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**Risk
Management
for
Texas
State
Agencies**

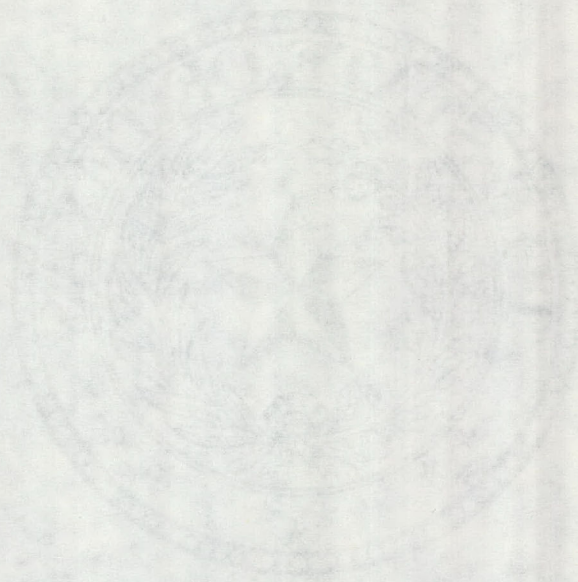
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**Volume IV  
Liability  
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PREFACE

The Texas Workers' Compensation Commission, Risk Management Division, is pleased to present its four volume set, Risk Management for Texas State Agencies. These four volumes are guidelines that form the direction and basis for developing and implementing a comprehensive risk management program to reduce property, liability and workers' compensation losses in each state agency. These guidelines are presented pursuant to the requirements of Article 8308, the Texas Workers' Compensation Act, Section 7.21, Risk Management for Certain State Agencies. The four volumes comprising the complete set of guidelines are:

- Volume I - Risk Management Administration
- Volume II - Property Conservation Exposures
- Volume III - Workers' Compensation Exposures
- Volume IV - Liability Exposures

Each volume is designed to provide initial general guidance that may assist an agency toward development of its own risk management program. These guidelines suggest programs, policies and procedures that collectively may comprise an appropriate risk management program for a state agency. Specific chapters may or may not be pertinent to the operations of a particular agency. Therefore, detailed programs, policies and procedures that more accurately address the agency's structure will need to be added to make the risk management program work for each agency. Agencies are encouraged to add and delete chapters as appropriate in order to arrive at a focused comprehensive program. Each agency is requested to provide copies of any changes, additions or deletions to these guidelines which support their documented risk management program to the Risk Management Division, Texas Workers' Compensation Commission.

Section 7.21(g) of the Texas Workers' Compensation Act provides that the Risk Management Division shall assist a state agency that has not implemented an effective risk management program to develop and implement such a program that meets Risk Management Division guidelines. Accordingly, the staff of the Risk Management Division is ready to serve state agencies as a resource for information and technical assistance. For more information or assistance, please contact:

Risk Management Division (MS 50)
Texas Workers' Compensation Commission
4000 South IH-35, Southfield Building
Austin, Texas 78704
(512) 440-3800

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the State Risk Management Division is not engaged in providing legal, accounting or other professional services. If legal advice or other expertise is required, the services of a competent professional person should be sought.

—From a Declaration of Principles adopted by the American Bar Association

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Risk Management for Texas State Agencies

REGISTRATION FORM

As recipient of Risk Management for Texas State Agencies, you will want to receive future updates, corrections or revisions. However, in order to receive such updates, the Risk Management Division needs a record of your name, mailing address and the volumes you have received. Please complete the registration form and mail to the address listed below.

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- Volume I Risk Management Administration
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Name: _____

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Future updates, revisions, or corrections will be sent directly to you if this registration form is on file. Please mail or fax this form to:

Liability Program Section (MS54)
State Risk Management Division
Texas Workers' Compensation Commission
4000 South IH-35, Southfield Building
Austin, TX 78704

Fax: (512)440-3910

REGISTRATION FORM

THIS FORM IS TO BE FILLED OUT BY THE STUDENT AND SUBMITTED TO THE REGISTRAR'S OFFICE. IT IS THE STUDENT'S RESPONSIBILITY TO OBTAIN A COPY OF THIS FORM FROM THE REGISTRAR'S OFFICE.

REGISTRATION INFORMATION

STUDENT INFORMATION

NAME (Last, First, Middle Initial): _____
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Section One



CHAPTER 1

OVERVIEW OF LIABILITY EXPOSURES

INTRODUCTION

Liability is defined as the "condition of being bound in law and justice to do something which may be enforced in the courts, and the probable cost of meeting a legal obligation."¹ Depending upon the context of the liability, the obligation may take on different forms. Liability losses are the amount of money an organization must spend to respond to actual claims brought against it. These losses may include compensatory or punitive damages as the result of personal injury or property damage claims brought against an organization by employees or the public. Even if the organization is not responsible for any legal wrong, liability losses (monetary) may be incurred in defense of a claim brought against the entity or individual employees.

Texas state agencies provide a wide range of public services and are involved in many activities (exposures) that may result in liability claims and losses or potential lawsuits. The scope of liability is continuously being expanded and tested in the courts.

In general, liability exposures may be prevented by avoiding and refraining from activities that give rise to that liability. Avoiding liabilities may be possible in certain situations, but is not feasible or practical for many agency operations. Specific activities may expose the individual

and the organization to liability. The expected value of liability losses should be evaluated to determine if the liability exceeds the expected benefit of engaging in a particular activity.²

An important function of a state agency's risk management loss control program is controlling liability exposures and losses. State agencies may be liable for the conduct of employees while performing the duties and responsibilities of the agency. In some cases, an agency may be liable for the conduct of subcontractors and other agents. All types of potential legal wrongs, such as breach of contract, criminal activity and torts, must be addressed. Financial costs associated with investigating and defending liability claims should also be addressed, as they can be substantial.²

An effective liability loss control program attempts to analyze and control potential liability-producing events to minimize circumstances that could lead to a claim or a loss.³ To this end, all efforts are made to reduce the frequency of loss occurrences and the severity of the loss if they occur. A state agency's ability to implement loss control measures will have a significant influence on the impact loss events have on the agency's business operations.

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

Regarding liability issues in general, the Texas Attorney General represents State agencies in litigation.⁴ However, certain State agencies are authorized to employ their own general or legal counsel.⁵ The Attorney General also issues legal opinions when requested by the Governor, heads of state departments, and other officials and agencies as provided by Texas statutes.⁶ Therefore, state agencies are encouraged to contact their legal counsel or the Office of the Attorney General for information and detailed assistance regarding liability issues.

Types of Liabilities

Under common and statutory law, a state agency may incur legal liability under tort, contract or criminal law. Common law "typically embodies widespread concepts of justice, derived from prior judicial rulings or precedents," while statutory law consists of "enactments of legislative, executive and administrative bodies within a local, state, or national jurisdiction."⁷

Tort liabilities are covered in considerable detail in Chapter 3 of this Section of Risk Management For Texas State Agencies. Wrongful acts that constitute torts generally fall into the following three categories.

- Intentional - intending the reasonable consequences of one's actions, without necessarily having malice toward those harmed.
- Negligence - exposing others to unreasonable danger through failure to exercise the degree of care the law requires under these circumstances. In Texas, negligence is defined as the failure to exercise the degree of ordinary care that a person of ordinary prudence would have done in the same or similar circumstances.
- Strict Liability engaging in inherently dangerous acts (such as blasting, manufacture of hazardous products, keeping wild animals) for which the law imposes liability without regard to intent or negligence.³

Contractual liability exposures arise from the existence of written documents between two or more parties. The document serves as proof of that obligation; and contains the terms and conditions of the contract. A State agency may take preventive measures to reduce the degree of exposure to contractual liability involved by operating under a 'worst case scenario' to anticipate future loss possibilities. Lost resources and opportunities should be included when making such an analysis.⁷ State agencies should also follow rules and procedures established by the General Services Commission to reduce their exposures to contract liabilities. Additional contract liability loss control issues are covered in Chapter 4 of this Section of Risk Management For Texas State Agencies.

Under criminal law, a wrongful act consists of the violation of a municipal, state or federal penal code.² A state employee may be personally liable for committing an intentional crime outside the course and scope of employment. Two important loss control techniques are (1) an agency's code of ethics, which is upheld by all levels of employees, and (2) established procedures to ensure the safety and security of personnel and property.

The law recognizes that every entity has certain legal rights that are protected by the civil law of torts and contracts, as well as by criminal law.⁷ Infringement of one of these interests may give rise to liability claim exposures. Several examples of these legal rights are:

Tort Liability

- Personal freedom of movement addresses the tort of false imprisonment, and crimes such as kidnapping or extortion.
- Protection of property may be infringed upon by torts of trespass, nuisance and negligent damage, and crimes such as burglary, robbery and fraud.
- Personal privacy may be infringed upon by the tort of giving unwarranted publicity to an individual's personal dealings.
- Economic freedom may be infringed upon by the tort of false advertising, harassing or intimidating customers, or other actions the court may find to limit fair competition.
- Security of reputation may be infringed upon by the tort of defamation, libel or slander.²

Contract Liability

- Performance of promises applies to failure to perform the condition of a legally enforceable contract.

Criminal Liability

- Physical safety of one's person may be jeopardized by the tort of assault and battery, negligence in harming others, and by violent crimes.
- Safety from criminal conduct is an interest that serves society as a whole.

Other Statutory Liability

- Legally protected interests that are established by specific statutes, such as the Civil Rights Act and Americans With Disabilities Act.

When these interests are infringed upon, legal responsibility may fall upon both organizations and individuals. When an organization's agents commit legal wrongs, the organization may be subject to the same tort, contractual or criminal liability exposures as are the individuals who act on their behalf.² The State of Texas is subject to tort and contract liability. However, the State has no criminal liability. Employees of the State may be held personally liable for criminal acts of the employee, but the State is not liable for criminal acts or intentional torts of its employees.

Identifying Liability Exposures

There are a number of ways to identify a state agency's exposures to liability risks.³ These include but are not limited to the following:

- Checklists assist in keeping track of properties and services and identify the risks associated with each. Each checklist will vary depending upon the specific exposures for the agency.
- Interviews with department supervisors and managers and other key personnel will provide valuable information. Staff members may notice procedures, operations or facilities that may create exposures, and may not always communicate these problems or issues unless they are prompted.
- Inspections and site visits often uncover physical hazards that may not be found through other methods.
- Records of incidents or claims may provide clues regarding problem areas. Standard forms and reports filled out by supervisors are valuable tools for identifying exposures.
- Complaint forms allow citizens and employees to point out hazardous conditions, equipment or facilities in need of repair and other potential loss exposures.
- Annual Reports and Budgets listing programs and services can identify risks that may increase liability exposures.

- Minutes of executive meetings or committees can help to anticipate new risks because they report on discussions of proposed programs or those being considered for cutbacks.
- Contracts describe the conditions and outline the liabilities that each party assumes.³

Methods to identify risk exposures are discussed in detail in Volume I, Section Two of Risk Management For Texas State Agencies.

Quantifying Liability Losses

Once liability risk exposures have been identified, the financial aspects of each exposure should be determined. This can be accomplished by examining historical records of past losses. These records can be examined to help determine potential future losses.

The cost of liability losses can be categorized as (1) legal general and administrative expenses, (2) costs of investigations, (3) court costs, (4) the cost of complying with injunctions and court orders for specific performance, and (5) money for settlements, verdicts or fines.³

A state agency may receive a court order to use an alternative method to provide services and programs. Compliance with court orders for specific performance or an injunction may involve additional liability expenses. If building access for persons with disabilities is ordered by the court, the cost of structural modification would be in addition to any penalties or fines imposed by the court.^{8,9} This is an example of statutory liability created by the Americans With Disabilities Act of 1991.

Liability losses may also include a settlement payment, verdict or fine. Payment for compensatory and/or punitive damages may represent a significant liability loss for an organization. Even if an out-of-court settlement is reached, the claimant may still need to be compensated.² Structured settlements present an alternative to making a lump sum payment. The State of Texas is not subject to punitive damages in tort liability actions. However, punitive damages may be awarded in civil rights actions.

Estimating the severity of liability loss exposures can be difficult because it involves assigning exact costs to variables that are unpredictable. However, it is possible to predict or forecast liability losses based on an analysis of the number of past losses and past aggregate loss associated costs. Adjustments for the future might include a change in operations, growth, inflation, changes in the law, and similar relevant factors.²

The following suggestions may help to make liability loss estimations:

- Determine liability exposures most likely to affect the state agency.
- Estimate potential losses from all events that may occur, considering all costs associated with each occurrence.
- Evaluate liability exposures by considering:
 - Federal, state and local laws regarding state agencies' liabilities and immunities.
 - Claims history over a three to five-year period.
 - Liability suits in other states.
 - Recent court cases.
 - Jury awards.
 - Settlements.^{8,9}

In addition to many hours of legal work, the cost of reproducing records, filing fees and expert witness testimony are part of the total legal expense.² Other consequences may also include the loss or compromise of an organization's reputation, as well as the lost opportunity to use the resources for other purposes.

Managing Litigation Costs

The cost of responding to a specific claim or liability loss involves a considerable amount of expense that is difficult to control. Most litigation expenses do not involve judgments or settlements, but involve the high cost of mounting a defense. By setting a legal expense fee schedule and conducting a detailed analysis of all legal tasks, it is possible that litigation costs can be controlled or reduced, while preserving and/or improving the quality of legal services. Internal policies and guidelines will provide some control of the services provided. Delegating the attorney caseload according to exposure-risk level, or by the type of litigation is another cost-effective liability loss control method.¹⁰

Another suggested way to control litigation expenses is to establish a budget for each case based on projected future legal work and anticipated costs. The budgets should provide some estimation of time and resources anticipated for each case. An agency's legal counsel should be given flexibility and latitude to negotiate budget or schedule adjustments as necessary.¹⁰

Work should be automated and information organized as efficiently as possible. Attorney meetings should be limited to those that are absolutely necessary. The legal

counsel's comprehensive management of the litigation process should be monitored through a confidential internal process. Monitoring the process identifies long-term trends in settlements and addresses changes that should be made in the litigation process. This provides a continuous stream of information that may improve the cost effectiveness and productivity of the entire legal system in the long-term.¹⁰

Any lawsuit will present a number of variables that may change as litigation develops. Suggestions for managing liability loss variables associated with the litigation process have been summarized in the following list:¹¹

- Develop written procedures to detail the process to be followed in managing litigation, including standards, appropriate action, and responsibilities.
- Select the most appropriate level of expertise for defense counsel.
- Develop a strategy to (1) establish priorities and objectives, (2) prepare a plan for defense, and (3) develop a budget of anticipated time and resources needed to provide a good defense.¹¹

It should be noted at this point that state agencies cannot hire outside legal counsel unless the Office of the Attorney General gives specific authorization to the agency.

LIABILITY LOSS CONTROL MEASURES AND TECHNIQUES

Essentially there are four primary objectives for liability loss control and, in order of priority, they are:

- To eliminate entirely the possibility of a loss.
- To reduce the possibility of a loss.
- To minimize the damages from losses that do occur.
- To develop a practical plan for recovery after a loss.

Although the ultimate goal of a liability loss control program is to avoid the loss entirely, the underlying objective is to minimize the combined total of actual losses and the costs of loss control measures. Risk prevention and loss control are two risk management techniques that address specific control points and measures that should be

incorporated into an agency's liability loss control program.

The agency's general counsel, executive offices and risk manager should be aware of any liability claims against the agency, and should maintain historical claims records. The agency should obtain a periodic automated report from the State Office of Risk Management to verify agency claims data, to use as an internal risk management tool, and to meet the Office's reporting requirements.

The State Office of Risk Management, in cooperation with agency risk managers, will continue to educate agencies concerning the use of historical claims data. State agencies should develop an internal process for dissemination to top-level agency management certain historical claims information, such as settled claims. It is important to educate management and establish consistent adherence to accepted standards as a defense against legal liabilities. Common standards need to be developed, communicated throughout the agency, and enforced by all levels of management.

Liability Risk Prevention

Liability risk prevention techniques serve to reduce the frequency and probability of a claim being filed. There are three general events that must occur in sequence to create a liability loss for any organization: (1) an act or omission generating legal responsibility for an organization; (2) harm to some other entity as a result of that act or omission; (3) a legal claim brought by the harmed entity.² (Note: An act or omission may be actual or perceived on the part of the plaintiff.)

Acts or Omissions An act or omission generating legal responsibility has three elements: (1) legally protected interest of another, (2) an invasion of that interest, and (3) lack of an affirmative justification for that invasion. Specific liability loss control measures that can be applied to an act or omission generating legal responsibility are as follows:

- Remove or limit the agency's legal obligation to others.
- Prevent invasions of others' protected interests.
- Establish affirmative justifications for these invasions.²

Examples of removing or limiting legal obligations would be wording of notices or contracts. Preventing invasions

of others' protected interests is best accomplished by fulfilling all requirements of the law.²

A program known as a "compliance management system" consists of loss control procedures through which managers do the following:

- Consult legal counsel to identify all legal obligations of the organization that relate to the activities of the particular program.
- Determine the actions that department should take to fulfill each of these obligations.
- Instruct employees and others for whose conduct the organization is responsible on how they should perform their assigned tasks in ways to fulfill these legal obligations.
- Monitor employees' and others' actions to ensure they fulfill their tasks according to the law.²

A third means of loss control is to establish justification for the invasion of another's interests. This justification may be achieved by either legal privilege or by legal immunity. Legal counsel should be consulted concerning the agency's immunity status and liability limits.²

Resulting Harm To Others The second control point that may be employed to prevent liability losses is to prevent or minimize any harm suffered by a potential claimant. Two basic applicable liability loss control measures are (1) voluntarily restoring any loss or damage to potential claimants and, (2) limiting the kinds of harm potential claimants may experience.²

Form of Legal Action The third control point that may be employed to prevent liability losses is control of the legal process through which claimants process their claims. At least two measures are available at this control point: (1) negotiating a settlement or (2) agreeing to an alternative to litigation. Either one of these measures may be more effective than waiting for a legal claim to be filed.²

Liability Loss Reduction

Liability loss reduction techniques are appropriate after the claim has been filed against an organization and generally serve to reduce the severity of loss after it has occurred. For Texas state agencies, these loss reduction techniques would generally come under the authority and control of

the Office of the Attorney General. The techniques seek to control the events that would increase the liability loss. These five events typically are: (1) the plaintiff's choice of a jurisdiction; (2) the absence of an amicable resolution of the suit; (3) severe harm to the plaintiff; (4) a high degree of wrongdoing by the defendant; (5) the absence of a strong legal defense by the organization.²

Liability loss control measures for each of these control points involve a range of actions that will be appropriate, dependent upon the discretionary judgment of the agency's legal counsel. There are some measures that can be taken to challenge the jurisdiction of the claim to ensure that it is favorable for the defendant. Often jurisdictional issues are established in a contractual obligation. Also, a pre-emptive countersuit may be filed.²

Another way to limit or reduce an agency's liability loss may be to negotiate an out-of-court settlement, even if the complaint has become a formal lawsuit. From the perspectives of both parties, effective and ethical negotiation tends to produce greater cooperation. Negotiation often offers a financial outcome whose expected present value may be more cost-effective than that of continuing litigation.

A structured settlement is one of the most cost-effective loss reduction methods available. Most structured settlements involve payment of an initial sum and, in the case of a bodily injury claim, payments for the remainder of the claimant's life or over a defined time period, such as 15 or 20 years. As a financial loss control technique, structured settlements have an advantage over lump sum settlements. They allow the agency to budget and plan for the necessary liability loss expenditure over a longer period of time. This reduces the impact of the total financial loss upon the organization's routine operations. The injured or disabled claimant also has the benefit of continual income that may total more than a lump sum payment.¹² State agencies can purchase lump sum annuities using current appropriations to provide structured settlements. However, future appropriations that are not authorized by the Texas Legislature cannot be committed to provide structured settlements to claimants.

An agency's liability losses may be reduced by lessening or mitigating the severity of harm experienced by the claimant or defendant. It is important that the claimant or defendant not suffer additional consequences, such as harassment, deceit, or bad faith, while conducting negotiations.

