to work in his briefcase. He was hired by Fireman's Fund in 1990, allegedly based on Allstate's good reference. According to an attorney representing the plaintiffs, he was terminated by Fireman's Fund in 1992 for being absent without providing a doctor's excuse. Fireman's Fund is not involved in this litigation: they have already reached confidential settlements with the plaintiffs.

According to the plaintiffs, Allstate allegedly gave Calden a letter of recommendation indicating that his separation from the company was unrelated to his job performance at least partially because of Calden's "unstable (mental) condition and frequent possession of a firearm in the workplace." The plaintiffs further allege that "Allstate provided the letter for Paul Calden's use with future employers so that the unstable Paul Calden would not become angry at Allstate over his termination...In so doing, Allstate violated its duty to fully and truthfully disclose all of its knowledge regarding Paul Calden's mental instability and dangerous propensity for violence." A jury trial is set for November.

While this case originated in Florida, it is of interest to Texas employers for several reasons. First and foremost, always use extreme caution when providing references for former employees. Never give out information about former workers, other than perhaps dates of employment, over the telephone: there's simply no way to determine who's actually on the other end of the line and what their motives are. If you do decide to provide information about former workers in writing - and do so only if you have your former employees' written consent to release the information - make sure that your statements are honest, accurate, and factually supportable (i.e., "this individual was tardy 40 times and missed 35 days of work in 1995 and we have the timecards to document it").

Do not engage in "grade inflation" by giving a worker who had a dismal and ongoing history of policy infractions with your company a glowing recommendation. Never provide false or undocumented information. Many employers ask departing employees to sign authorization statements during outprocessing, letting them know that if they do not authorize the company to release their personnel history, absolutely no information will be provided to anyone. Above all, be consistent - providing information on some people while providing none on others could boomerang if minorities are somehow adversely affected by such a policy.

Second, this is a good time to consider developing your company's policy on concealed weapons in the workplace. Senate Bill 60 ("the Concealed Handgun Act") has been signed into law by Governor George Bush and will allow Texans who comply

Business Briefs

• The familiar Veteran's Reemployment Rights (VRR) law has been refitted for the 90's by the new Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). This new law, which bars discrimination against individuals because of their military service-connected obligations, replaces and clarifies over 50 years' worth of case law surrounding the VRR. It also changes the law by eliminating distinctions among the various types of military service, requiring employees to provide advance notice of military service, and allowing employers to require documentation of service lasting more than 30 days.

The law also provides strong new enforcement mechanisms for use against employers who do not comply with its requirements. These include attorney's fees and expert witness fees for successful plaintiffs, as well as double damages for willful violations. A special Labor Law Report explaining USERRA's details is available from CCH, Inc. for $2.50 each. To obtain your copy, call 1-800-TELL-CCH. The United States Department of Labor's VETS Department also stands ready to assist employers with this law. They can be reached at (512) 463-2814. Finally, an article concerning this law may be downloaded free of charge from the hi-T.E.C. BBS under the filename "userra.txt"; see the article on downloading from the BBS in this issue.

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*(**Legal Briefs,** continued)*

with certain training and registration requirements to carry concealed handguns after January 1, 1996. However, simply because an individual is licensed to carry a handgun, that right does not automatically extend to the workplace, according to a recent Attorney General's opinion letter. Under both existing criminal trespass laws and the Concealed Handgun Act, employers who do not want concealed weapons making their way into the workplace may prohibit both employees and invitees from bringing guns on the premises.

Employers should post a clear, written sign at the entrance to their property, building, or office banning handguns of any type from the premises. This same prohibition should be spelled out in your employee policy handbook: clearly inform your employees that any violation of this zero tolerance policy will result in immediate termination.

• Effective September 1, 1995, **Texas employers must file the "employer's report of injury" and "supplemental report of injury" with their insurance carriers only**, rather than with their carriers and the Texas Workers' Compensation Commission (TWCC). Under the new requirements, insurance carriers will report the injury or illness to TWCC electronically. According to TWCC Executive Director Todd K. Brown, "We expect these changes in filing requirements to result in faster and more efficient claims filing and to enhance customer services to all workers' compensation system participants."

Employers must deliver a copy of the injury report to the injured employee and provide a plain language summary of the injured worker's rights and responsibilities. The employer may provide this information to the employee by mail or personal delivery. Employers must submit reports of injuries, deaths, and occupational diseases to their insurance carrier within eight days, using TWCC's prescribed form. Employers may submit these reports to the carrier electronically or by mail, personal delivery, or teleclaims.

For information on forms availability and cost, call TWCC Publications at (512) 440-3618.

Renée M. Miller, Legal Counsel to Commissioner Bill Hammond

IN THIS ISSUE

TexasBusinessToday

TexasBusinessToday is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

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