If the agency is apparently guilty of wrongdoing it is important to avoid any further wrongdoing. For example, it would be in the State's best interest to be cooperative and

empathetic at the scene of an accident. Often the attitude and conduct of employees at an accident scene will determine how aggressively the claimant will pursue additional liability claims. Employees, and especially managers, should be instructed as to the limits of acceptable behavior and should be trained to respond appropriately to events that may lead to a legal claim.²

An agency's legal defenses should be preserved by documenting facts related to the loss-causing event and safeguarding the State's rights. All employees who may become involved in liability-generating events should be trained in the following procedures:

- Securing names and addresses of those involved in or witnessing the events that gave rise to the claim;
- Collecting and preserving physical evidence;
- Avoiding statements that could be interpreted as admissions of responsibility;
- Notifying supervisors and the appropriate level of management within the organization.²

Documentation should also include appropriate policy statements and operating procedures as evidence of the organization's commitment to proper, safe and legal conduct. State agency legal counsel must be contacted in all liability loss-causing events. The contribution and supervision of legal counsel is vital to minimizing any future losses.²

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RESOURCES AVAILABLE TO TEXAS STATE AGENCIES

Publications

Head, George L. Ph.D., CPCU, ARM, CSP, CLU, Editor; Essentials of Risk Management; Volumes I and II; Insurance Institute of America; 720 Providence Road, Malvern, Pennsylvania, 19355-0770; 1991.

Head, George L. Ph.D., CPCU, ARM, CSP, CLU, Editor; Essentials of Risk Control; Volumes I and II; Insurance Institute of America; 720 Providence Road, Malvern, Pennsylvania, 19355-0770; 1989.

Roos, Nestor R., DBA and Joseph S. Gerber, JD; Governmental Risk Management Manual, Volumes I and 2; Risk Management Publishing, 2030 E. Broadway, Suite 110, Tucson, Arizona, 85719. Manual is supplemented monthly.

Suing and Defending Governmental Entities; State Bar of Texas Professional Development Program; Dallas, Texas, July 9 and 10, 1992.

Warren, David CPCU and Ross McIntosh; Practical Risk Management, Volumes 1 and 2; P.O. Box 10093; Oakland, California, 94610.

Agencies and Organizations Providing Assistance

Office of the Attorney General
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Austin, TX 78711-0258
(512) 463-2100

State Office of Risk Management
William P. Clements, Jr. Building, 6th Floor
300 W. 15th Street
P.O. Box 13777
Austin, TX 78711-3777
(512) 475-1440
FAX: (512) 472-4769

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**CHECKLIST FOR
ESSENTIAL PROGRAM ELEMENTS**

1. Does the agency have operations that potentially invade other persons or organizations' legally protected interests? Yes No
2. Does the agency emphasize in its operations the need to control events that potentially create liability losses? Yes No
3. Does the agency have a system to identify and comply with all legal obligations? Yes No
4. Are policies/procedures coordinated through general counsel prior to implementation? Yes No
5. Are policies/procedures coordinated through the risk manager prior to implementation? Yes No

6. Are policies/procedures signed only by the executive head of the agency or his/her designee? Yes No
7. Are policies/procedures kept together and easily accessible to agency employees? Yes No
8. Is a loss reporting system in place to report liability exposures and claims/losses incurred? Yes No

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ENDNOTES

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3. Walsh, Kathy, Ed.; Public Sector Risk Management: "The Risk Management Process"; Public Risk Management Association; Arlington, VA; 1990. p 2.
4. Vernon's Texas Codes Annotated, Government Code, §402.021; "Attorney General, Representation of State."
5. V.T.C.A. Government Code §402.0211; "Provision of Legal Services-In-House Agency Counsel."
6. V.T.C.A. Government Code §§402.041-402.045; "Opinions."
7. Head, George L., Ed.; Essentials of Risk Management, Volume I; Insurance Institute of America; Malvern, PA; pp 211-266.
8. Walsh, Kathy, Ed.; p 4.
9. Bianchi, Sal M.; Public Sector Risk Management: "Basic Legal Issues"; Illinois Risk Management Association; Chapter 2.
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11. McEuen, Bryce, J.D.; Public Sector Risk Management: "Claims and Litigation Management"; Utah Risk Management Mutual Association; Chapter 3.
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CHAPTER 2

INTERNAL CONTROLS

INTRODUCTION

'Internal Control' is the plan of organization and all methods and measures adopted within an agency to safeguard its resources, assure accuracy and reliability of information and proper reporting of that information. It assures adherence to applicable laws, regulations and policies, promotes operational economy, efficiency and effectiveness, and protects assets and resources from fraud, waste and abuse.¹

Internal controls do not require a separate system within the organization. Rather, internal controls should be an integral part of each system used to operate programs and functions. They should be incorporated into the operational procedures and policies of each function. Because of this integration, the ultimate responsibility for good internal controls rests with management. Therefore, internal controls should be high on the list of priorities for management. Continual vigilance regarding internal controls helps assure that resources are safeguarded, reports are reliable, policies and procedures are followed, and operations are conducted economically and effectively.¹

An agency with a sound risk management program will take steps to prevent and control all losses. The costs of these precautionary actions, taken before any particular

loss occurs or legal claim is filed, are not themselves liability losses. They are costs of loss prevention or reduction. A good risk management program attempts to minimize the exposures brought on by wrongful conduct or failure to maintain good controls over programs and resources. However, it must be noted that proper legal conduct does not completely remove the potential for liability losses. It only reduces the amount of exposure.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

Regarding internal controls, state agency internal auditors, as mandated by the Texas Internal Auditing Act (V.A.T.S. 6252-5d), are responsible for evaluating an agency's internal control structure and reporting the condition to management. Internal auditors are guided by Standards For The Professional Practice Of Internal Auditing as well as other standards that are promulgated by the Institute of

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

Internal Auditors. The State Auditor's Office generally relies on the internal auditor's assessment of an agency's internal control structure after examining the Internal Audit Department's management, staffing, organization, planning, and sampling their work. The State Auditor's Office is guided by 'Generally Accepted Government Auditing Standards' and other guidelines as promulgated by the American Institute of Certified Public Accountants.

The Internal Auditing Act authorizes state agencies of significant size and scope of operations to employ their own internal audit staff, therefore State agencies are encouraged to contact their internal auditor and/or the State Auditor's Office for more specific information and detailed assistance regarding internal controls.

ATTRIBUTES OF INTERNAL CONTROL

For an internal control system to be effective, certain attributes or qualities should exist. These include:

- **Separation of Duties** - The internal control plan should describe proper separation of functional responsibilities so that a mistake cannot be made without being detected by at least one other person. Authorizing transactions, running a department, handling assets, and keeping the records of assets for the agency should not be the sole responsibility of one person.
- **Sound Accounting System** - The procedures for authorization and record keeping should offer good accounting control over assets, liabilities, revenues, and expenses. The internal control plan should detail system security and checks to be done to ensure the accounting function has maximum efficiency with few errors and chances for fraud. This should include routine yearly audits and other audits when conditions warrant.
- **Sound Personnel Policies** - Sound practices should be followed in managing the people who carry out the duties and functions of each department. This should include bonding personnel who handle cash.
- **Reliable Personnel** - All employees should be well trained and able to handle the position for which they were hired.
- **Regular Internal Review** - The accounting system and internal control system should come under regular review to ensure it is working properly and in accordance with prescribed procedures.²

LIMITATIONS OF INTERNAL CONTROL

Internal control systems are subject to human error as long as people carry out control procedures. Errors may arise because of mistaken judgement, carelessness, misunderstandings or fraud. Weaknesses within an internal control system can be reduced by implementing sound internal control procedures and strong management practices. The system should be reviewed regularly, and revised when necessary to keep pace with the changing demands of the agency and its personnel.

INTERNAL CONTROL STANDARDS

Internal control standards relate to: (1) the qualifications, capabilities, and attitudes of the organization's managers and employees; (2) the implementation of effective internal control objectives and techniques; and (3) effective audit resolution. Managers and employees should have high personal and professional integrity and should be competent by virtue of education, experience and training to accomplish their assigned duties. Managers and employees should maintain and demonstrate a positive and supportive attitude toward internal control at all times. This can be accomplished by keeping internal control consistently high in priority. Internal controls should provide reasonable, but not absolute, assurance that the objectives of the system will be accomplished. Internal control standards recognize that the cost of internal control should not exceed the benefits derived. The benefits reduce the possibility of failure in achieving the stated objectives in the most efficient and effective manner possible. Managers should apply the concept of reasonable assurance in all situations concerning internal controls by analyzing the costs, benefits and risks to assure that appropriate decisions are made.¹

Specific internal control standards that apply to state agencies include the following:

- **Reasonable Assurance** - Internal control systems shall provide reasonable, but not absolute assurance that the objective of the system will be accomplished. This standard recognized that the cost of internal control should not exceed the benefits derived therefrom, and that the benefits consist of reductions in the risks of failing to achieve the stated objectives.
- **Attitude** - Managers and employees are to maintain and demonstrate a positive and supportive attitude toward internal control at all times.

- **Competent Personnel** - Managers and employees are to have high standards of integrity, are to be competent by education, experience, and/or training to accomplish their assigned duties, and are to possess adequate knowledge of internal control.
- **Internal Control Objectives** - Specific internal control objectives are to be developed for each agency activity (i.e., each program or function). The control objectives must be complete, logical, and applicable to the specific activity and are to be consistent with the accomplishment of the overall objectives of internal control.
- **Internal Control Techniques** - Internal control techniques, such as processes and documents, that accomplish the internal control objectives are to be designed for and operated in all agency activities, in order to accomplish the control objectives on a consistent basis, and in an efficient and effective manner.
- **Documentation** - Internal control systems (i.e., internal control objectives, internal control techniques, accountability for resources, all transactions, and other events) shall be clearly documented. Documentation shall be readily available.
- **Recording of Transactions** - Transactions shall be recorded as executed, when executed, and shall be properly classified.
- **Execution of Transactions** - Independent evidence shall be maintained that authorizations are issued by persons acting within the scope of their authority and that transactions conform with the terms of the authorizations.
- **Separation of Duties** - To minimize the risk of loss to the agency key duties, such as authorizing, approving and recording transactions, issuing or receiving assets, making payments, and conducting audits, shall be assigned to separate individuals. Internal control eliminates opportunities to conceal errors or irregularities. The controlled assignment of work assures that no one individual controls all phases of an activity or transaction, which would permit errors or irregularities to go undetected.
- **Supervision** - Qualified and continuous supervision shall be provided to assure that approved procedures are followed. Lines of personal responsibility and accountability shall be clear.
- **Access to Resources** - Access to resources shall be limited to authorized personnel. Access includes both direct physical access and indirect access through the preparation or processing of documents that authorize the use or disposition of resources. Periodic comparison shall be made of the resource with the authorization record to determine whether the two agree. The frequency of the comparison will depend on how vulnerable to loss the asset may be.
- **Audit Resolution and Follow-up** - Managers should promptly evaluate findings and recommendations reported by the auditors; determine proper action in response to audit findings and recommendations; and complete within established time frames all actions that correct or otherwise resolve the matters brought to management's attention.¹

ADMINISTRATIVE CONTROLS

The following are items to look for when evaluating administrative controls:

- Duplication of effort, including duplicate record keeping and reporting.
- Improper or unwise use of funds.
- Failure to accept responsibility.
- Failure to properly control or account for funds or activities.
- Cumbersome or extravagant organizational patterns or procedures.
- Capabilities of personnel, particularly with reference to weaknesses or inadequacies that exist.
- Ineffective or wasteful use of employees and physical resources.
- Necessity for and effectiveness of various organizational units in relation to the costs of maintaining them.
- Maintaining records which serve no useful purpose or are seldom used.
- Unnecessary voluminous and frequent reporting of data.
- Work backlogs and efforts to overcome them.

- Whether significant savings may be possible in the cost of preparing, processing and storing records through the use of improved data processing and storage techniques.
- Whether standards or goals have been established and are used by management in judging accomplishments, production, efficiency, use of goods and services, and other factors requiring recurring management appraisals.
- Lack of clarity in written procedures resulting in improper or inconsistent interpretations by various units or individuals within the organization.
- Efficient and effective management reporting systems.¹

THE TEXAS INTERNAL AUDITING ACT

The Texas Internal Auditing Act "establishes guidelines for a program of internal auditing to assist agency administrators by furnishing independent analyses, appraisals, and recommendations concerning the adequacy and effectiveness of an agency's system of internal control policies and procedures, and the quality of performance in carrying out assigned responsibilities³". Internal Auditing should exist as an independent appraisal function to examine and evaluate agency activities as a service to management. This function should have the highest degree of support and cooperation from staff at all levels for it to be effective.

SUMMARY

Internal controls are effective risk prevention and loss control mechanisms that provide safeguards for an agency's resources, assures accuracy and reliability of information, proper reporting of information, assures adherence to applicable laws, regulations and policies, promotes operational economy, efficiency and effectiveness, and protects assets and resources from fraud, waste and abuse. Internal controls should be integrated into all operations, programs and functions of the agency. They should be incorporated into the operational policies and procedures of each program and function of the agency. Continual vigilance regarding internal controls helps assure that resources are safeguarded, reports are reliable, policies and procedures are followed, and operations are conducted economically and effectively.

A comprehensive risk management program includes all reasonable steps that can be taken to prevent and control losses, and to minimize the exposures brought on by wrongful conduct or failure to maintain good controls over programs and resources. Therefore, an agency's internal control program should be considered an important part of an agency's liability loss control and risk management program.

AVAILABLE RESOURCES FOR TEXAS STATE AGENCIES

An agency's first and foremost source of information regarding internal controls is its own Internal Audit Department.

Texas State Auditor's Office
206 East 9th Street
Suite 1900, Austin, TX 78701
(512) 479-4700

Texas Department of Information Resources
William P. Clements Building
Austin, TX 78701
(512) 475-4733

ENDNOTES

1. *Kearns, Paul; "Internal Control"; Paper presented to the Texas State Agencies Risk Managers Group; March 1993.*
2. *Henry R. Anderson, James C. Caldwell, Belverd E. Needles, Jr.; Principles of Accounting; Third Edition; Houghton Mifflin Company; 1987; pp 255-257.*
3. *Texas Internal Auditing Act; Article 6252-5d; Section 2; 71st Legislature; chapter 787; eff. Sept. 1, 1989.*

CHECKLIST FOR TEXAS STATE AGENCIES

1. Does the agency have a documented internal control plan or procedure? Yes No

2. Are operational procedures established and reviewed periodically in the operational divisions?

Yes No

3. Are financial areas reviewed on a regular basis by:

A. Agency managers? Yes No

B. Internal Auditors? Yes No

C. State Auditor's Office? Yes No

4. Are all agency managers aware of the importance of effective internal controls and managerial involvement?

Yes No

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CHAPTER 3

TORT LIABILITY EXPOSURES

INTRODUCTION

A 'liability' is any legally enforceable obligation.¹ It is a broad legal term of comprehensive significance that is used to include almost every character of hazard or responsibility, whether it be absolute, contingent or likely.² Liability losses may arise from a real or implied responsibility imposed by law or assumed by contract. If the loss exposure involves general liability issues, then the 'law of negligence' or 'torts' governs any claims or losses.

A 'tort' is a civil or private wrong that gives rise to legal liability.¹ Tort law therefore involves civil liability for personal injuries, property damage, or the invasion of civil liberties. Although it is difficult to define the parameters of tort law, it deals with civil rather than criminal liability and includes most areas of liability for damages not arising from breach of contract.

It is the purpose of this chapter to explain the nature and scope of the tort liability exposures of Texas state agencies and their individual officers and employees under the Texas Tort Claims Act (Vernon's Texas Codes Annotated, Civil Practices & Remedies Code, § 101.001 *et seq.*). This chapter does not address claims against state agencies as a result of competitive bidding, contractual liability claims, human resources liability claims, or environmental liability

claims. These topics are covered in other Volume IV chapters.

Every state agency risk manager should be familiar with the laws that govern tort liability in Texas. This is essential to understanding the basic legal issues of risk management.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

Regarding tort issues in general, the Texas Attorney General represents State agencies in litigation.⁴ However, certain State agencies are authorized to employ their own general or legal counsel.⁵ The Attorney General also issues legal opinions when requested by the Governor, heads of state departments, and other officials and agencies as provided by Texas statutes.⁶ Therefore, state agencies are encouraged to contact their legal counsel or the Office

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

of the Attorney General for information and detailed assistance regarding tort issues.

DEFINITIONS

To better understand tort liability it is necessary to understand the meaning of the following terms:

Tort- A tort is defined as a civil or private wrong, other than breach of contract, which gives rise to legal liability¹. The word is derived from the latin "*tortus*" or "*twisted*". The metaphor is apparent: a tort is conduct that is twisted or crooked, not straight. Society expects persons to conduct themselves in a manner of reasonable care, without obligation of contract².

Intentional Tort- A tort perpetrated by a person who intends to do that which the law declared wrong as contrasted with negligence where the perpetrator failed to exercise that degree of care in doing what is otherwise permissible.²

Sovereign Immunity- The 'doctrine of sovereign immunity' may be traced back to the English common law, which held that 'the King can do no wrong,' and therefore the sovereignty was declared 'immune' from liability.⁷ Texas State and local governmental units are free from liability for torts committed except in cases where the state has specifically granted permission under the Texas Tort Claims Act. The Act limits sovereign immunity only to the extent that liability is created by the Act. Claims for damages against a governmental entity are recoverable only to the extent specifically allowed under the Act (§ 101.025).

Qualified or Official Immunity- The state grants immunity to state officials and employees subject to certain criteria or qualifications as specified in the Act.⁸ These criteria are met if the employee or official:

- performed or was involved in the performance of a discretionary task,
- acted in good faith, and
- acted within the course and scope of his or her authority.

Discretionary Acts- Those acts where there is no hard fast rule as to the course of conduct that a governmental employee must or must not take.² Discretionary acts involve the exercise of deliberation or judgement and are made in good faith within the scope of official authority.¹⁵

Ministerial Acts- These acts are the opposite of "discretionary acts", and include acts performed in a prescribed manner in obedience to the mandates of legal authority without regard to the exercise of individual judgment.²

Compensatory Damages- A sum of money to which the plaintiff is entitled that, as far as possible, makes amends for the actual loss sustained.¹

Exemplary or Punitive Damages- Damages on an increased scale, awarded to a plaintiff over and above compensation for personal injury, or property loss. Awarded in cases where the tort was aggravated by circumstances of violence, oppression, malice, fraud, or wanton neglect on the part of the defendant.² Exemplary damages are not allowed under the Act (§ 101.024) but may be awarded in federal court for violation of federal statutes.

Negligence- The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.² In Texas, when used with respect to an owner or occupier of a premise, negligence means failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premise's condition which the owner or occupier knows about or in the exercise of ordinary care should know about.¹³ Generally, the elements of this tort include:

- A legal duty to use reasonable care under the circumstances;
- A breach of this duty;
- A direct causal link between the breach and the plaintiff's harm; and
- Resulting harm to the plaintiff.¹⁰

Wanton or 'Gross Negligence'- Willful or wanton misconduct;¹ Intentional, heedless, and reckless disregard for another's rights, knowing that to act or failure to act may result in injury to another.²

Omission- The neglect to perform what the law requires. The intentional or unintentional failure to act or perform a legal duty.² An omission involves the failure to do what a person of ordinary prudence would do in a same or similar circumstance, and must involve a duty owed to another person.

Ordinary Care- That care which a reasonably prudent person would exercise in the management of his/her affairs in order to avoid injury to themselves or their property, or other individuals and their property. Ordinary care is a

relative term and is used in determining whether it was exercised in a given case. The conduct in question must be viewed in light of all the surrounding circumstances that are shown, given the evidence of the case.²

Proximate Cause- That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, or without which the result would not have occurred. That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.²

Strict Liability- Liability without fault, where the defendant is held liable even though his/her actions were unintentional and performed with due care and responsibility. Strict liability will be found in situations where the defendant's activities are unusual and abnormal, and impose great danger upon others even though the activity is conducted using every possible precaution.³ (Example: Use of explosive devices; keeping wild animals).

Vicarious Liability- Indirect legal responsibility; for example, the liability of an employer for the acts of an employee.² In tort litigation it may also include supervisors and other officials in the defendant's chain of command.

Trespasser- A person who enters the property of another without any right, lawful authority, express or implied invitation or license. A trespasser is owed only the legal duty of the owner to refrain from injuring him or her willfully, intentionally, or through gross negligence.²

Licensee- A person, who for his or her own purposes, enters or comes onto the premises of another with the consent of the owner. The owner/occupier of the land or property owes the licensee the duty of reasonable or due care, and to refrain from willfully, intentionally injuring the licensee. If known defects reside on the premises, the owner has a duty to warn the licensee or to make the premises safe.²

Invitee- A person to whom an express or implied invitation has been given to enter the premises of another for business that concerns the occupier. The occupier has the duty to protect the invitee, not only against dangers which are known, but also against those which with reasonable care might have been discovered. The invitee, `the

business visitor' is given a higher status than a licensee because of the implied duty of the owner to inspect his premises.²

Attractive Nuisance- A notable exception in the law relating to trespassers that imposes a special duty of care on a person maintaining an artificial condition on land which attracts children. Under the attractive nuisance doctrine, children enjoy the status and protection of invitees and, in some cases the landlord has been held absolutely liable (see strict liability above) even though the children were trespassers.¹

Indemnity- An agreement by which one party agrees to `indemnify' a second party for losses suffered by the second party.¹⁰ To `indemnify' is to restore a loss, in whole or in part, by payment, repair, or replacement.² An insurance policy is one major class of indemnity agreement.

Given the above definitions, the following discusses specific aspects of tort liability for Texas state agencies.

TEXAS TORT CLAIMS ACT

The Texas Tort Claims Act was passed in 1969. Prior to its passage, an individual injured by the negligent actions of a state employee performing a governmental function for the state could not recover damages for personal injuries from the governmental unit. Texas governmental entities were protected by the doctrine of "sovereign immunity", which provides immunity from both suit and liability to governmental entities.⁸

The Act does not completely waive or abolish the doctrine of sovereign immunity but limits waiver of immunity only to areas specifically covered in the Act. Currently, the State is liable for:

- property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
 - the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
 - the employee would be personally liable to the claimant according to Texas law; and

- personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.⁹ (§ 101.021)

Operation or Use of Motor Driven Vehicles and Motor Driven Equipment

The term "motor vehicle" is not defined in the Act, but it has been generally defined as any self-propelled device, in or upon which a person or property may be transported. This definition encompasses automobiles, trucks, trains, buses, airplanes etc.¹¹

Motor driven equipment is also not defined,¹¹ however the Act specifically excludes the following:

- Equipment used in connection with operation of floodgates or water release equipment by river-authorities created under Texas law.
- Medical equipment, such as iron lungs located in hospitals.⁹ (§101.101)

Condition or Use of Tangible Personal Property

Tangible personal property as opposed to real property, is quite broad and covers an array of items. It is property that is capable of being handled, touched, or seen. Most tools, instruments, equipment, furnishings, etc. satisfy the common definitional meaning of personal property. The Act specifically states that the State is liable for property damage only in cases involving the "operation or use of motor-driven vehicle or motor-driven equipment" when "proximately caused by the wrongful act or omission or negligence of an employee acting within his scope of employment".¹¹ (§101.021)

Condition or Use of Real Property (Premises Liability)

Premises liability applies when a person goes onto land or into a building of another person and is injured by a dangerous condition on the premises. A dangerous condition is distinguished from an activity that may occur on the premises.¹²

Owners and occupiers of land and buildings do not owe the same duty of care to all persons who come onto their premises and are injured by a dangerous condition. The duty owed depends upon the status of the person as an "invitee, licensee, or trespasser".¹²

The status of a person rightfully on government property is defined by the Act. In most cases, the person who comes on government property is classified as a "licensee." If payment for the use of the premises is made by the person then the person is classified as an "invitee." If the person is on government premises without a right to be there, then the person is a "trespasser."¹³ (§ 101.022)

If a person is a licensee or invitee, then the government is liable if the person is injured by willful, wanton, or gross negligence. In addition, if the government knows of a dangerous condition and the person coming onto the premises does not know of that condition, the government has a duty to either warn of the dangerous condition or to make it reasonably safe.¹⁴

Special Defects

A special defect is a dangerous condition, such as an excavation or an obstruction on a highway, road, or street. In these cases, the government has an ordinary duty of care to warn of dangerous conditions of which it has knowledge. In addition the government has a duty to warn of dangerous conditions when the government would have discovered the defect by exercising ordinary care. This implies the duty to inspect the premises, and where appropriate erect signs, signals, alarms, etc., to warn of the dangerous condition.^{12,14}

Limitations of State Liability

The liability of state government under the Act is limited to monetary damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence of bodily injury or death, and \$100,000 for each single occurrence for injury to or destruction of property. Suits to enforce liability under the Act are usually brought in state court but can be joined with federal claims. The Act does not allow for payment of exemplary damages,¹³ attorney's fees, or any claims based upon assaults or other intentional torts.⁹ (§ 101.023 and §101.057)

Individual Employee Liability

If suit has not previously been initiated against the state, a plaintiff may sue a state employee in his or her individual capacity. Suits against individual employees may be based upon any conduct, and are not limited to the instances noted above where the state has waived its sovereign immunity.

When this occurs, the employee or official may have the defense to suit known as 'official,' 'qualified' or 'quasi-judicial' immunity.¹⁵ Official or qualified immunity is a defense available to an individual public official or

employee which shields the official or employee from personal civil liability for the consequences of his or her actions.¹⁶ The Act (§101.026) preserves the privilege of immunity for governmental employees "to the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter." The general rule is that public officials are not personally liable for acts performed within the scope of their duties.¹⁵

In order to evoke the status of official or qualified immunity, the government employee must pass a three-part test regarding his or her action:

- the action must be classified as quasi-judicial (discretionary);
- it must be taken in good faith; and
- it must be within the scope of his or her official authority (scope of employment or office).¹⁵

A governmental official or employee is entitled to qualified immunity only while acting in the official capacity, and is not entitled to qualified immunity while acting outside the scope of official duties or while acting in a private capacity.¹⁶ The action performed must be discretionary, or that which requires personal deliberation, decision or judgment, and must be fact-specific.¹⁶

If the employee is found liable for damages as a result of his or her conduct performed in an official capacity, the state may indemnify the employee (reimburse for expenses) up to certain limits. The state may provide indemnity up to \$100,000 to a single individual and \$300,000 per occurrence in the case of personal injury, death, or deprivation of a right, privilege, or immunity, and up to \$10,000 for a single occurrence of damage to property (§101.023) if:

- the damages arise from an act or omission by an employee performing in the course and scope of authority or employment;
- the damages arise out of negligent conduct (but not willful or wrongful acts of gross negligence); and
- the deprivation of a right, privilege or immunity was not done in bad faith.

Governmental employees will be subject to liability in an individual capacity for wrongful acts that are performed in an unofficial capacity. Employees may be held personally liable if they have exceeded the legitimate bounds of their office. However, governmental officials are "liable personally only when, in the exercise of the power conferred upon them, they have acted willfully,

maliciously or when activated by actual malice."¹⁵ If indemnification is not provided by the state or if the damage award exceeds the statutory dollar limits, the employee will be responsible for satisfying the judgment using his or her own personal assets.

If A State Official Or Employee Is Sued

It is absolutely necessary for an employee who is served with a lawsuit to immediately notify the agency's legal counsel. The Attorney General represents state agencies when they are sued for the conduct of agency employees. The Attorney General also represents individual employees in suits arising out of employment with state agencies if the employee delivers to the Attorney General all process (documentation) served on the individual not later than the tenth day after the suit was served. Failure to deliver the process timely relieves the state of its obligation to indemnify the employee for damages, costs and attorneys fees. (§ 104.002, through 104.005) An employee may choose to hire their own attorney to represent the employee's individual interest in the lawsuit.

SUMMARY

The state may be held liable for damages arising from the negligence of its employees in the operation or use of motor-driven vehicles or motor-driven equipment, in the condition of real property used by the state, or in the condition or use of tangible personal property. State employees, while acting within the scope of employment, may be held personally liable for certain acts done either intentionally or negligently. If the employee is found liable in a lawsuit based upon negligence, or deprivation of constitutional rights (but is not guilty of acting in bad faith), the state may indemnify the employee for an award of monetary damages, as well as costs and attorneys' fees up to the statutory limits. Personal liability may be avoided if the defense of official or qualified immunity is available.

LIABILITY LOSS CONTROL

There is no guarantee that the state or its employees will not be sued. Therefore liability loss control measures should be developed and implemented by every state agency to minimize exposures to tort litigation, and to control losses when liability claims and suits occur. The following steps are suggested to reduce the risk that a judgement will be made against the state or against an individual employee:

- Review on a regular basis the legality of agency operations as performed by boards, executives, supervisors, and employees.
- Develop and implement appropriate policies and procedures, update them as needed, and make sure that employees adhere to them.
- Train all managers, supervisors and employees to know the laws that pertain to their jobs and the agency policies and procedures that regulate their conduct in carrying out their duties.
- Train all employees regarding their civil liability for negligent or wrongful conduct.
- Train supervisors regarding employee rights.
- Routinely inspect and properly maintain state buildings, contents, facilities, and raw land.
- Erect or place appropriate warning signs, alarms, or signals in all areas of state property where potential danger to life or property exists.

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RESOURCES AVAILABLE FOR TEXAS STATE AGENCIES

PUBLICATIONS

Public Sector Risk Management
Public Risk Management Association
1117 N. 19th St., Suite 900
Arlington, VA 22209
(703) 528-7701

Governmental Risk Management Manual
Risk Management Publishing Company
2030 E. Broadway, Suite 110
Tucson, Arizona 85719

Suing and Defending Governmental Entities; State Bar of Texas, Professional Development Program; 1992.

AGENCIES AND ORGANIZATIONS PROVIDING ASSISTANCE

Office of the Attorney General
Tort Litigation Division
Price Daniel Sr. Building
P.O. Box 12548
Austin, TX 78701
(512) 463-2100

State Office of Risk Management
William P. Clements, Jr. Building, 6th Floor
300 W. 15th Street
P.O. Box 13777
Austin, TX 78711-3777
(512) 475-1440
FAX: (512) 472-4769

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ENDNOTES

1. Glossary of Insurance Terms and Risk Management Terms; International Risk Management Institute, Inc.; Dallas, TX; 1991
2. Black, Henry C.; Black's Law Dictionary; West Publishing Co. St. Paul, Minn.; 1979.
3. Duties and Responsibilities. The Office of the Texas Attorney General; Office of the Texas Attorney General; March, 1989.
4. Vernon's Texas Codes Annotated, Government Code, §402.021; "Attorney General, Representation of State."
5. V.T.C.A. Government Code §402.0211; "Provision of Legal Services-In-House Agency Counsel."
6. V.T.C.A. Government Code §§402.041-402.045; "Opinions."
7. Watson, Jane - Senate Research Center; Tort Terminology Simply Stated; Clearing House Update; September 1992.
8. Roos, Nestor R., & Gerber, Joseph S.; "Legal Aspects of Governmental Responsibility and Immunity"; Governmental Risk Management Manual; July 1986, Volume# 2; pp. 9-1.

9. *Cain, Delmar L. & Ferguson, Jan & DeVille, Kenneth; Texas Attorney General's Office/ Tort Litigation Division; "Use" and "Non-Use" of Property Under The Texas Tort Claims Act; State Bar of Texas - Suing and Defending Governmental Entities; May 1992.*
 10. *Vernon's Texas Codes Annotated, Civil Practice and Remedies Code; Governmental Liability - Sections 101.001 thru 105.004 and 1992 Supplements; West Publishing Co.; 1986.*
 11. *Risk Management Glossary; Risk Management Society Publishing; 205 East 42nd Street, New York, NY 10017; January 1989.*
 12. *Labrec, David J., & Oliver, Kevin E.; Overview of The Texas Tort Claims Act; Strassburger & Price; State Bar of Texas - Suing and Defending Governmental Entities; June 1992.*
 13. *Glick, Grady - Texas Attorney General's Office; Premises Liability Under The Texas Tort Claims Act; Defensive Perspective; State Bar of Texas - Suing and Defending Governmental Entities; June 1992.*
 14. *Weldon, Terry; Premises Liability Under The Texas Tort Claims Act; State Bar Of Texas - Suing and Defending Governmental Entities; July 1992.*
 15. *Smith, David A. - Texas Attorney General's Office/ Tort Litigation Division; Premises Defects; Paper presented at State Risk Management Seminar; November 1992.*
 16. *Leal, Gloria; Individual Immunity Under the Texas Tort Claims Act; State Bar of Texas - Suing and Defending Governmental Entities; July, 1992.*
 17. *Wren, Ronald D.; Discretionary Immunity and Differences Between Immunity From Suit and Immunity From Liability; Defense; State Bar of Texas - Suing and Defending Governmental Entities; July 1992.*
-
2. Are agency managers and supervisors trained regarding tort liability issues that effect the agency? - Yes No
 3. Are all employees and supervisors trained regarding the laws that pertain to their jobs? Yes No
 4. Are all employees and supervisors trained regarding the agency policies and procedures that regulate their conduct in carrying out their duties? Yes No
 5. Is training provided to all employees regarding their civil liability for negligent or wrongful conduct? Yes No
 6. Does the agency have a written procedure for handling tort liability claims? Yes No
 7. Does the procedure instruct agency personnel to immediately contact the agency's legal counsel when a claim or suit has been filed? Yes No
 8. Are all agency policies and procedures reviewed on an annual basis? Yes No
 9. Are measures taken to make sure that employees follow and adhere to agency policies and procedures? Yes No
 10. Are agency buildings, contents, facilities and raw land routinely inspected and properly maintained? Yes No
 11. Where potential danger to life or property exists, have appropriate warning signs, alarms, or signals been erected or placed? Yes No

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CHECKLIST FOR TEXAS STATE AGENCIES

1. Have potential tort liability issues and exposures been identified? Yes No

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CHAPTER 4

CONTRACTUAL LIABILITY EXPOSURES

INTRODUCTION

A contract is an agreement between two or more competent parties to create an obligation to either complete, or abstain from doing, some act or thing.¹ Contracts are typically concerned with the creation, transfer, and disposition of rights and duties through promises, or sets of promises, which are legally enforceable in court. Generally, a contract is viewed as a voluntary agreement between competent parties that is made for sufficient legal consideration.²

To create a valid contract, the terms of the agreement must be in compliance with applicable common and statutory law. The following five elements typically must be present for an enforceable contract to exist:

- **An agreement** - an offer made by one party and accepted by another;
- **Competent parties** - there must be no limitation on a party's mental ability to make and understand a binding contract;
- **Legal consideration** - something of value paid or bargained in exchange for a promise;

- **Legal purpose** - the contract must have a lawful objective that is consistent with sound public policy; and,
- **Form required by law** - some contracts are required by law to meet formal requirements; the Statute of Frauds, for example, requires certain contracts to be in writing.³

There are several kinds of contracts, each with specific requirements and characteristics. Contracts may be written or verbal. They may be 'express' - where the terms of the contract are stated in words, or 'implied' - where the contract is presumed to have been made based on the circumstances and the relationship of the parties. In order for Texas state agency contracts to be valid, they must be entered into in the manner provided by Texas law. If the applicable statutory provisions are not followed, the contract may be invalid. For the purposes of the Volumes of Risk Management For Texas State Agencies, this chapter's discussion on the subject of contracts applies only to written contracts that comply with Texas law.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

Regarding contractual liability issues in general, the Texas Attorney General represents State agencies in litigation.⁴ However, certain State agencies are authorized to employ their own general or legal counsel.⁵ The Attorney General also issues legal opinions when requested by the Governor, heads of state departments, and other officials and agencies as provided by Texas statutes.⁶ Therefore, state agencies are encouraged to contact their legal counsel or the Office of the Attorney General for information and detailed assistance regarding contractual liability issues.

IMMUNITY FROM SUIT AND IMMUNITY FROM LIABILITY

Immunity from suit and immunity from liability are two terms that come under the doctrine of 'Sovereign Immunity'. In contract actions, as opposed to tort actions, the state has immunity from suit but not immunity from liability. When the state enters into a contract, it is liable for fulfilling contractual terms in the same way a citizen would be liable for a contract. Although the state is sovereign and cannot be sued without permission, it is still bound by the contract.² The doctrine of "Sovereign Immunity" is further discussed in Chapter 3, 'Tort Liability Exposures'.

If permission to sue the state on a contract matter is not granted, the party attempting to bring suit against the state may file suit against a state employee(s). However, the state may still be liable if the state employee(s) named in the suit performed acts that meet any of the following criteria:

- The acts performed were contract performance terms.
- The acts performed established the contract's validity.
- The acts performed enforced performance of the contract.
- The acts performed were specifically required and therefore imposed contractual liabilities on the state.²

Texas state employees are usually granted official immunity by the Texas Tort Claims Act when acts committed in an official capacity are lawfully authorized. Although state officials may be granted official immunity from civil liability, the costs associated with the legal process to prove the individual's official immunity status is time-consuming and expensive. In addition, a state

employee may still be sued for wrongful acts performed in an individual (unofficial) capacity.²

CONTRACTUAL LIABILITY RISK PREVENTION AND LOSS CONTROL

To minimize contractual liability losses, Texas state agencies should take steps to avoid contract ambiguities. The following guidelines are provided as suggestions to accomplish this goal.

- *Verify that the state agency and state employee actually have the authority to enter into and execute the contract.* If the state employee does not have the authority to bind the state, that individual may be liable for damages that arise. Legal counsel should always be consulted prior to signing any contract document.²
- *Act only within the course and scope of official duties, as defined by the job description.* Every state employee involved in managing or executing a contract should read and know his or her job description.²
- *Conduct the actual performance of the contract in accordance with its terms.* If there are significant deviations, a letter or memo should be drafted to document the reason(s) for the deviation and explain why the agency believes the deviation will still accomplish the contract's original purpose.² In addition, the other parties to the contract should be notified of changes.
- *Document circumstances surrounding the making of the contract.* This may be accomplished using a "decision memorandum" that explains the purpose in making the contract, sets out the statutory authority for entering into the contract, and identifies the need for entering the contract in the first place.²
- *Provide specific language within the contract that is consistent with the general terms of the contract.* The specific provisions of a particular contract should be drafted within the framework of the general provisions on the same subject matter.²
- *Define key words or phrases within the body of the contract.* Providing definitions of certain words or phrases may prevent the possibility of a contract being construed as being ambiguous,² or being misinterpreted.

When language of a contract is ambiguous, the incidence of contractual disputes increases. When drafting a contract or requesting that a contract be written by legal counsel,

individuals responsible for the subject matter of the contract should thoroughly consider whether the language actually achieves the intended objective(s) of the contract. Texas state agencies should also consider any corresponding or reciprocal obligations the contract may impose upon the state.

The purpose of the contract should be clearly stated to give the contract a definite legal meaning. If the contract does not have a clear legal meaning, the court may construe it to conform with the common sense meaning. Words or ambiguous phrases capable of more than one meaning should be avoided so that a court will not be inclined to go beyond the language of the contract to determine the parties' intentions. If a court considers the contract language to be ambiguous, the state may find itself in a situation where real and perceived obligations are imposed, each with corresponding liabilities and losses.²

State agencies should take additional steps to reduce lost time and opportunities that may arise once the agency is involved in litigation. An agency should operate under the assumption of a worst case scenario in order to place itself in an optimal position if a contract dispute arises. Planning for the possibility of a dispute gives the agency the opportunity to prepare for a wide range of contingencies that may result if a dispute arises. The following loss control measures are suggested. However, the agency should consult its legal counsel prior to initiating any of these measures.²

- Establish a central point of contact for all contract-related communications.
- Keep a phone log of telephone conversations and a record of meetings held.
- Follow contract terms and document the rationale for any deviations. Notify other parties of any deviations.
- Consult persons knowledgeable in the field (experts) prior to signing the contract.

CONTRACT REVIEW

State agencies may enter into contracts for products or services that may expose the agency to third-party claims for bodily injury and/or property damage. Problems are especially likely to arise in the following contracts:

- Construction contracts
- Maintenance contracts
- Building leases
- Equipment and auto leases

- Professional services leases
- Purchase orders
- Bills of lading
- Warehouse receipts
- Sales contracts
- Warranties of goods and services⁷

Agency procedures should require a review of significant contracts by the risk manager and legal counsel. Contracts by their nature create the possibility of future liabilities, and therefore should be evaluated by both the agency's risk manager and legal counsel before they are signed. This is especially true of large contracts. The risk manager may be more knowledgeable than an attorney in insurance matters, risk prevention and loss control measures. The need for insurance or other loss control provisions will be facilitated by coordination with the risk manager. The risk manager should help prepare appropriate procedures, standard contracts, and large purchase orders. Even if the risk manager gets a copy of the contract after signature, a contract addendum may still be an option if a change is necessary.⁷

Reviewing contracts requires thorough consideration of all the possibilities and consequences of the provisions of the contract. Recommendations for change and actions to carry out contract provisions should only be performed after the risk manager has reviewed the entire contract. Skimming with a practiced eye will catch certain terms and clauses that should be examined, such as: insurance; indemnity; damages; maintenance; repair; and, termination. Also, if a contract requires that leased property be returned in the same condition as received excluding only wear and tear, the implication is that the lessee has assumed all risks. The risk manager should be sensitive to subtle implications within the language of the contract.⁷

The following subsections address several routine kinds of contracts that commonly involve Texas state agencies. The list is not all inclusive and is provided as an overview of the types of liabilities that generally appear in state agency contracts.

Construction Contracts - If contractors are hired, the contractor's negligence may result in liability lawsuits against the agency and the state. State agencies may protect themselves in the following ways:

- **Include a Hold Harmless Clause** - Include a 'hold harmless' indemnity clause within the contract that requires the contractor to assume all liability that arises from the project. Require the contractor to provide evidence of insurability for each contract concerned.⁷

- **Name the State as Additional Insured** - Include the state as an additional insured within the contractor's liability policy. This prevents the contractor's insurer from subrogating against the state.^{7,9}
- **Specify Insurance Requirements** - In some instances it may be appropriate to require the contractor to provide a separate owner's protective insurance policy that covers the state's liability that may arise from the project. Bid documents should always detail indemnity provisions and insurance requirements to be provided by the contractor.⁷
- **Include Safety Measures and Right of Inspections** - Contract provisions should specify safety precautions to be taken, competence level of employees who will perform the work, and the right of the agency to inspect the work performed.^{7,8,9}

The American Institute of Architects (AIA) has developed a document called 'AIA Document A201' that sets out standard contract provisions.^{7,8,9} State agencies may want to consult this document.

Building Leases - Building leases generally are not standardized and although standard printed lease forms are available, leases typically differ considerably from each other. Important lease provisions to check include:

- Responsibility for damages
- Fire insurance coverage
- Valuation of property - replacement or actual cash value.
- Subrogation waivers
- Liability limits
- Breach of lease conditions⁷

Equipment Leases - When leasing equipment, a thorough evaluation of the liability assumed by the state (lessee) for damages to the property should be performed. Liability for damages to leased property may become the responsibility of the lessee unless the lease specifically states that this is not the case.⁶

COMPETITIVE BIDS AND PURCHASING

The State Purchasing and General Services Act (Article 601b, V.T.C.S., §301(a)) provides that the General Services Commission shall purchase, lease, rent, or otherwise acquire all supplies, material, services, and equipment for all state agencies except for specified purchases by higher education system libraries and state-owned hospitals and clinics. Under Section 3.08(a) of this

Act, state agencies have been delegated the authority to purchase supplies, materials and equipment if the purchase does not exceed \$500.00.¹⁰

INTERAGENCY CONTRACTS

Rules for written contracts between state agencies were established by the Interagency Cooperation Act (Article 4413(32)). The Act provides guidelines for interagency contracts between Texas state agencies for services and resources. Each Texas state agency should be familiar with the terms of this Act.¹¹

One significant exception to state agency authority under the Interagency Cooperation Act is that a Texas state agency may not supply another Texas state agency with services or resources required to be supplied under contract with the lowest responsible bidder by Article 16, Section 21, of the Texas Constitution - "Public Printing and Binding; Repairs and Furnishings; Contracts." Section 21 establishes that "handicapped individuals employed in nonprofit rehabilitation facilities providing sheltered employment" should receive Texas state agency employment preference for specified services and resources. All other services and resources "shall be performed under contract, to be given to the lowest responsible bidder."¹²

The General Services Commission has written a procedures manual to assist agencies in complying with Article 3 of the General Services Commission Act.¹⁰ Section 5 of the General Services Manual details the agency's rules and outlines the policies and procedures a state agency must follow when purchasing, leasing, renting, contracting, or otherwise acquiring supplies, materials, services, and equipment. Texas state agencies should obtain a copy of Section 5 of the General Services Manual for use as a reference for state purchasing.

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RESOURCES AVAILABLE FOR TEXAS STATE AGENCIES

Publications

Warren, David, CPCU and Ros McIntosh, CPCU; Practical Risk Management; Warren, McVeigh & Griffin; Oakland, California; 1986.

General Services Commission Manual
Materials Management Department
General Services Commission
Central Services Building
P.O. Box 13047, Capitol Station
Austin, Texas 78711
(512)463-3336

AIA Document 201
American Institute of Architects

Organizations

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2191

General Services Commission
Central Services Building
1711 San Jacinto
P.O. Box 13047
Austin, Texas 78711
(512) 463-3446

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ENDNOTES

1. *Black's Law Dictionary, Fifth Edition; West Publishing Company; St. Paul, MI, 1984.*
2. "Contract Liability: Minimizing Your Risks of Liability in Contract Actions"; Paper presented by Fred Garrett, Assistant Attorney General, Tort Litigation Division/ Commercial Law Section of the Texas Office of the Attorney General, at the Risk Management For Texas State Agencies Seminar, Austin, Texas, November 17, 1992.
3. *Head, George L. and Horn, Stephen; Essentials of the Risk Management Process; Insurance Institute of America; 1985; p 199.*
4. *Vernon's Texas Codes Annotated, Government Code, §402.021; Attorney General, Representation of State."*
5. *V.T.C.A. Government Code §402.0211; "Provision of Legal Services-In-House Agency Counsel."*

6. *V.T.C.A. Government Code §§402.041-402.045; "Opinions."*
7. *Warren, David and Ross McIntosh; "Contract Review;" Practical Risk Management; P.O. Box 10093, Oakland, California, 94610, 1989.*
8. *American Institute of Architects; AIA Document.*
9. *Warren, David and Ross McIntosh; "Bid Specifications"; Practical Risk Management; P.O. Box 10093, Oakland, California, 94610, 1986.*
10. *The State Purchasing and General Services Act. Vernon's Annotated Civil Statutes. Article 601b. 1992.*
11. *Interagency Cooperation Act. Vernon's Annotated Codes. Title 7, Chapter 771, 1992.*
12. *Texas Constitution. "Public Printing and Binding; Repairs and Furnishings; Contracts." Article 16, Section 21, 1992.*

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CHECKLIST FOR TEXAS STATE AGENCIES

1. Does the agency utilize 'decision memoranda,' 'requests for information' (RFI), 'requests for proposals' (RFP) to identify the purpose and need to enter into contracts? Yes No
2. Are significant contracts reviewed by the risk manager? Yes No
3. Are significant contracts reviewed by legal counsel? Yes No
4. Do program experts or consultants review terms of contracts prior to signature? Yes No
5. Does the agency have internal procedures that address purchasing, leasing, renting, contracting, or acquiring supplies, materials, services, or equipment? Yes No
6. Do internal procedures comply with General Services Commission rules, policies and procedures? Yes No

7. Do the procedures define which employee(s) have the authority to enter into contractual agreements?
 Yes No
8. Do employee job descriptions define specific responsibilities of employees that are authorized to enter into contractual agreements? Yes No
9. Do the procedures establish a central point of contact for all contractual related communications?
 Yes No
10. Do contract bidding documents specify indemnity provisions and insurance requirements where appropriate? Yes No
11. Are contractors required to show evidence of insurability? Yes No
12. Are contractors required to name the agency and state as 'additional insured' within the contractor's liability policy? Yes No
13. Are contractors required to carry an 'Owner's Protective Insurance' Policy, if appropriate?
 Yes No
14. Do building lease contract procedures provide for the review of liability for damages, fire insurance coverage, valuation of property (replacement or actual cash value), subrogation waivers, liability limits, and breach of lease conditions? Yes No
15. Does the agency risk manager review administrative manuals and operational procedures to identify potential contractual liability exposures?
 Yes No

CHAPTER 5

ETHICS

INTRODUCTION

'Ethics' is formally defined as: the discipline dealing with what is good and bad, and with moral duty obligation; a set of moral principles or values.¹ Beyond this formal definition, ethics have also been defined as "the guidelines or rules of conduct by which we aim to live."² Applied to Texas state government, ethics may be considered the set of principles, values, guidelines, rules and laws governing the professional conduct of state employees and officials.

A number of external and internal factors may interact to produce ethically sensitive situations for state agency employees. For example, Texas state agencies must fulfill legislative mandates and operate with fewer resources and smaller budgets, while managers and supervisors are required to carry out ambitious production and performance schedules. The pressure of producing a quality product or providing an excellent service within economic constraints may sometimes cause individuals to be confronted with ethically sensitive situations. State officers and employees who know the ethics standards and who are aware of changes to the state's ethics laws will be able to make informed decisions about their own conduct.

There are a number of benefits to establishing an ethics program. An ethics program can boost employee morale, create a positive image for the organization, and encourage

ethical behavior by employees. It may also provide long-term financial benefits for the organization. Unethical conduct can adversely affect the agency as well as the individual employee engaged in the conduct. Property theft, embezzlement, misuse of equipment, misuse of work time and theft of services are just some of the consequences of unethical conduct within an agency. A written ethics policy and a training program regarding ethical conduct are risk prevention and loss control measures an agency can utilize to help control liability losses that may result from unethical behavior.³

A legal framework has been established that sets standards of conduct and ethical behavior for state officials and state employees in Texas. These legal provisions provide specific rules and guidelines to be followed by state officials and employees while conducting state business. Certain penalties for unethical conduct in violation of these provisions and laws are provided. These legal provisions governing ethical and professional standards of conduct are provided in the following:

- The Texas Constitution, Article XVI
- Texas Penal Code, Chapters 36 and 39
- Article 6252, Vernon's Texas Civil Statutes
- Government Code, Chapter 305
- The General Appropriations Act

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

This chapter of Risk Management for Texas State Agencies presents some of the important provisions of the above listed statutes. The information contained in this chapter is not intended to present a comprehensive, all-inclusive listing of ethical provisions of concern to state agencies and state employees. Legal counsel should be consulted regarding the applicability of and compliance with all ethics-related statutes, provisions and requirements.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

Regarding ethical issues, the Texas Ethics Commission is available to assist State agencies with interpretations, administration and enforcement of laws which govern the conduct of state officers and state employees. The Commission may issue advisory opinions and adopt rules regarding administration and enforcement of certain statutes relating to ethics and conduct of state officers and employees (Refer to the discussion of the Texas Ethics Commission on page 6 of this Chapter). Therefore, State agencies should contact the Texas Ethics Commission or the agency's legal counsel for information and detailed assistance regarding ethics issues.

STANDARDS OF CONDUCT OF STATE OFFICIALS AND EMPLOYEES

In 1973, the Texas Legislature passed a bill entitled "Standards of Conduct of State Officers and Employees," (Article 6252-9b, Vernon's Texas Civil Statutes). In its amended current form, this legislation outlines standards of conduct and disclosure requirements which must be observed "by all persons owing responsibility to the people of Texas and the government of the State of Texas in the performance of their official duties." ⁶ The act states, "It is the policy of the State of Texas that no state officer or state employee shall have any interest, financial or otherwise, direct or indirect, or engage in any business transaction or professional activity to incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest."⁶

Other statutes, including the Penal Code (Chapters 36 and 39), Government Code (Chapter 304), and General Appropriations Act, have been enacted by the Texas Legislature that contain ethical provisions or considerations that are of concern to state officials and employees. The following are some of the more significant ethics related provisions and standards contained in Texas statutes which govern the conduct of state officials and employees:

- **Gifts** - "No state officer or state employee should accept or solicit any gift, favor, or service that might reasonably tend to influence him in the discharge of his official duties or that he knows or should know is offered with intent to influence his official conduct."⁴
- **Disclosure of Confidential Information** - "No state officer or state employee should accept employment or engage in any business or professional activity which he might reasonably expect would require or induce him to disclose confidential information acquired by reason of his official position."⁴
- **Employment in Conflict** - "No state officer or state employee should accept other employment or compensation which could reasonably be expected to impair his independence of judgment in the performance of his official duties."⁴
- **Personal Investments** - "No state officer or state employee should make personal investments which could reasonably be expected to create a substantial conflict between his private interest and the public interest."⁴
- **Benefits for Performing Official Duties** - "No state officer or state employee should intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised his official powers or duties in favor of another."⁴
- **Dual Office Holding** - "No person shall hold or exercise at the same time, more than one civil office of emolument (with certain exceptions for armed forces positions and non-statewide offices). A nonelective state officer or employee may hold other nonelective offices under the state or the United States, if the other office is of benefit to the State of Texas or is required by State or Federal law, and there is no conflict with the original office for which he receives salary or compensation."^{5,6} "The state is required to withhold payment of salary or compensation to a person who is in violation of the constitutional provision."⁵

"Before accepting other nonelective offices or positions, the nonelective officer or employee must obtain from the executive head of the agency, a finding that the requirements have been met. The executive head of the agency shall make an official record of the finding and of the compensation to be received from the additional office or position."⁶

- **Public Disclosure of Personal Interest** - "If an elected or appointed state officer has a personal or private interest in a measure, proposal, or decision pending before the agency, he must publicly disclose such to the agency in an Open Meeting and he cannot vote or otherwise participate in the decision. The disclosure must be entered in the minutes of the meeting. Violation of this provision could result in removal from office through suit brought by the Attorney General on his own initiative or when requested by another agency member or a citizen." [§6]⁴
- **Property Interest Acquired by Public Funds** - "An elected, selected, appointed, or employed governmental officer who has a legal or equitable interest in property which is acquired by public funds must file an affidavit with the county clerk of the counties in which the property is located and the county of the official's residence, within 10 days prior to the acquisition, describing the interest and the date the interest was acquired. A violation is a Class A misdemeanor."⁷
- **Interest in Private Consultant** - "An officer or employee of a state agency who has a financial interest in a firm or corporation which acts as a private consultant and which submits an offer to provide consulting services to the agency, or who is related within the second degree by consanguinity or affinity to a person having such a financial interest, must report the financial interest to the executive head of the agency not later than the 10th day after the day on which the private consultant submits the consulting services offer."⁸
- **Nepotism** - "No state officer may appoint, vote for, or confirm the appointment to any office, position, clerkship, employment or duty, of any person who is related within the second degree by affinity or within the third degree by consanguinity to either that board member or to any other board member of his agency, if the salary, fees, or compensation of the appointee are to be paid for directly or indirectly out of state funds. This provision applies to all state agency members. The nepotism law may not be evaded by trading between officials of different agencies, each of which is subject to the nepotism provisions. A violation is a misdemeanor involving official misconduct, and shall be fined not less than one hundred and not more than one thousand dollars. A state official in violation of nepotism provisions is subject to removal from office through suit brought by the Attorney General."⁹
- **Discrimination** - "A state officer or employee acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin: 1) refuse to issue a license, permit, or certificate; 2) revoke or suspend a license, permit, or certificate; 3) refuse use of public facilities; 4) refuse participation in a state program; 5) refuse to grant a benefit; 6) impose an unreasonable burden; or 7) refuse to award a contract. Violation of this provision is a misdemeanor punishable by a fine of not more than \$1,000, confinement in the county jail for not more than one year, or both."¹⁰
- **Money from Entity Being Audited** - "A state officer or employee traveling to perform official duties shall not accept any sums of money for wages or expenses, from any corporation, firm, or person who may be or is being audited, examined, inspected or investigated. The Comptroller is prohibited from paying the salary of any state employee who violates this provision."¹¹
- **State Funds for Aircraft** - "No state owned aircraft, nor any State funds, shall be used solely for political purposes. If this provision is violated, the person is civilly liable to the State for the cost."¹² Furthermore, "No state funds may be used to lease or operate an airplane unless:
 - a. The purpose of the trip is official state business,
 - b. all passengers are state officials or employees,
 - c. the destination is not served by commercial carriers, or the time required to use such a carrier interferes with other obligations, or the number of state officials and employees traveling makes the use of state aircraft cost effective,
 - d. any speeches given by passengers are related to official state business,
 - e. events attended by passengers are not sponsored by a political party or for its promotion,
 - f. no fees or honorariums are received by passengers, unless travel costs are reimbursed to the state,
 - g. no money is raised for private or political purposes, and
 - h. audiences are not charged to see or hear any of the passengers."¹³

- **Financial Statements** - "An elected state officer, a salaried appointed officer, an appointed head of a major state agency, and an executive head of a state agency must file an annual financial statement. Appointees of salaried appointed offices, to fill vacancies in elective offices, or of offices in major state agencies, must file within 30 days of appointment or qualification, whichever comes earlier. Executive heads must file within 45 days of assuming the duties of the position." [§3(a)(b)(c)]⁴
- **Publication of Legal Notice or Financial Statements** - "A state officer who is required by law to publish legal notices or financial statements and who fails, refuses, or neglects to make such publications is guilty of non-feasance of office and subject to forfeiture of salary for the month in which such failure occurs, and to removal from office for willful continuance of such neglect of duty."¹⁴
- **Bribery** - "A state official commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit as consideration for his decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, or in a judicial or administrative proceeding, or for a violation of a duty imposed on him by law. This offense is a felony of the second degree." [§36.02]¹⁵ "A state official convicted of bribery shall be removed from office."¹⁶
- **Misuse of Official Information** - "A state officer or employee commits an offense if, in reliance on information to which he has access in his official capacity and which has not been made public, he:
 - a. acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the transaction, or
 - b. speculates or aids another to speculate on the basis of the information. This offense is a Class A misdemeanor." [§39.03]¹⁵
- **Official Misconduct** - "A state officer or employee commits an offense if, with intent to obtain a benefit or with intent to harm another, he intentionally or knowingly;
 - a. violates a law relating to his office or employment, or
 - b. misapplies anything of value belonging to the government that has come into his custody or possession by virtue of his office or employment. This offense ranges from a Class C misdemeanor to a felony of the second degree." [§39.01]¹⁵
- **Gifts From Regulated Entity** - "A state officer or employee in an agency performing regulatory functions or conducting inspections-or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person he knows to be subject to regulation, inspection, or investigation by his agency. A violation is a Class A misdemeanor." [§36.08(a)]¹⁵
- **Gifts From Person in Litigation** - "A state officer or employee in an agency carrying on litigation on behalf of the government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom he knows litigation is pending or contemplated by his agency. A violation is a Class A misdemeanor." [§36.08]¹⁵
- **Gifts From Persons Interested in Contracts** - "A state officer or employee who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person he knows is interested or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion. [§36.08]¹⁵
- **Gifts From Interested Person** - "A state officer or employee with administrative authority commits an offense if he solicits, accepts, or agrees to accept any benefit from a person he knows is interested or likely to become interested in any matter before his agency. A violation is a Class A misdemeanor." [§36.08]¹⁵
- **Official Oppression** - "A state officer or employee commits an offense if, acting under the color of his office, he:
 - a. intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful, or
 - b. intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful. This offense is a Class A misdemeanor." [§39.02]¹⁷
- **State Auditor Access to Records** - "A state officer or employee is guilty of a misdemeanor for refusing to permit the State Auditor to examine or have access to state records, or for interfering with the State Auditor's examination. The misdemeanor is punishable by a fine of not less than \$100 nor more than \$1,000, imprisonment in the county jail for not

less than one month nor more than one year, or both." [§321.019]⁸

- **Contact on Behalf of Another** - "Every person appearing before a state agency or contacting in person any officer or employee on behalf of another, in relation to any case, proceeding, application, or other matter before the agency, must register the following information: his name, on whose behalf he is appearing, and whether any compensation is received by him for making the contact."¹⁹
- **Revolving Door** - "A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment." This only applies to employees who, on their last day of employment, are paid a salary equal to or greater than a group 17, step 1 position and to employees who are exempt from the position classification plan. A violation of this subsection is a Class A misdemeanor.²⁰
- **Solicitations and Gifts to Employee Organizations of Regulatory Agencies** - "An association or organization of employees of one regulatory agency, other than an agency regulating the operation of motor vehicles or the inspection thereof or an agency charged with enforcing the parks and wildlife laws of this state, may not solicit, accept, or agree to accept anything of value from any business entity regulated by that agency and from which the business entity must obtain a permit to operate the business."²¹
- **Solicitations and Gifts Relating to Contracts** - "A state officer may not solicit or accept from the state or any state entity a commission, fee, bonus, retainer, or rebate that is compensation for the officer's personal solicitation for the award of a contract for services or sale of goods to the state or state entity, excluding those contracts that are awarded by competitive bid as provided by law and that are not otherwise prohibited by law and all court appointments."²²
- **Acceptance of Honorarium** - "A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties."²³

ETHICS PROVISIONS WITHIN THE GENERAL APPROPRIATIONS ACT

Article V of the General Appropriations Act contains additional ethics provisions pertaining to conduct of state employees. These ethics provisions may be modified with each Legislative session, therefore each agency and state employee should consult the current General Appropriations Act for the latest provisions. The following is not intended to be an all-inclusive list of ethical provisions from the General Appropriations Act; however, some of the more frequently encountered provisions are presented below.

- **Publicity of Individuals** - "No state funds may be used by an agency to publicize or direct attention to any individual official or employee." (§6)²⁴
- **Dual Employment With the State** - "Employees who are legally employed in two positions within Texas State government are subject to..." [the provisions in Section 9].²⁴
- **Use of Alcoholic Beverages** - "None of the moneys appropriated under this Act shall be used for the payment of salaries to any employee who uses alcoholic beverages while on active duty. None of the funds appropriated under this Act for travel expenses may be expended for alcoholic beverages." (§10)²⁴
- **Travel Regulations** - General travel provisions, including guidelines for state-paid expenses for transportation, meals and lodging are contained in Sections 12 through 17 of Article V.²⁴
- **Acceptance of Gifts of Money** - "All bequests and gifts of money to state agencies named in this Act including Article VI who have specific authority to accept gifts are hereby appropriated to the agency designated by the grantor and for such purposes as the grantor may specify, subject to..." [the restrictions set forth in this Section 21].²⁴
- **State Telephone System Use** - All policy manuals of state agencies and institutions of higher education must contain the directive that state employees will be held liable for the cost difference between a non-State Telecommunications Systems (STS) call and an STS call unless the non-STs call meets standards in Section 43 of Article V. State agencies must use the Tex-An telecommunications network to the fullest extent possible. (§47)²⁴
- **Discriminatory Practices** - "None of the funds appropriated in this Act shall be expended by agencies which practice discrimination based on race, creed, sex or national origin." (§54)²⁴

- **State Property Use** - "No person shall entrust state property to any state official or employee or anyone else to be used for other than state purposes." (§83)²⁴
- **Consultant Contracts with Previous Employees** - "None of the funds appropriated to a department or agency may be used to enter into a consultant contract with any individual who has been previously employed by the department or agency within the past twelve months." (§141)²⁴
- **Excess Obligations** - "If excess obligations are incurred by an agency, the comptroller shall deduct the amount of the over-obligation from the salary of the responsible disbursing or requisitioning official or employee and apply it to payment of the obligation."²⁴

TEXAS ETHICS COMMISSION
TEXAS GOVERNMENT CODE, CHAPTER 304

Changes in Texas' ethics laws occurred when the 72nd Texas Legislature enacted a law relating to ethics of public servants and creation of the Texas Ethics Commission. This Act, codified in Chapter 304 of the Texas Government Code, became effective January 1, 1992.²⁵

The Act granted the Texas Ethics Commission the power and duty to "administer and enforce Chapters 302 and 305, Government Code; Title 15, Election Code; and Chapter 421, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-9b, Vernon's Texas Civil Statutes); perform any other powers and duties given to the Commission under those laws."²⁵ Under the authority of this Act, the Ethics Commission interprets, administers, and enforces those laws which govern the conduct of state officers and state employees. The Commission may issue advisory opinions, adopt rules and forms for filing, investigate alleged violations and impose sanctions for violations of the two laws.²⁵

Advisory Opinions - Sections 129 and 130 of the Act make provisions for issuance of ethics advisory opinions by the Commission. Any person who is subject to the following laws may request in writing a Commission opinion about the application of the law to the person:

- Article 6252-9b, V.T.C.S.
- Chapters 302 and 305, Government Code
- Title 15, Election Code
- Chapters 36 and 39, Penal Code²⁵

The opinion requested may be in regard to a specified factual situation, and may be either an existing or hypothetical situation. The Act requires the Commission to maintain the confidentiality of the person making the

request for the advisory opinion, unless the person files a written notice to the Commission that waives confidentiality of identity.²⁵

A written advisory opinion will normally be issued by the Commission within sixty days of receipt of the request for an opinion. However, the Commission may vote to extend the time period available for issuing the opinion for an additional thirty days, with no more than two extension periods allowed. Each opinion is numbered, categorized, and compiled into an annual summary document. Each opinion that is issued is published in the Texas Register, and is also available from the Ethics Commission.²⁵

The Act establishes a defense to prosecution or civil penalty when an advisory opinion is relied upon. Section 130(a) states, "It is a defense to prosecution or to imposition of a civil penalty that the person reasonably relied on a written advisory opinion of the Commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved."²⁵

Ethics Training Program - Section 1.11(6) of the Act requires the Ethics Commission to provide a program of ethics training for state employees in cooperation with state agencies. A training program applicable to state agencies currently is being developed by the Commission.²⁵

Rules Limiting Acceptance of Gifts or Benefits - Section 1.11 of the Act directs the Ethics Commission to "require each regulatory executive branch agency to develop rules limiting the acceptance of gifts or other benefits from persons appearing before or regulated by the agency that are at least as restrictive as the rules of the commission and provide for the submission of the rules to the commission for approval" [sub-section (a)(7)].²⁵ To assist in this regard, and to serve as an internal resource regarding ethics, the Ethics Commission requests that each state agency appoint a staff person to serve the agency as 'Ethics Advisor.'

STATE AGENCY ETHICS PROGRAM

State officials and state employees are responsible to the people of Texas in the performance of official duties. High agency standards and high personal standards are critical to fulfilling a state agency's, or a state employee's, responsibility to the citizens of Texas. The laws and statutes enacted by the Legislature should be viewed as the *minimum* standards to guide the conduct of state employees. It is up to state agencies and employees to set higher standards.²⁶

Unethical conduct by an employee may result in a loss of resources, time and services for the agency. Liability

losses such as theft of equipment, services and work time, misuse of equipment, and embezzlement can be minimized by implementing an ethics program. It is important for each state agency to regularly communicate to its employees the ethical standards for conducting the agency's business.

An ethics program is a mechanism that can be employed by state agencies to set high ethical standards. An ethics program provides a positive image for a state agency, improves employee morale, emphasizes ethical behavior, and provides long-term financial benefits. A ethics program typically includes a policy statement, or 'code of ethics,' and provides ethics training to employees. An appointed 'ethics advisor' can also serve as a valuable internal agency resource to employees regarding general ethical situations. Some other ideas that may be incorporated into an ethics program are listed below.

- o Include articles on ethics in the agency's employee newsletter or publication.
- o Provide methods for employees to report unethical practices, such as a comment box or ethics hot line.
- o Distribute employee questions and answers regarding the ethics policy or ethical conduct.
- o Provide classes or seminars for employees on ethical conduct.

Sample Ethics Policies

Appendix A of this chapter contains a sample ethics policy. This policy is presented as an example of an ethics policy that may be developed by other agencies.

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AVAILABLE RESOURCES TO TEXAS STATE AGENCIES

PUBLICATIONS

Texas Research League; Inventory of Basic State Human Resource Management Statutes; Austin, Texas, 1992.

The "Ethics Journal" is published by the Ethics Resource Center, and is available upon request by writing to the Ethics Resource Center, 1120 G Street NW, Washington, D.C., 20005.

Organizations and Agencies Providing Assistance

Texas Ethics Commission
1101 Camino La Costa
P.O. Box 12070
Austin, Texas 78711-2070
(512)463-5800

Office of the Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548
(512)463-2191

Ethics Resource Center
1120 G Street NW
Washington, DC 20005
(202)737-2258

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CHECKLIST FOR TEXAS STATE AGENCIES

1. Does the agency have an ethics program? Yes No
2. Does the ethics program include a written ethics policy statement, or code of ethics? Yes No
3. Are procedures, or standards of conduct, written for its employees? Yes No
4. Does the ethics program provide ethics training for employees? Yes No
5. Does the agency have an appointed ethics advisor or ethics officer? Yes No
6. Is the ethics advisor/officer's name and location known to agency employees? Yes No

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ENDNOTES

1. Webster's Ninth New Collegiate Dictionary; Philippines; 1991. p. 426.
2. Cadbury, Sir Adrian; 'Ethical Managers Make Their Own Rules'; Harvard Business Review. Volume 65; September-October, 1987; pp 69-73.
3. Moore, Robert H.; "Ethics and Risk Management;" Risk Management; March 1992.
4. "Standards of Conduct of State Officers and Employees"; Article 6252-9b, V.T.C.S.
5. Texas Constitution; Article XVI, Section 40.
6. TEX. REV. CIV. STAT. ANN.; Article 6252-9a (Vernon 1970).
7. TEX. REV. CIV. STAT. ANN.; Article 6252-9e (Vernon 1988).
8. TEX. REV. CIV. STAT. ANN.; Article 6252-11c, Section 6A (Vernon 1988).
9. TEX. REV. CIV. STAT. ANN.; Article 5996 (Vernon 1962).

10. *TEX. CIV. PRAC. & REM. CODE ANN.*; Section 106.001 (Vernon 1986).
11. *TEX. REV. CIV. STAT. ANN.*; Article 6823a, Section 4 (Vernon 1960).
12. *TEX. REV. CIV. STAT. ANN.*; Article 6252-15 (Vernon 1970).
13. *Appropriations Act*; Article V, Section 19.
14. *TEX. REV. CIV. STAT. ANN.*; Article 6252-2 (Vernon 1970).
15. *Texas Penal Code Annotated*; Vernon 1988.
16. *Texas Constitution*; Article XVI, Section 41.
17. *Texas Penal Code, Ann.*; Section 39.02 (Vernon 1974).
18. *Texas Government Code*; Section 321.019 (Vernon 1988).
19. *TEX. REV. CIV. STAT. ANN.*; Article 6252-23 (Vernon 1988).
20. Article 6252-9b, Section 7A, VACS, as amended by S.B.1, 72nd Legislature, Regular Session, Section 3.07.
21. Article 6252-9b, Section 7B, VACS, as amended by S.B.1, 72nd Legislature, Regular Session, Section 3.07.
22. *Ibid*, Section 7C, as amended.
23. *Texas Government Code*, Chapter 304, Sec. 36.07.
24. "General Appropriations Act", Acts of the 72nd Legislature, Article V.
25. *Government Code*, Chapter 304; Acts of the 72nd Legislature - Regular Session.
26. "A Guide to Ethics Laws for State Officers and Employees"; Texas Ethics Commission; April 1, 1993.

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Appendix A

Sample Ethics Policy

(NAME OF STATE AGENCY)

CODE OF ETHICS

Special trust has been placed in employees to fairly and impartially administer the *(name of the enabling)* Act. Employees act and speak for the *(name of state agency)* and the State of Texas. They must treat all parties and their representatives fairly and impartially. Loyalty to the highest ethical standards and moral principles must prevail over all other loyalties.

Employees Shall:

- Give a full day's work for a full day's pay.
- Learn their duties and perform them in a responsible manner.
- Strive to be fair and impartial to all parties and their representatives.
- Conduct themselves at all times in a manner that promotes public confidence in their integrity and impartiality.
- Not give preferential treatment to any party or a person representing a party or disperse special privileges or favors to anyone.
- Not accept a gift, gratuity, or entertainment from any person or entity having an interest in any matter or proceeding pending before *(name of state agency)*.
- Not accept or permit members of their families to accept favors or benefits that might be construed as influencing actions of the employee.
- Not use their position in *(name of state agency)* for private gain.
- Immediately advise their supervisor if they are seeking or have obtained future employment with anyone doing business with *(name of state agency)* and disqualify themselves from acting on any matter in which their future employer has a interest.
- Not hold financial interests that conflict with conscientious performance of duties.
- Not engage in outside employment or activities that conflict with *(name of state agency)* duties and responsibilities.
- Not disclose confidential information gained through employment with the *(name of state agency)*.
- Provide equal treatment to all persons regardless of race, color religion, sex, national origin, age, or handicap.
- Report fraud, waste, abuse corruption, and violation of this code of ethics to appropriate authorities.
- Not only follow the law and ethical standards but also avoid actions that create the appearance of violating the law or ethical standards.
- Assist one another in observing these ethical standards.

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CHAPTER 6

RECORDS MANAGEMENT

INTRODUCTION

The records of Texas state agencies are important resources for the citizens of Texas as well as the agencies themselves. A 'record' is a document that contains data or information of any kind and in any form whether generated or received by an organization, that is necessary for the operation of that organization's business.¹ State records provide evidence of action taken by agencies and state employees that may protect the rights of individuals or the state, and provide necessary support for decisions made by state agencies. As important resources, state records require a system of procedures, standards and controls to effectively manage the accumulation of records, without which the records would remain inaccessible and unmanageable. Such a system is typically referred to as 'Records Management.'²

IMPORTANCE OF RECORDS MANAGEMENT
TO RISK MANAGEMENT

A records management program is an important element of a comprehensive risk management program for a number of reasons. A records management program:

- enhances document identification and retrieval;

- establishes an approved retention period for state records in each agency;
- provides documentation and proof of state agency and employee actions that may be useful in future litigation;
- provides a management audit trail;
- provides physical protection of vital records; and
- provides security for confidential records.

The above functions of a records management program are all compatible with a comprehensive risk management program that protects the assets of an agency from damage, destruction or loss.

Non-Duplication of Programs

The State Office of Risk Management (Office) prefers to cite standards, guidelines, rules and regulations of other agencies and organizations, and to refer state agencies to those programs administered by other agencies and organizations when feasible and appropriate. This approach of referencing and referral recognizes and emphasizes the role, responsibilities and expertise of the agency or organization, and also avoids duplication of reporting and compliance with separate sets of guidelines.

For example, the State and Local Records Management Division of the Texas State Library and Archives

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency liability exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its liability program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

Commission has developed the Texas State Records Management Manual to provide procedures and guidelines to assist State agencies in the development and implementation of their records management program. Also, the Department of Information Resources has developed its Security and Risk Management Policy Standards and Guidelines which provides guidance to State agencies regarding electronic records security procedures. Therefore, State agencies are encouraged to refer to these documents and contact these respective agencies for additional information and detailed assistance.

RECORDS MANAGEMENT PROGRAM

The State and Local Records Management Division of the Texas State Library and Archives Commission operates under the authority of the Texas Government Code, Chapter 441.³ This code requires all agencies to establish and maintain an active, continuing program for the economical and efficient management of records.⁴

To assist state agencies establish their records management program, the Texas State Library and Archives Commission has established a procedures manual to accomplish the requirements prescribed in the Texas Government Code. The procedures manual, known as the Texas State Records Management Manual, details procedures and guidelines an agency must follow when appointing a records administrator, conducting an inventory, identifying vital records, developing a retention schedule, and managing state records. Appointed state agency records administrators should previously have received a copy of the Records Management Manual. Additional copies may be obtained for a nominal fee.

The State and Local Records Management Division offers periodic training for state agency personnel regarding records management. State agencies are encouraged to contact the Division directly when the need for training arises.

The Texas State Records Management Manual identifies the basic components of a records management program, which includes the following elements:

- **Agency Records Administrator** - Section 441.037 of the code requires the head of each department or institution to either act as or appoint an employee to serve as the agency or institution's records administrator. The appointed records administrator is required to perform specific duties and functions relative to development of the agency's records management program.⁵

- **Records Inventory** - This inventory is a complete listing of the records held by the agency, and identifies all records, their location and quantities. The records inventory is required by §441.057 of the code.⁶
- **Retention Schedule** - A records retention schedule is a timetable that identifies the length of time a records series must be retained in active and inactive status before final disposition. The schedule is developed directly from the records inventory, and is required by §441.057 of the code.⁷
- **Vital Records** - Vital records are those records that are essential to resume or continue an agency's business, the records necessary to recreate legal and financial positions, and those records necessary to preserve the rights of the agency, employees or clients. Section 441.051 of the code requires each agency to identify and protect the vital records of the agency.⁸
- **Archival Appraisal** - The Texas State Library and Archives Commission provides a service to agencies and institutions to identify and maintain state records that contain archival value as permanent documentation of the agency's activities. Agency records administrators must work with the Commission to identify and appraise those records that have archival value.⁹
- **Disposition of Records** - The code (§441.035) requires all agencies to obtain approval of the Texas State Library and Archives Commission for the destruction of records.¹⁰
- **Disaster Recovery** - Section 441.051 of the code requires all agencies to identify and protect vital or essential records. Such protection requires planning to identify common hazards for records and to develop a disaster recovery plan, to include preventive measures to reduce the risk of disaster, and post-disaster measures that can be taken to recover agency records.¹¹

SPECIALIZED APPLICATIONS OF RECORDS MANAGEMENT

In addition to the basic elements of an agency's records management program, the Texas State Records Management Manual identifies and discusses certain specialized applications of records management, which include the following:

- **State Records Center** - State agencies in the Austin area may be eligible for services provided by the State Records Center. Such services include transfer, storage and retrieval of records. The Manual should be consulted for complete eligibility criteria, and the State Records Center should be contacted for more details.¹²
- **Micrographics** - The Manual provides guidelines and assistance to agencies in determining the advantages and disadvantages of utilizing microforms as a records management medium.¹³
- **Electronic Records** - The growth of information systems and technology has spurred a new era in records management and records retention. Electronic records are being utilized more frequently for maintaining information and records. The Manual establishes procedures and guidelines for use by agencies to manage electronic records.¹⁴ The Texas State Library and Archives Commission has also published 'Standards and Procedures for Electronic Records of Texas State Agencies' that establish administrative rules for maintenance, use, retention, and storage of all electronic records of state agencies that have an approved retention of ten (10) years or more, including records having archival value. These standards are consistent with Department of Information Resources "Information Security Standards".
- **Forms Management** - Section 441.152(b) of the code authorized the Records Management and Preservation Advisory Committee to adopt guidelines to form the basis for forms management and to reduce or simplify paperwork generated by state agencies. Each agency is required to cooperate with the State Library and Archives Commission in the implementation of a statewide plan and program to reduce and simplify state agency paperwork and to analyze and classify forms used by agencies. The guidelines presented in the Texas State Records Management Manual should form the basis for an agency's forms management program.¹⁵
- **Filing Systems** - The selection and establishment of an appropriate records filing system is a key element in the success of the records management program. The Manual provides assistance to agencies in establishing appropriate, effective filing systems.¹⁶

COMPUTER INFORMATION RESOURCES:
SECURITY AND LOSS CONTROL

Continuing availability of information is essential to the operation of state programs. Rapid and continuing technical advances in information processing have increased the dependence of state agencies on information and automated systems. The value of state data and software in terms of restoration costs or losses due to unauthorized disclosure, may far exceed the value of its associated hardware. For that reason, information processed by computer must be recognized as a major state asset and be protected accordingly through the implementation of sound loss and internal control measures.

The Department of Information Resources

The Department of Information Resources (DIR) was established through the Information Resources Management Act (Vernon's Annotated Civil Statutes, Article 4313(32j)). DIR is required by the Act to develop and publish policies, procedures, and standards. In accordance with the Act, DIR established 'Information Security Standards' (1 Texas Administrative Code, §201.13(b)) which requires state agencies to provide for the confidentiality and security of state owned information and information resources. To assist Texas state agencies in the interpretation and implementation of the standards, DIR has also published 'Information Resources Security and Risk Management Policy Standards and Guidelines.' The optional guidelines are recommended as effective loss control and security practices which should be implemented where such controls are applicable, as determined by agency management.¹⁷

The guidelines serve as a basis for creation of common ground among agencies in the protection of the state's vital information resources. This common ground among agencies promotes loss control measures in the sharing of data and trust in the inter-operability among agencies in the performance of their responsibilities to the people of Texas.¹⁷

DIR encourages each agency to fully evaluate the standards and guidelines to determine whether more stringent loss control measures are required and appropriate given the individual agency's mission and authority. DIR directs each agency to complete implementation of an information resources security program consistent with the standards on or before September 1, 1997.¹⁷

**RESOURCES AVAILABLE TO
TEXAS STATE AGENCIES**

Publications

Information Resources Security and Risk Management Policy Standards and Guidelines; Texas Department of Information Resources; October 7, 1992.

Standards and Procedures for Electronic Records of State Agencies; Texas State Library and Archives Commission; Effective Date: March 12, 1993.

Texas State Records Management Manual; Texas State Library and Archives Commission; Latest Revision: May 1992.

Agencies and Organizations Providing Assistance

Texas State Library and Archives Commission
State and Local Records Management Division
4400 Shoal Creek Boulevard
P.O. Box 12927
Austin, TX 78711
(512)454-2705

Texas State Auditor's Office
206 East 9th Street
Suite 1900
Austin, TX 78701
(512)479-4700

Texas Department of Information Resources
William P. Clements Building
Austin, TX 78701
(512)475-4700

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ENDNOTES

1. Texas State Records Management Manual; Texas State Library and Archives Commission; State and local Records Management Division; May, 1990; p. G 14.
2. *Ibid*; May, 1990; p. IN 1.
3. *Ibid*; May, 1992; p. RML 3.
4. *Ibid*; May, 1992; p. RML 8.
5. *Ibid*; May, 1990; pp. RA 3-4.
6. *Ibid*; May, 1990; p. RI 3.
7. *Ibid*; May, 1990, p. RS 3.
8. *Ibid*; May, 1990; p. VR 3.

9. *Ibid*; May, 1990; pp. AA 3-4.
10. *Ibid*; May, 1992; pp. DR 3-5.
11. *Ibid*; May, 1992; pp. DRP 3.
12. *Ibid*; May, 1990; pp. SRC 3-4.
13. *Ibid*; May, 1990; p. MG 3.
14. *Ibid*; May, 1992; p. ER 3.
15. *Ibid*; May, 1992; pp. FM 3-4.
16. *Ibid*; May, 1990; p. FS 3.
17. Information Resources Security and Risk Management Policy Standards and Guidelines; Texas Department of Information Resources; October 1992.

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**CHECKLIST FOR TEXAS STATE
AGENCIES**

1. Does the agency have a records management program established in accordance with Texas State Library and Archives Commission procedures and the Texas Government Code, Chapter 441? Yes No
2. Does the agency have a designated records administrator? Yes No
3. Has the agency conducted a records inventory? Yes No
4. Has the agency identified vital records that are essential to carrying out established plans and programs? Yes No
5. Has the agency provided for disaster recovery of vital records? Yes No
6. Has the agency developed a records retention schedule? Yes No
7. Is the retention schedule approved by the State Auditor's Office and the Texas State Library and Archives Commission? Yes No
8. Does the agency follow standards for electronic records recommended by the Department of Information Resources? Yes No

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Chapter 7

Insurance

INTRODUCTION

'Insurance' is defined as "a contractual relationship that exists when one party (the insurer) for a consideration (the premium) agrees to reimburse another party (the insured) for loss to a specified subject (the risk) caused by designated contingencies (hazards or perils)."¹ More simply stated, insurance is a system in which a risk or the possibility of a loss is transferred to an insurance company which reimburses the insured for covered losses and provides for the sharing of the cost of losses among all its insureds. Risk, transfer, and sharing are vital elements of insurance. By transferring risk to insurance companies, insureds exchange the possibility of large losses for smaller, certain, manageable costs (e.g., insurance premiums). Risks are transferred to insurance companies by use of insurance policy contracts that state the rights and duties of the insurance company (the insurer) and the insured.²

The purchase of insurance is a form of risk transfer which is a basic tool for managing risk. By purchasing insurance, insureds share the costs of each other's losses. Premiums are paid to the insurance company which pools the premiums into a large fund. Losses are then paid from this pool of money. The total cost of paying for losses that occur to relatively few insureds is spread among all members of the group. Sharing the cost among

all insureds makes each insured's premium relatively small.² However, the cost of insurance increases as the number of claims and the amount paid out increases.

This chapter is intended to:

- provide general information regarding purchasing insurance by Texas state agencies;
- provide a brief description of the anatomy of an insurance policy;
- offer some general suggestions for reviewing a policy; and
- identify the most common types of insurance policies that may be purchased by state agencies (if the agency has the authority to purchase insurance).

INSURANCE FOR TEXAS STATE AGENCIES

The Texas Tort Claims Act (Civil Practices & Remedies Code, § 101.027) makes provision for state agencies to purchase insurance policies to protect the agency and its employees against claims covered under the Act.³ However, the current General Appropriations Act (Article V, § 53 Seventy-second Legislature, First Called Session) states "None of the funds appropriated in this Act may be expended for the purpose of purchasing insurance covering claims under the Texas Tort Claims Act."⁴

This section of Risk Management for Texas State Agencies supplies general information regarding liability exposures, and identifies specific resources available for managers and supervisors. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel. Legal counsel should always be consulted regarding rights and obligations under the law.

In lieu of specific legislative authorization and funding to purchase insurance, the State of Texas is generally considered 'self-insured' for most risk exposures. In this situation, the agency must 'self-fund' its claims and losses. This general situation exists unless an agency is able to purchase insurance through the use of funding sources other than general appropriations. **Accordingly, each state agency should examine its specific statutory authority and sources of funds to determine its ability to purchase insurance.** If the purchase of insurance is authorized, the agency should include in its risk management manual a section that defines the agency's coverage and program.

Regarding workers' compensation insurance, Article 8309g governs workers' compensation for most state agencies and state employees. Article 8309g specifies "with respect to injuries sustained by employees in the course of their employment, the state is self-insuring." This article establishes the State Employees Division of the Office of the Attorney General, and states that the Director of this Division "shall act in the capacity of employer and insurer" for the purpose of administering the workers' compensation self-insurance program for state employees.⁴ This provision of the 'old law' was amended, but not repealed, by the 1989 Texas Workers' Compensation Act, Article 8308 (new law), and therefore Article 8309g remains in effect. Refer to Volume III, Section One, "Workers' Compensation Exposures" for further information.

For those agencies that are authorized and funded to purchase insurance, the agency's risk manager should oversee the purchase and replacement of all insurance policies. The risk manager should analyze agency risks to determine appropriate coverages, limits of liability and insurance carriers. The risk manager should compile all underwriting data, such as loss history, valuation of property and contents, business interruption and extra expense valuations, bond classifications, liability rating data, crime coverage rating data, and boiler/machinery coverage. The risk manager should also be involved in the development and submission of Requests for Proposal (RFP) for brokers and agents, evaluation of bids, and selection of appropriate brokers, agents, and coverages.

REVIEWING INSURANCE POLICIES

If an agency purchases insurance, the risk manager should conduct a thorough review of all insurance policies to determine whether the policy includes the proper coverage, conditions, endorsements, and exclusions. The

following provides some general guidance to the risk manager in conducting an insurance policy review.

- ***Make a photocopy*** - Notes can be made on the photocopy. The original policy should not be written on, in order to avoid potential problems if the policy is used as evidence in a court of law. Notations regarding questions that arise should be made in the margins of the photocopy. These questions can be referred to the broker or insurance agent. This process will facilitate understanding the coverage as well as developing a list of questions for the broker or company.
- ***Definitions of key words*** - Each key word encountered should be defined and written in the margin.
- ***Review each provision*** - The policy should be reviewed provision-by-provision. When reading the provisions, think about what the policy does not say as well as what it says.
- ***Review the declarations page*** - Verify that all information on the declarations page is correct and accurate.
- ***Review the endorsements*** - Endorsements should be understandable, logical, and contain no material typographical errors. If an endorsement deletes an exclusion, the exclusion should be crossed out and the number of the endorsement written down. If a particular endorsement has been canceled by one issued at a later date, a notation to this effect should be made on the canceled endorsement.
- ***Review the exclusions*** - Make notations next to exclusions that are covered by other policies. This process will ultimately reduce the number of policies that must be considered.
- ***Make sure a complete policy is provided*** - All endorsements should be included and attached to the policy.
- ***Request the agent, broker, or insurance representative to respond in writing to any questions that arise*** - Questions should be answered in writing particularly when policy provisions appear to conflict.⁶

ANATOMY OF AN INSURANCE POLICY

Insurance policies contain a number of sections and parts, each of which serves a separate and distinct purpose. The typical sections of an insurance policy are the:

- declarations page (information page);
- insuring agreement;
- exclusions;
- definitions;
- general conditions; and,
- endorsements.

Declarations Page

The declarations page provides individualized information about the insured, the policy, and the insurer. It identifies the type of policy, name and address of the insured, type of organization insured (i.e., partnership, corporation, etc.) policy period, amount of insurance, insurance company, and policy premium. Endorsements attached to the policy are also listed.⁷

A "Hazard Schedule" is often contained on the declarations page but may also be provided separately. The hazard schedule provides detailed information about the risks being insured. For example, a schedule of locations or classifications of operations, depending on the type of insurance policy, may be provided. The hazard schedule may also provide a breakdown of the policy premium by location, type of operation, etc.⁷

Insuring Agreement

The insuring agreement specifies the coverage provided by the policy. Typically, it is broad in nature and the coverage is later narrowed in the exclusions and definitions.⁷

The insuring agreement in property insurance policies will normally reveal:

- whether the policy is 'all risk' or 'named perils'; and,
- whether it covers real or personal property, or both.

In liability insurance policies, it will usually reveal:

- the types of liability claims which the policy covers;
- whether the policy 'indemnifies' or 'pays on behalf of';

- whether its a 'claims-made' or 'occurrence' form; and,
- whether defense costs are covered by the policy.⁷

Exclusions

Exclusions generally limit the coverage that has been granted in the insuring agreement. Exclusions serve three basic functions:

- To avoid insuring risks that are considered uninsurable (i.e., business risks) or which underwriters are unwilling to accept;
- To avoid insuring risks covered by other types of insurance (example: the general liability policy excludes risks covered by workers' compensation insurance); and,
- To exclude risks that the insurer is willing to cover, (usually through endorsement), for an additional premium if given notice that risks exist and if the insured desires the coverage (example: contractual liability coverage can be added to the general liability policy by endorsement).⁷

Property insurance policies may have two sets of exclusions. One set will preclude coverage for losses arising from certain perils, such as earthquake and flood. The other set will exclude coverage for any damage to certain types of property, such as trees, shrubs and landscaping.⁷

Definitions

Key words and phrases contained in insurance policies are precisely defined in the "definitions" section. Terms that are defined in this section are either boldface, underlined, in italics, or in all caps whenever they appear in the policy. Definitions may or may not correspond with those in general usage and should be carefully studied. Definitions can broaden or limit (but usually the latter) coverage afforded by an insurance policy. If the policy does not have a separate "definitions" section, important definitions will usually be found in the "conditions" section.⁷

Conditions

Conditions typically enumerate administrative procedures and rights of both the insurer and insured under the contract. The conditions normally contain the:

- cancellation provision;
- policy territory;
- claims reporting requirements;
- subrogation provisions;
- the entire contract clause; and,
- premium payment and refund provisions.⁷

Endorsements

Rather than draft customized insurance policies for each and every insured, the insurance industry utilizes standard forms which normally contain all of the sections discussed above. Standard forms are then tailored to the specific needs of the insurer through endorsements (sometimes called "riders") that modify standard form provisions.⁷

Standard endorsements also have been devised for use on an industry-wide or company-wide basis. Endorsements have an unlimited number of uses, but the more common ones include:

- broadening coverage by deleting or modifying an exclusion or changing a definition;
- restricting coverage by adding or broadening the scope of an exclusion or changing a definition;
- modifying the rights of the insurer or insured by amending a general condition or adding a new one;
- clarifying coverage that already exists; and,
- adding persons as insureds or adding to the schedule of covered property.⁷

While many endorsements are short, some insurance policies may contain endorsements that are long and complicated. These endorsements may have their own insuring agreements, definitions, exclusions, and limits of liability.⁷

Endorsements to policies may be issued throughout the year. As soon as a new endorsement has been received, reviewed and understood, it should be attached to the corresponding insurance policy.⁷

Standard Insurance Coverages

Appendix A of this chapter identifies standard insurance coverages that may be of concern to state agencies that

are authorized to purchase insurance. The appendix briefly identifies certain property and liability insurance coverages, and the purposes for which the various coverages are provided. Appendix B provides an overview of the types of coverage provisions that are available on commercial general liability policies. Some agencies may have specialized exposures for which other types of coverage would be required.

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ENDNOTES

1. *Glossary of Insurance and Risk Management Terms: Fifth Edition*; International Risk Management Institute, Inc.; Dallas; 1991.
2. Smith, Barry D.; *How Insurance Works*; Insurance Institute of America; 1984.
3. *Texas Tort Claims Act*; Civil Practices and Remedies Code, §101.027.
4. *General Appropriations Act*; Article V, Section 53; Seventy-Second Legislature, First Called Session.
5. *Texas Workers' Compensation Act (old law)*; Article 8309g, "Workers' Compensation Insurance for State Employees."
6. Stevens, Ginny; *Basics of Risk Management Insurance Coverage*; Risk/Insurance Administration; City of Dallas, TX; November 8, 1990.
7. Vogt, Robert C.; "Anatomy of an Insurance Policy"; *Public Sector Risk Management*; Public Risk Management Association; 117 N. 19th St., Suite 900; Arlington, VA 2209.

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CHECKLIST FOR TEXAS STATE AGENCIES

1. Does the agency's enabling legislation permit the purchase of liability insurance? YES NO

2. Has the agency determined risk exposures that may be transferred by purchasing insurance?
 YES NO
3. Has the agency performed a risk analysis to determine the feasibility of purchasing liability insurance to cover various exposures?
 YES NO
4. Is the effectiveness of the agency's risk management program periodically reviewed to determine if insurance coverage is appropriate and adequate?
 YES NO
5. Are all insurance policies reviewed by the agency's risk manager?
 YES NO
6. Does the risk manager retain copies of all insurance policies and certificates of insurance?
 YES NO
7. Are insurance policies reviewed by the agency's legal counsel?
 YES NO

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APPENDIX A
SUMMARY OF POTENTIAL INSURANCE POLICIES⁶

I. PROPERTY COVERAGES

PURPOSE OF COVERAGE

Property Insurance	Physical damage to buildings and contents
Business Interruption Coverage	Loss of revenues, rents, or extra expenses because of interruption of business
Fine Arts Coverage	Loss of or damage to fine arts
Boiler & Machinery Insurance	Damage caused by explosion, rupture, bursting, cracking, bulging of boilers, turbines, engines, pressure vessels, and apparatus
Underground Storage Tanks	Loss or damage to natural resources
Builders Risk Insurance	Property insurance (fire, theft, wind, etc.) during the course of construction
Installation Floater Insurance	Property insurance for equipment to be installed at an insured facility
Non-owned Fine Arts Insurance	Loss of or damage to fine arts on loan or ON exhibit
Money & Securities Insurance	Theft, disappearance, or destruction of money or securities
Public Employee Blanket Bond	Faithful performance by employees

II. LIABILITY INSURANCE COVERAGES

PURPOSE OF COVERAGE

Commercial General Liability	Bodily injury and property damage liability to third parties arising out of premises or operations
Commercial Auto Liability	Bodily injury and property damage liability to third parties arising out of vehicles; physical damage to vehicles
Workers' Compensation Insurance	Job-related injuries and occupational diseases to employees.
Owners & Contractors Protective Liability	Bodily injury and property damage liability arising out of a specific project
Umbrella Liability	Excess liability coverage following the form of the primary liability policies
Excess Liability	Excess liability coverage for specific areas
Professional Liability (Errors & Omissions)	Bodily injury and property damage liability arising out of the rendering or failure to render proper professional services
Medical Malpractice Liability	Bodily injury and property damage arising out of the rendering or failure to render medical services
Environmental (Pollution) Liability	Bodily injury and property damage liability arising out of release of pollutants

APPENDIX B

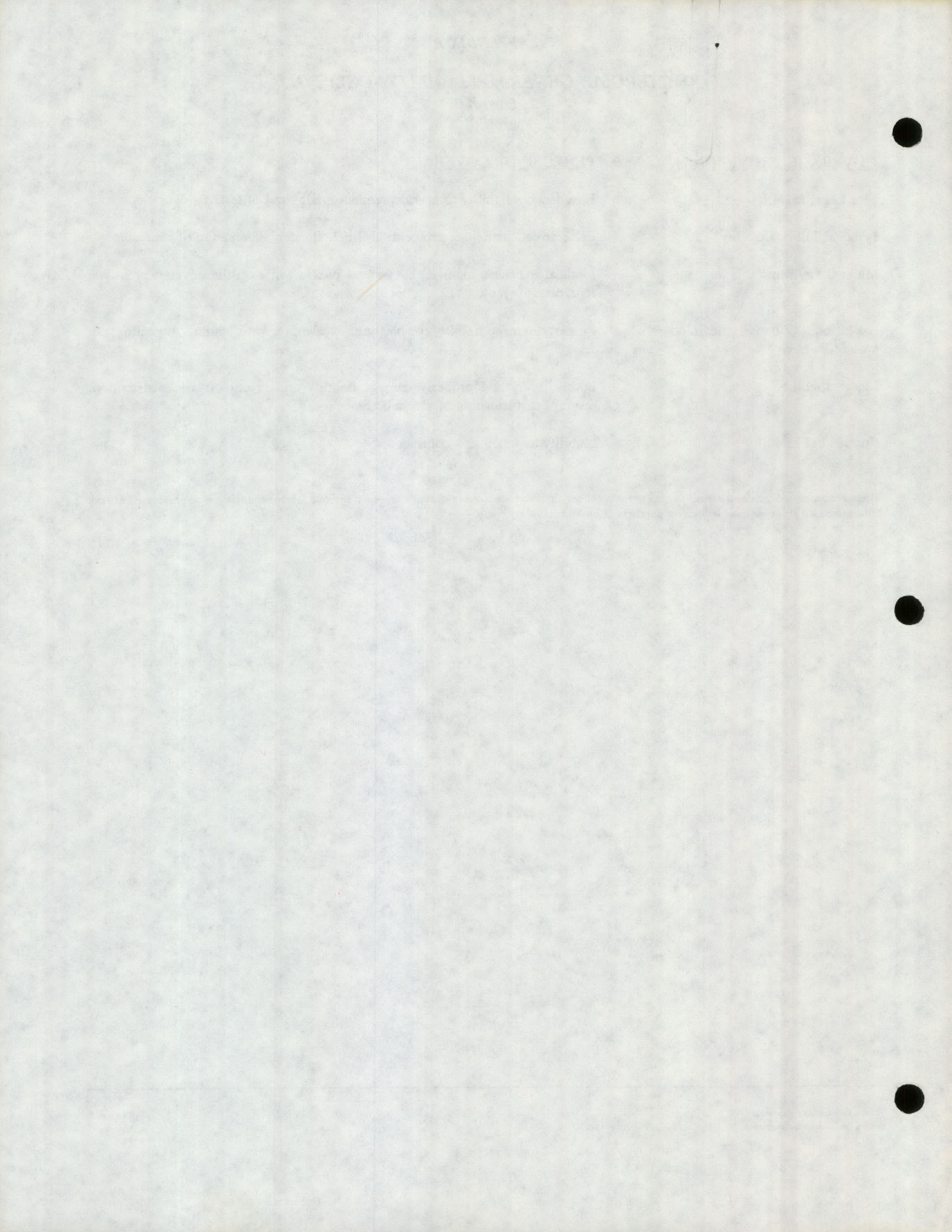
COMMERCIAL GENERAL LIABILITY (CGL) POLICY
Overview

COVERAGE PROVISION

PURPOSE OF COVERAGE

Fire Legal Liability	Fire damage liability to leased premises arising out of lessee's operations
Personal Injury Liability	False arrest, malicious prosecution, libel, slander, defamation of character
Medical Payments	Medical expenses incurred by general public while on the covered premises, regardless of fault
Explosion, Collapse and Under-ground Hazards	Property damage liability for blasting, excavating, land grading, tunneling, etc.
Liquor Liability	Bodily injury and property damage liability arising out of sale, distribution, serving, or furnishing of alcoholic beverages
Contractual Liability	Liability assumed in a contract

There are statutory limitations concerning the purchase of certain insurance coverages, depending upon revenue funding sources and other factors. Always obtain legal advice concerning bidding/or purchase of insurance line coverage.



Section Two

Chapter 1

Overview of Human Resources Liabilities

INTRODUCTION

An effective, comprehensive human resources program is one of the most challenging management functions of Texas state agencies. There are a number of variables that contribute to the overall success of a well-managed human resources program. These include the diversity of employees, changing societal values, and evolving federal and state legal requirements. By their very nature, these variables are difficult to control. An agency's human resources management program must undergo a process of continual, regular review and revision to stay current with a dynamic blend of legislation, case law and accepted employment practices.

Human interactions within an organization are of special concern to human resource program managers. Both indirect and direct consequences of employee interactions may result in liability claims. Lawsuits may rise from employee complaints or grievances involving errors and oversights, inconsistent application of benefits, compensation, classification, employee relations and employment programs, policies, procedures and practices. Once a lawsuit is set in motion, litigation costs are difficult to control, particularly if neither party is

agreeable to settlement negotiations. The high costs of litigation make it imperative that managers, supervisors and employees have a clear understanding and working knowledge of, and comply with, all applicable laws that impact employees and the human resources program.

Texas state agencies can take many actions to insulate the agency against human resources liabilities. Section Two, "Human Resources Exposures," of Volume IV, Risk Management for Texas State Agencies, identifies policies, programs, and procedures that state agencies may develop and implement to effectively manage the agency's human resources program. A related goal of this section is to identify specific documents, reports, agencies and organizations that may serve as resources to Texas state agencies in managing their human resources programs.

Texas state agencies generally conduct their daily business operations based on a set of established procedures and policies. Procedures apply commonly accepted principles to assist the organization in achieving its stated purpose and function more efficiently. These procedures may be altered as the organization's requirements change. A clear statement of the employment relationship, described in terms of employer and employee expectations, is a

This section of Risk Management for Texas State Agencies supplies general information regarding human resources liability management programs, and identifies specific resources available for managers and supervisors. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel. Legal counsel should always be consulted regarding rights and obligations under the law.

necessary element of a human resources management program.¹ Attendance, leave, equal employment opportunity, compensation, benefits, employee relations, complaint or grievance procedures, sexual harassment, and drug free workplace policies are examples of aspects of the employment relationship that should be addressed. A more detailed discussion of these elements is included in Chapter 2 of this section.

IDENTIFICATION AND ANALYSIS OF LOSS EXPOSURES

Exposures to human resource liabilities may be identified through surveys, questionnaires, internal audits, interviews and knowledge of an agency's previous loss experience.² An agency's prior experience with employee complaints, grievances and lawsuits are useful to identify the types of exposures unique to each state agency. An assessment of the frequency, severity and types of exposures and losses should be conducted. The state agency's legislative mandate, operational objectives, legal requirements, workforce factors, and prevalent societal concerns are factors involved in this assessment.

LOSS CONTROL MEASURES

When exposures have been identified and assessed, the appropriate loss control method can be utilized.² Risk prevention and loss control within the human resources management function typically involve the development of policies, procedures and programs that specifically address those human resources loss exposures identified in the earlier assessment. Policies and procedures should be well-written, implemented consistently, distributed, communicated and applied equally to all affected employees, and reviewed and revised regularly. If not, they may present a liability in the event of a legal challenge brought by a current or former employee.³

LOSS REPORTING

Loss reporting is an important means of identifying an agency's losses and provides information used to prioritize loss control programs.² Sources of specific loss reporting information may be obtained from an agency's Human Resources Information System (HRIS), claims reporting and complaint/tracking process.

MONITORING THE HUMAN RESOURCES MANAGEMENT PROGRAM

Monitoring the human resources management program provides a routine means of evaluating the program. It also affords opportunities to improve or update policies, procedures, and programs.² The loss reporting process provides a mechanism for evaluating the effectiveness of the program. In addition, a centralized system of review and approval for all human resources related actions is an important aspect of a human resource management program. Legal counsel should be consulted on difficult human resource decisions before final action is taken.

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#### ADDITIONAL RESOURCES AVAILABLE TO TEXAS STATE AGENCIES

Head, George L. Ph.D., C.P.C.U, ARM, C.S.P.; The Risk Management Process; Risk and Insurance Management Society, Inc.; 1978.

Inventory of Texas Basic State Human Resources Statutes; Texas Research League; Austin, Texas. 1992.

Scholar, Randall S., Nicholas J. Beutell and Stuart A. Youngblood; Effective Human Resources Management, Third edition; West Publishing. Co.; St. Paul, MN; 1989.

Shawe and Rosenthal; Employment Law Deskbook; Matthew and Bender Publishing Co.; Baltimore, Maryland; 1991.

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CHECKLIST FOR TEXAS STATE AGENCIES

ENDNOTES

- 1. Does the agency have a human resource director, manager or coordinator?
 Yes No
- 2. Does the agency provide 'new employee orientation training'?
 Yes No
- 3. Are human resource/personnel policies and procedures discussed in new employee orientation?
 Yes No
- 4. Does the agency train employees regarding specific human resources/personnel issues, such as EEO sensitivity, workforce diversity, performance evaluations, hiring/firing, drug use/abuse, sexual harassment?
 Yes No
- 5. Are records kept of employee attendance at all training programs?
 Yes No
- 6. Are personnel records kept in a secure, confidential area and access restricted to these records?
 Yes No
- 7. Does the agency have a system to report to management all personnel related complaints, grievances, claims and lawsuits?
 Yes No
- 8. Does the agency routinely analyze personnel related complaints, grievances, claims and lawsuits to identify trends and to design loss control measures?
 Yes No
- 9. Does the agency have a 'Human Resources Information System' (HRIS) to monitor complaints, grievances, claims and lawsuits?
 Yes No

- 1. Employee Handbooks From A to Z: Texas Employment Commission; Austin, Texas; 1992.
- 2. Head, George L. and Stephen Horn II; Essentials of Risk Management, Volume I; Insurance Institute of America; Malvern, Pennsylvania; 1991.
- 3. Snell, Ann Clarke; The Role of The Policy Manual; Paper presented at the Professional Development Institute's, "Suing and Defending Public Entities" seminar, sponsored by the State Bar of Texas; Austin, Texas; 1992.

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Chapter 2

Personnel Policies and Procedures

INTRODUCTION

Numerous external and internal factors contribute to the effectiveness of an organization's human resources program. The external elements include economic conditions, labor market influences, laws and regulations, and employee union activities. An agency may not have a large degree of control over external factors that influence its operations. However, it can develop an effective human resources program to manage and control those internal factors that influence human resources actions. These human resources programs are an important part of a comprehensive risk management program. An important liability loss control measure is the development of internal policies and procedures to manage human resources liability exposures.

There are a large number of federal laws and state statutes that affect state agency human resources programs. Federal laws that impact state agency human resources programs primarily consist of the 'civil rights' statutes. The impact of these statutes from a risk management perspective are discussed in Chapters 3 and 4 of this section of Risk Management For Texas State Agencies. Texas state agency statutes have been inventoried and summarized by the Texas Research League in their publication entitled Inventory of Texas

Basic Human Resource Management Statutes.¹ State agencies must comply with these statutes in development and implementation of their human resources programs, policies and procedures. Therefore, these statutes become an important element of risk management for Texas state agencies.

Human Resources Functions

A human resources program is primarily established to administer five basic human resources functions. These basic functions include Employment, Compensation and Classification, Benefits, Employee Relations and Training.² These five basic human resources functions are briefly described below with emphasis placed upon the importance of liability loss control in each function.

EMPLOYMENT

Human resources employment activities typically include applicant recruitment, screening, interviewing, testing, conducting reference checks and performance evaluations, internal promotion and demotion, termination, confidentiality and privacy issues regarding employee medical and personnel records, employee leasing, and

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compliance with state and federal equal employment laws and regulations, among others. The employee relations element of an agency's human resources management program is closely linked to the employment function.

From a loss control perspective, employment liability exposures may be controlled by implementing human resources management systems or programs that control the entire employment process. Common errors made during the employment process may result in future legal action. By exercising sound, informed judgment and by following established procedures approved by an agency's legal counsel, human resources liability exposures are reduced.³

Managers and supervisors should receive specific training on employment law issues. Standards and procedures for appropriate conduct in these areas should be established and implemented after thorough review by legal counsel. The establishment of a single point-of-contact for human resources liability issues will also assist in liability loss control measures for employment-related decisions.

COMPENSATION AND CLASSIFICATION

The human resource function involving classification, compensation, and salary administration for state employees is administered on a statewide level by the State Auditor's Classification Office. Payroll, longevity pay, and merit increases are administered by the Comptroller of Public Accounts. The compensation and classification systems are both administered according to the most current General Appropriations Act enacted by the Texas Legislature. Some Texas state agencies may not be covered by the classification plan, and should verify individual requirements with the State Auditor's Classification Office.⁴

The General Appropriations Act provides a detailed listing of classified positions, and specific guidance on salary provisions and other employment policies and provisions, such as methods of salary payments, overtime, withholdings, deductions, working hours and holidays, vacations and leaves, and dual employment with the state.

It also supplies information on the state's general travel provisions, transportation expenses, meals and lodging, and moving expenses. Further information on salary administration for a state agency may be obtained by referencing the General Appropriations Act, by contacting

the State Auditor's Classification Office and/or the State Comptroller's Office.^{4,5}

From a risk management perspective, state agency loss control efforts regarding compensation and classification should include the development and implementation of policies and procedures that adhere to federal and state statutory requirements for compensation and classification of employees. Statutory requirements include (but are not necessarily limited to) the State's General Appropriations Act, the federal Fair Labor Standards Act, and the federal Civil Rights Act, as amended. State agency policies and procedures should conform to the rules/requirements of the State Classification Office and State Comptroller's Office. Policies and procedures should also include non-discriminatory features that are aimed at eliminating discriminatory acts or practices in compensation and classification programs.

BENEFITS

Benefits for Texas state agency employees to which loss control efforts should be directed include:

- Observance of certain national, state and optional holidays -- modified by the 72nd Legislature, Regular Session, Section 31, in Senate Bill 1095, Article 4591.2.⁴
- Leave time including but not limited to, annual, sick, emergency, without pay, foster parent, military and parental. The State Auditor's Office, in an advisory capacity, may provide an interpretation of the General Appropriations Act provisions on employee leaves. However, the Attorney General has responsibility for interpreting legislative intent as it relates to the General Appropriations Act.¹ State agency loss control efforts with respect to leave benefits should concentrate on the development and implementation of programs, policies and procedures to provide fair, equitable and non-discriminatory application of the leave provisions of the Appropriations Act.
- In 1975 the Uniform Group Insurance Program was created by the Texas Employees Uniform Group Insurance Act during the 64th Legislature. The Act established a comprehensive insurance program whose primary goal is to "provide uniformity in life,

accident, and health benefits coverage on all employees of the State of Texas".¹ The provisions of the Act are administered by the Employees Retirement System (ERS) of Texas and any questions should be directed to this agency. Additional provisions relevant to state employees' benefits may be referenced in the most recent General Appropriations Act.

Regarding health benefits, loss control efforts should reflect the implementation requirements of the Uniform Group Insurance Program, as administered by the Employees Retirement System. Health benefits loss control can also include programs such as wellness programs (developed in accordance with the State Employees Health Fitness and Education Act), an Employee Assistance Program, and a Drug Free Workplace Program (in accordance with the Texas Workers' Compensation Act.)

- The Teacher Retirement System of Texas was established by amendment to the Texas Constitution in 1936 and enactment of statutes in 1937 to provide a retirement program for persons employed in public education. Benefits were later expanded to include disability, death and survivor benefits. In 1949, membership was expanded to include all employees of public education and in 1985, the administration of a health insurance program for public school retirees was added.¹²

EMPLOYEE RELATIONS

Among an organization's most important assets are its employees. The ways in which employees are managed and supervised contribute significantly to the level of liability exposures and losses. A state agency's liability exposures and losses may take the form of wrongful termination suits, high rates of employee turnover, defamation claims, retaliation claims, sexual harassment claims, and other claims of employment discrimination.

An essential component of every state agency's human resources management program is an employee relations program for all employees, supervisors and managers. Elements of an employee relations program may include workforce diversity training, grievance and complaint policies and procedures, employee and supervisory training, 'brown bag' seminars and employee newsletters.

TRAINING

Training and education is an effective loss control reduction and prevention measure in a human resources management program. The State Employees Training Act of 1969 provides that a state agency may use public funds to provide administrators and employees with training and education for current and prospective duty assignments. State agencies may expend public funds to pay tuition for classes and review courses for their employees if the training and instruction are related to the employee's duties and if eligibility is consistent with regulations. Among the purposes that may be served by these training and educational programs are preparation of employees to deal with new technological and legal developments, development of additional work capabilities, increasing the number of qualified faculty in institutions of higher education, and increasing the level of competence.¹

The Governor's Office provides guidelines on training in four areas: College Degree Programs; In-Service Training and Education; Out of Agency Staff Development; Internship Training. Regulations on employee eligibility are required from each agency and must be approved in writing by the Governor. Under the guidelines of the State Employees Training Act, the Governor's Office instituted the Texas State Management Training Development Center in 1981. Participant selection is done by the agencies.¹

TRAINING LIABILITY LOSS CONTROL

Training is an effective loss control tool to prevent and reduce the frequency and severity of claims of equal employment opportunity violations, civil rights violations and other kinds of legal claims. Training for employees and supervisors may prevent claims of sexual harassment, age discrimination, retaliation, defamation, wrongful discharge, failure to train, and other types of legal claims.

The following are loss control suggestions which should be incorporated into an agency's training program.

- Establish objective standards of performance for instructors.
- Establish realistic requirements for instructor qualifications.
- Establish measurable learning objectives and enforce them consistently.

- Train employees on job-specific safety issues.
- Comply with all statutory regulations regarding content and scope of training.
- Document the training each employee receives.
- Develop job-specific and measurable evaluation standards.
- Document each trainee's performance as it relates to the specific training objectives.
- Make reasonable accommodations for trainees who are persons with disabilities, and document the entire process.
- Carefully evaluate and validate testing criteria before administering tests, taking into consideration accommodations for language and/or cultural barriers.
- Develop checklists for generating the appropriate documentation.
- Conduct programs to educate trainers on appropriate documentation techniques.^{6,7}

HUMAN RESOURCES/PERSONNEL POLICIES AND PROCEDURES

The human resource management function typically sets forth policies and procedures that become the principal human resources loss control measures for the organization. Most procedures are developed and instituted to serve the requirements of the organization in achieving its stated purpose. The procedures usually follow commonly accepted principles and approaches and may be modified to address changes in organizational requirements.

Organizations develop personnel policies and procedures for a variety of reasons: communicate rights and responsibilities; achieve equitable and consistent personnel decisions; enhance employee morale; define the nature, benefits and obligations of the employment relationship; and promote the mission and image of the organization.⁸ Personnel handbooks and manuals must be viewed by employees as being fair, consistent and able to

accommodate unusual situations that arise. Policies and procedures, therefore, provide a valuable forum for employers to communicate with their employees.

Well-defined policies and procedures establish uniform personnel practices for the agency and help avoid potential complaints, claims and lawsuits.⁹ Many organizations provide employees with handbooks or a policies and procedures manual or both. Without them, decisions are often made on an *ad hoc* basis based on notions of fairness which may vary depending upon those making the decisions. This inevitably leads to confusion among employees and may expose the agency to legal liability.

It should be recognized that an employee handbook or manual is optional and not required. The traditional view that employee handbooks only serve as an organization's statement of general policy has been modified by recent court decisions. Handbooks and manuals are now viewed as much more than an informal contract.⁸ An agency should always consult legal counsel regarding the appropriateness of a handbook or manual and their contents.

A state agency should also consider including appropriate disclaimer language in the employment application and the policy manual as a means to preserve the at-will status of the agency. Employees should be apprised that an employee handbook or policy manual is not an employment contract. If the language is properly constructed, it will help avoid misunderstandings and may provide important legal protection. An example of a disclaimer follows:

I understand that this policy manual (employee handbook, employee policy guide, benefits handbook, etc.) is a general guide and that the provisions of this handbook do not constitute an employment agreement (contract) or a guarantee of continued employment. (Name of governmental entity) reserves the right to change the provisions of this policy manual/handbook at any time and may do so without advance notice to employees. The provisions contained in this policy manual are applicable to all employees. Any promises made to an employee which conflict with the provisions in this policy manual are effective only if in writing and signed by (authorized representative).¹¹

All such disclaimers should be approved by an agency's legal counsel division. A disclaimer that is signed by an employee may provide an additional measure of protection to the agency. Furthermore, supervisors and managers should be trained regarding the employment-at-will status and the importance of avoiding oral or written statements that could be construed by the courts as an employment contract.

A state agency's failure to enforce or consistently apply established policies and procedures could adversely impact a state agency's ability to defend the policy or procedure's existence if litigation were to occur. Internal tracking and monitoring mechanisms are useful in establishing compliance with agency policies and procedures. For example, an office operating on a flex-time schedule could use a sign-in/out log which is kept in the supervisor's office, to ensure that an employee has worked a full eight hour day.

ELEMENTS OF A POLICIES AND PROCEDURES MANUAL

If an agency chooses to have a policies and procedures manual or employee handbook, human resource subjects typically addressed might include the following. (Note: this list is not intended to an exhaustive, all-inclusive list.)

● STAFFING

- . Job Announcements
- . Hiring and Selection Procedures
- . Nepotism Policy
- . Minimum Age of Employees
- . Re-employment and Re-instatement Policy
- . Reference Checks
- . Driving Policy
- . Employment Processing
- . Classification Policy
- . Volunteer or Intern Policy

● SALARY/ BENEFITS

- . Salary Warrants
- . Health Insurance Benefits
- . Retirement Benefits
- . Deductions
 - . Withholding Tax; Retirement; Insurance; Bonds; Deferred Compensation/ TexSaver.
- . Salary Adjustments
 - . Regular Increases; Longevity Pay; Merit

Increases; Promotion; Demotion; Salary Decreases.

- . Garnishment
- . IRS; Child Support.

● ATTENDANCE AND LEAVE

- . Work Hours
- . Overtime (FLSA, Exempt and Non-exempt);
- . Holidays
- . Leave
 - . Annual/Vacation; Sick; Compensatory; Emergency; Extended Sick Leave; Sick Leave Pool; Military; Volunteer Fireman's; Seeing Eye Dog Training; Jury Duty; Witness (Court); Educational; Short/Extended Leave without Pay.

● GENERAL MANAGEMENT

- . Conferences
- . Workers' Compensation
- . Emergency Evacuation Procedures
- . Personnel Files (access and confidentiality)
- . Agency Rules; Work Rules; Ability to Perform Duties; Quality/Quantity of Work
- . Management Directed Transfers, Reassignments, Reorganizations
- . Facilities Use
- . Witness Fees

● EMPLOYEE RELATIONS

- . Performance Evaluations
- . Employee Recognition Program
- . Employee Assistance Program
- . Safety Policy
- . Smoking Policy
- . Temporary Reassignment or Removal From Workplace
- . Suspension with Pay for Investigative Purposes
- . Reprimands-Verbal; Written
- . Probation
- . Disciplinary Suspension
- . Salary Decrease/Demotions
- . Participation in Employee Organizations and Associations
- . Drug Free Workplace Policy

● ETHICS

- . Ethics Policy
- . Political Activities
- . Outside or Dual Employment with the State
- . Prohibited Activities
- . Conflict of Interest & Standards of Conduct

● **COMPLAINTS AND GRIEVANCES**

- Complaint Policy
- Grievance Policy

● **EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION**

- Equal Employment Opportunity Employer
- Prohibition Against Discrimination on Basis of Age, Sex, Race, Color, Religion, National Origin or Disability
- Disabled/ Reasonable Accommodation;
- Sexual Harassment
- EEO Complaint Procedures
- Affirmative Action
- Work Force Diversity

● **JOB SEPARATIONS**

- Resignations/ Transfers
- Retirement
- Reduction-in-Force (RIF)
- Death
- Dismissals

LIABILITY LOSS CONTROL SUGGESTIONS FOR WRITING HUMAN RESOURCES POLICIES AND PROCEDURES, AN EMPLOYEE HANDBOOK OR PERSONNEL MANUAL

When drafted carefully and used properly, personnel policies, procedures, employee handbooks and manuals serve as valuable liability loss control tools. By following certain guidelines, future liability exposures may be reduced. The following suggestions are offered as liability loss control measures to be used when writing human resources policies, procedures, employee handbooks or manuals.

- Review policies and procedures, handbooks and manuals at least annually with legal counsel. Policies and procedures should comply with current laws, rules, regulations and guidelines. Outdated and inappropriate provisions should be removed. The tone of the document need not and should not be legalistic.^{8,9}
- Evaluate all policy language judiciously. Language should be clear and unambiguous, without jargon. Common personnel terms that refer to the employee as 'permanent' or 'probationary' should be avoided because they imply a guarantee of employment.

Language should be avoided that states or implies that an employee may be terminated only for good cause. Specific causes for dismissal should include language explaining that the list is not all inclusive. Progressive discipline procedures, where employees are warned of problem areas, should be flexible enough to allow for unusual situations.

- Include restrictive clauses, such as positively worded disclaimers and acknowledgements, in prominent places throughout the handbook or manual.¹⁰
- Policies must be applied and enforced consistently and procedures developed in order reinforce that policies are followed correctly.⁸
- Every employee should be given a copy of the handbook or manual at a predetermined point of the employment process, such as new employee orientation, and a written acknowledgement of receipt should be obtained from the employee. Employees should receive all updates, additions or revisions to supplement personal copies of the employee handbook or policy manual.⁹
- Establish a mechanism for monitoring compliance with policies and procedures. If compliance is not occurring, evaluate the effectiveness of the policy or procedure and implement necessary changes.

The contents and information contained in this chapter are provided as suggestions only and are not meant to be definitive or absolute. There are no absolute guidelines as to what must be covered in a policy handbook, or employee manual. However, as many workplace questions should be answered as clearly as possible.⁹ The suggestions in this chapter should not be substituted for legal advice. It is always wise to have any final version of an agency's policy reviewed by an attorney.

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**ADDITIONAL RESOURCES AVAILABLE FOR
TEXAS STATE AGENCIES**

Publications

- **The Complete Hiring Manual of Policies, Procedures, and Practices;** written by Joseph D. Levesque, CMC/SPHR, published by Prentice Hall, Englewood Cliffs, NJ, 07632. 1991.
- **Employee Matters: A Legal Guide to Hiring, Firing and Setting Employee Policies,** written by E. Kenneth Snyder, published by Probus, Chicago, ILL., 1991.
- **Essentials of Risk Management, Volumes 1 and 2,** written by George Head, Insurance Institute of America, Malvern, PA. 1991.
- **Writing a Human Resources Manual;** written by Susan L. Brock and Sally Cabbell; Crisp Publications; 95 First Street, Los Altos, California, 94022; 1992.

**Agencies and Organizations
Providing Assistance**

- **Employees Retirement System**
18th and Brazos
Austin, TX 78711
(512) 476-6431
- **Texas Employment Commission**
101 E. 15th Street and 1117 Trinity
Austin, Texas 78701
phone: 512/ 463-2222
- **State Auditor's Office**
906 E. 9th Street, Suite 1900
Austin, TX 78701
(512)479-4700
- **State Comptroller of Public Accounts**
L.B.J. State Office Building
Austin, TX 78701
(512) 463-4000
- **Society of Human Resource Management**
606 N. Washington Street
Alexandria, VA 22314
(703)548-3440

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CHECKLIST FOR TEXAS STATE AGENCIES

1. Does the agency have written personnel/human resources policies and procedures? Yes No
2. Are policies and procedures readily accessible to all employees? Yes No
3. Do policies and procedures address the major personnel/human resource functions of employee staffing, classification and compensation, benefits, training and employee relations? Yes No
4. Does the agency distribute policies and procedures and/or a manual/handbook to each employee upon hire? Yes No
5. Are policies and procedures reviewed and revised on a regular basis? Yes No
6. Is legal counsel consulted during revisions? Yes No
7. Are updates of the manual/handbook provided to all employees? Yes No
8. Does the manual/handbook contain equal employment opportunity/nondiscrimination statements? Yes No
9. Do policies and procedures require an official executive signature? Yes No
10. Does a policy/procedure exist stating whether the agency is or is not an 'employment-at-will' agency? Yes No
11. If yes, is the employment-at-will status communicated to employees? Yes No
12. Are hiring supervisors and managers trained regarding the 'at will' employment doctrine? Yes No
13. Is a mechanism established for monitoring compliance with policies and procedures? Yes No

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ENDNOTES

1. Texas Research League; Inventory of Texas Basic Human Resource Management Statutes; Austin, TX; January, 1992.
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3. Greathouse, Christina. L.; "The Ten Most Common Hiring Mistakes"; Spirit; May 1992; p 18.
4. Senate Bill 1095, Section 31, Article 4591.2; 72nd Legislature, Regular Session.
5. General Appropriations Act; 72nd Legislature (1st Called Session) House Bill No. 1; 1992-93 Biennium.
6. Martinez, Michelle Neely; "Training Common Culprit of OSHA Violations"; HR News; Society For Human Resource Management; July, 1992. p A3.
7. Eyres, Patricia S., Attorney at Law; "Avoid Training Liabilities Through Legally Required HRD-Line Alliances"; Paper presented to ASTD National Conference, Long Beach, CA; June 3, 1992.
8. Johnson, Pamela R. and Susan Gardner; "Legal Pitfalls of Employee Handbooks"; Advanced Management Journal; Volume 54, Issue 2; Spring 1989. pp 42-46.
9. Nabers, Mary Scott; Employee Handbooks From A To Z; Texas Employment Commission; Austin, TX; 1992.
10. Article 6252.11-B, Section 4; Vernon's Texas Revised Civil Statutes.
11. Snell, Ann Clarke; "The Role of the Policy Manual"; Suing and Defending Governmental Entities Institute; Lawfirm of Bickerstaff, Heath & Smiley, L.L.P.; Austin, Texas; July, 1992.
12. Hineman, Bruce, Component Unit Financial Report For Fiscal Year Ended August 31, 1990: Teacher Retirement System of Texas; 1991.

Chapter 3

The Americans With Disabilities Act

INTRODUCTION

The Americans With Disabilities Act (ADA/Act) was signed into law as Public Law (PL) 101-336 on July 26, 1990. It is a comprehensive federal antidiscrimination law designed to remove barriers to employment and increase access to public accommodations and services for individuals with disabilities.

The ADA contains five titles that prohibit discrimination in employment, public accommodations, public services, telecommunications, and miscellaneous provisions. Specific civil rights protections and avenues of legal recourse, similar to those guaranteed to individuals under the Civil Rights Act, are provided to persons with disabilities.

While the Civil Rights Act prohibits employers from making employment decisions based on characteristics such as race or sex, the ADA requires employers to determine whether reasonable accommodations can be made for people with disabilities. The Act establishes a process by which the employer assesses the essential functions of the specific job. An individual with a disability must be able to perform the essential job functions with or without reasonable consideration, in

order to be considered a 'qualified individual with a disability.' This enables disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect from all employees.

The terms, 'handicapped' and 'disabled person', which are used frequently in the Rehabilitation Act of 1973, have been replaced by the phrase, 'individuals with disabilities.' The change in terminology is significant and indicates that although a person may have a particular disability, the disability itself does not define the limitations of that person's skill level or ability to perform the essential functions of a job.

Significant changes in the Civil Rights Act of 1991, in addition to ADA nondiscrimination provisions, expand the punitive and compensatory damages available for intentional discrimination. State agencies and all covered employers should consider whether a thorough legal assessment of their human resources management program is necessary.

The importance of state agency development, implementation and monitoring of risk reduction and loss prevention methods within the human resources program

This section of Risk Management for Texas State Agencies supplies general information regarding human resources liability management programs, and identifies specific resources available for managers and supervisors. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel. Legal counsel should always be consulted regarding rights and obligations under the law.

is emphasized by Section 502, Title V of the ADA. The section states that the doctrine of 'sovereign immunity' and the U.S. Constitution's Eleventh Amendment do not apply to states that have lawsuits brought against them in federal or state court for violations under the ADA.¹

PURPOSE OF THE AMERICANS WITH DISABILITIES ACT

The stated purpose of the Act is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent and enforceable standards that address discrimination against individuals with disabilities;
- (3) to ensure that the federal government plays a central role in enforcing the standards established in the Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.²

LEGISLATIVE BACKGROUND OF THE ACT

The ADA arose from Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. A large number of disability access statutes and Executive Orders preceded the ADA and generally address physical access to federally funded facilities. The most recent is the Civil Rights Act of 1991.

The following list highlights the most important federal statutes and executive orders that offer access rights or anti-discrimination provisions to persons with disabilities. These federal laws and executive orders may or may not have applications to specific state agencies in Texas. Each agency should consult legal counsel regarding specific applicability to the agency.

- **Urban Mass Transportation Act of 1964** -- Requires that mass transportation facilities meet

access needs of elderly and disabled people. Also known as the 'Federal Transit Act'.

- **Architectural Barriers Act of 1968** -- Requires that Federal government buildings be accessible to people with disabilities, and resulted in Uniform Accessibility Standards. Also known as the 'Federally Funded Building Construction Act'.
- **Rehabilitation Act (Sections 501 & 503) of 1973** -- Requires affirmative action programs with goals, targeted disabilities and advancement for people with disabilities working for federal agencies for federal government contractors.
- **Rehabilitation Act (Section 504) of 1973** -- Prohibits discrimination against "otherwise qualified individuals with handicaps" in any program or activity receiving federal financial assistance.
- **Federal Aid Highway Act of 1973** -- Requires that special effort be taken in the planning and design of mass transportation facilities and services to permit access by elderly and disabled persons.
- **Education for all Handicapped Children Act of 1975** -- Addresses the exclusion of children with disabilities from public schools and inappropriate educational programs for those who were attending school.
- **Developmental Disabilities Act of 1975** -- Makes federal grant money available to states complying with specific care and treatment program procedures for people with severe or long-term disabilities that occur prior to age 22.
- **Executive Order 11830** -- Established the Interagency Committee on Handicapped Employees.
- **Voting Accessibility Act of 1984** -- Makes all polling and voter registration places for federal elections accessible.
- **Air Carrier Access Act of 1986** -- Prohibits all air carriers from discriminating against people with disabilities.
- **Executive Order 12640** -- Established the President's Committee on Employment of People With Disabilities.

- **Technology-Related Assistance for Individuals With Disabilities Act of 1988** -- Creates a program of Federal grants to states to promote assistance to persons with disabilities.
- **Fair Housing Amendments Act of 1989** -- An amendment to the Fair Housing Act, to prohibit discrimination in sale or rental of private housing to people with disabilities.
- **Civil Rights Act of 1991** -- Amends previous Civil Rights Act amendments to authorize lawsuits for intentional discrimination.

OVERVIEW OF TITLE REQUIREMENTS AND CORRESPONDING IMPLEMENTING REGULATIONS

Each of the five Titles in the ADA addresses specific nondiscrimination issues affecting people with disabilities. This section summarizes the requirements for each title under the Act and the regulations adopted to implement it.

State agencies should consult the appropriate Federal regulations and interpretive guidelines for complete statutory compliance information when seeking to comply with specific provisions of the Act. "The Americans With Disabilities Handbook" provides interpretive guidance to the Act and regulations and is available through the U.S. Government Printing Office. Although the Handbook is a comprehensive resource document suitable for state agencies, legal counsel should always be consulted when interpretation of the Act is required.

GENERAL DEFINITIONS

The Equal Employment Opportunity Commission (EEOC) has defined a number of terms and phrases used throughout the ADA. A short practical explanation follows each definition.

What is a 'Disability'?

The ADA adopted a definition of 'disability' that is similar to the one used in the Rehabilitation Act of 1973. To qualify as an "individual with a disability", a person must meet one of the following criteria:

- Have a physical or mental impairment that substantially limits one or more major life activities,
- Have a record of such an impairment, or
- Be regarded by the employer as having an impairment.³

'Physical and Mental Impairment'

Under EEOC regulations, a 'physical or mental impairment' is considered to be 'any physiological condition or disorder, anatomical loss or cosmetic disfigurement that affects one or more of several body systems'. The following list provides several affected systems or disorders that qualify under this definition.

- neurological
- musculoskeletal
- special sense organs
- respiratory (including speech organs)
- cardiovascular
- digestive
- genitourinary, hemic, lymphatic, skin, and endocrine systems
- mental retardation
- organic brain syndrome
- emotional or mental illness
- specific learning disorders⁴

Examples of physical and/or mental conditions that apply using this definition are the following:

- multiple sclerosis
- back condition
- cerebral palsy
- tuberculosis
- heart disease
- HIV infection
- epilepsy
- cancer
- recovering alcoholic
- recovering drug user
- dyslexia
- loss of hearing or sight⁴

Specific 'exceptions' to coverage under the definition of disability are addressed in Title V of the ADA, and are discussed later in this chapter. A complete list may be found at 29 CFR Part 1630.2(h).

"Substantially Limits"

If an individual is significantly restricted in performing a major life activity, that individual is considered to be 'substantially limited'. Other factors to consider in determining if an individual is substantially limited are the following:

- nature and severity of the impairment;
- duration or expected duration of the impairment;
- permanent or long-term impact resulting from the impairment.⁵

EEOC regulations provide specific instructions about how to determine if a person's impairment substantially limits the major life activity of working. Factors to be considered when determining if a person is substantially limited in their ability to work are:

- the individual's reasonable access to a geographical area;
- the number and types of jobs that are similar to the one from which the individual is disqualified because of the impairment (or the class of jobs);
- the number and types of different jobs from which the individual is disqualified because of the impairment (or the broad range of jobs).⁵

EEOC Interpretive Guidelines provide an example of the baseball pitcher who is no longer able to pitch. The baseball player is not substantially limited in the major life activity of working because the player is not significantly restricted in the ability to perform an entire class of jobs, or a broad range of jobs in various classes.⁵

'Major Life Activities'

Major life activities are functions that an average person can perform, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁶ Other examples of major life activities contained in the EEOC's Interpretive Guidelines and at 29 CFR Part 1630.2(i), include sitting, standing, lifting and reaching.

'A Record of Such Impairment'

This part of the definition provides protection to persons with a history of having a physical or mental condition or disorder, or who have been misclassified as having such

disability. A person with an infectious or contagious disease that does not pose a direct threat to other employees is included under this definition. Also included are persons with severe burns or stigmatic conditions.⁷

'Is Regarded As Having a Disability'

If an individual is able to prove that an employer made an employment decision on the perception of a disability that was based on stereotype or fear, the individual will be covered under the definition of 'disability'.

As an example, if an individual who volunteers in a hospital for patients with acquired immune deficiency (AIDS) is able to show that an adverse employment decision was made based on the individual's association with this group, that individual will be protected under the 'regarded as having a disability' section of the disability definition. It will be the employer's responsibility to prove that the decision was made on non-discriminatory grounds.⁸

EMPLOYMENT PROVISIONS: TITLE I

Title I of the ADA addresses employment provisions for persons with disabilities. EEOC regulations entitled, "Regulations to Implement the EEO Provisions of the ADA", (29 CFR Part 1630), implement Title I of the ADA and became effective July 26, 1992. Enforcement authority for this title is shared by the U.S. Department of Justice and the EEOC.

Compliance with the employment provisions of Title I of the ADA applies to private employers, state and local governments, employment agencies, labor unions, and joint labor-management committees. The ADA calls these groups 'covered entities'.

Employment non-discrimination requirements for state and local governments went into effect January 26, 1992. private employers with 25 or more employees were required to comply with Title I by July 26, 1992, while smaller private employers with 15 or more employees have until July 26, 1994, to comply.

State agencies should submit an action plan for self-evaluation and correction of deficiencies under Part I, Title I of the Act, effective July 26, 1992. The action plan should be submitted to the Governor's Committee

For Persons With Disabilities, P.O. Box 12428, Austin, TX 78711, in accordance with S.B. provisions set out in the Human Resources Code, Title 7, Chapter 115, of Vernon's Texas Codes Annotated

Who Is Protected By Title I?

Title I protects 'qualified individuals with a disability' from employment discrimination. The title contains provisions relating to employment practices and sets up a process for the employer to use to evaluate a disabled individual's ability to perform the essential functions of a specific position. An individual must be able to complete the essential functions of the specific position, with or without reasonable accommodation, in order to be a 'qualified individual with a disability'.

Conduct Prohibited Under Title I

Employers are prohibited from engaging in the following types of conduct:

- Employers may not discriminate against 'a qualified individual with a disability in any term, condition or privilege of employment'. This includes classifying or limiting a disabled job applicant or employee in such a way as to adversely affect job opportunities or status for that individual.⁹
- Employers are not permitted to ask whether someone has a disability but may inquire about a person's ability to perform a job.⁹
- Employers may not use standards or tests that tend to screen out people with disabilities, unless the test is job-related, consistent with business necessity and is administered to all applicants or employees. (As with all employment-related testing, issues of validity and utility must be addressed.)⁹

Employers need to provide "reasonable accommodation," if needed, to individuals with disabilities, to include steps such as job restructuring and equipment modification.⁹

For additional information, a state agency may reference the Appendix of 29 CFR 1630, "Interpretive Guidance on Title I of the ADA". The EEOC has also published a statutorily required Technical Assistance Manual, which is available from the Government Printing Office.

Who is a 'Qualified Individual with a Disability'?

The ADA defines a 'qualified individual with a disability' as:

"An individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."¹⁰

The EEOC further defines the key terms used within the 'qualified individual with a disability' definition. This definition may be referenced at 29 CFR 1630.2(m).

'Essential Job Functions'

These are job-related duties that are fundamental to performing the job adequately. Determining whether a function is essential or marginal is a critical element used to assess an individual's ability to perform the job. The qualified individual must be able to perform essential job functions unaided, or with the assistance of reasonable accommodation.¹¹

Factors to consider when determining whether a job duty is an essential function, include but are not limited to the following.

- Whether the reason that position exists is to perform the function;
- Whether the position has a limited number of employees available among whom the performance of that job function can be distributed;
- Whether the position is highly specialized so that the employee performing the job duties is hired for his or her expertise and ability to perform that particular job function.¹¹

An employer must actually require an employee to perform those functions that have been determined to be essential. The list set out in 29 CFR 1630.2(n), provides examples of the types of evidence that may be used to determine whether a particular job function is essential. These include, but are not limited to, the following:

- The employer's judgment as to whether the job function is essential.
- The job descriptions, if any, written prior to advertising or interviewing job applicants.
- The amount of time spent on the job performing the function.
- The consequences of not requiring the incumbent/employee to perform the function.
- The terms of a collective bargaining agreement.
- The work experience of past incumbents in the job.
- The current work experience of incumbents in similar positions.¹¹

'Essential' Versus 'Marginal' Job Elements

A "qualified individual with a disability" must be able to perform all essential job elements. The ADA does permit an employer to reallocate job elements. Examples of essential and marginal job elements for different jobs are provided in the EEOC Interpretive Guidelines.

'Reasonable Accommodation'

In its Interpretive Guidelines, the EEOC has delineated three categories of reasonable accommodation. These are:

- accommodations that are required to ensure equal access and opportunity in the application process;
- accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired;
- accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment that are enjoyed by employees without disabilities.⁹

Within the context of reasonable accommodation, section 102(b)(5) of the ADA defines discrimination to include:

- (A) Not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability

who is an applicant or an employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant."¹²

The ADA provides a list of reasonable accommodations and specifically states that the list is not intended to be exhaustive.¹³ If the accommodation appears on the list, it does not mean that an employer is obligated to provide that accommodation, since the accommodation may impose an undue hardship upon the employer. However, anything that provides assistance to the disabled employee in performing essential job functions should be considered. An accommodation could be as simple as making an adjustment to a workstation by placing bricks under desk legs in order to provide enough clearance for a wheelchair. The following are examples of reasonable accommodations that may be made.

- Facilities which are physically accessible to the worker with a disability, including not only the employee's work station, but also other areas, such as a company cafeteria or employee lounge.
- Adaptive hardware that "specifically assists the worker in performing the duties of a particular job" as opposed to an adjustment or modification that 'assists the individual throughout his or her daily activities, on and off the job.'
- Qualified readers or interpreters are covered as an example of reasonable accommodations. The Act does not require an employer to provide an assistant to help with personal hygiene, such as feeding, toileting or assistance in dressing.
- Modification of examinations, training materials, or policies.
- Part-time or modified work schedules.
- Restructuring of non-essential or marginal job functions.

- Reassignment to a vacant position.
- Additional unpaid leave.
- Disabled employee access to employer-provided transportation already accessible to other employees.
- Parking for the disabled.
- Personal assistants to complete certain functions of the job.

Employers may also be required to provide accommodations that do not appear on the list. Further information on the kinds of accommodations that have already been used for people with disabilities is stored in the Job Accommodation Network (JAN), a computer data bank of proven accommodations that have been made for many kinds of disabilities. The service is free and provided by the President's Committee on Employment of People With Disabilities. Their only request is that agencies, in turn, provide them with information on accommodations that have been successful. The address and phone number of the Job Accommodation Network is provided at the end of this chapter.

Before making expensive alterations to facilities, a thorough audit should be conducted of exactly what disabled persons need for ease of access. The following are some examples of ideas and ways of meeting the requirements of the law that are economical and innovative.

- If water fountains are too tall for persons in wheelchairs, provide disposable drinking cup dispensers instead of installing shorter fountains.
- Communicate with persons who are hearing-impaired by writing notes rather than hiring a sign language interpreter, when appropriate.
- Install power-assisted doors only if existing doors cannot be adjusted to open with the proper pressure and right amount of clearance.
- Create more floor room for wheelchairs by moving existing furniture.
- Create designated parking places for persons with disabilities.

- Establish ground floor offices for programs that are frequently utilized by the public including persons with disabilities.
- Some compliance costs may be eliminated entirely by changing work-post locations, such as moving a blind worker much closer to an exit rather than modifying the path to the exit.¹⁴

The Act provides specific examples of what constitutes reasonable accommodation in Section 101(9). A list of the kinds of actions that fulfill the reasonable accommodation requirements may be referenced in the EEOC Interpretive Guidelines, 29 CFR 1630.9.

'Undue Hardship'

A reasonable accommodation must be made unless to do so would pose an 'undue hardship' on the employer. This concept was a part of the Federal Rehabilitation Act of 1973, as well as many state laws, and may already be familiar to many employers.

'Undue Hardship' means an action requiring significant difficulty or expense. It must be one that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the employment. It also must be considered on a case-by-case basis, which is generally made by comparing the nature and cost of the accommodation in relation to the employer's resources and operations.¹⁵

The ADA gives employers an affirmative duty to provide 'reasonable accommodation' for qualified individuals with a disability. This means that an employer's liability limitations for discrimination do not end with a determination of whether the act was based on prejudice, but continues if the employer fails to make reasonable accommodations.¹⁵

'Qualification Standards'

Qualification standards are personal and professional attributes that an individual must possess to be eligible to qualify for the position. These standards are established by the employer and include the skill, experience, education, physical, medical, safety and other requirements. They must be job related and consistent with business necessity.¹⁶

'Direct Threat'

Direct threat is a term used to describe a situation when there is a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. A state agency must be able to meet very specific and stringent requirements to establish that a direct threat exists.¹⁷

Factors to be considered include:

- duration of the risk;
- nature and severity of potential harm;
- likelihood that potential harm will occur;
- imminence of potential harm.¹⁷

Consideration of the above factors must rely on objective, factual evidence about the nature and effect of the disability. Reasonable accommodation must be considered to eliminate or reduce risk below the point where there is significant risk of substantial harm.¹⁷

Pre-Employment Checks

EEOC regulations specifically prohibit employers from conducting or requiring an applicant to take a medical exam, inquiring into whether an applicant has a disability, or inquiring as to the nature or severity of a disability.¹⁸ The regulations provide that pre-employment inquiries and tests can only be made 'into the ability of an applicant to perform job-related functions'.¹⁹

Under the ADA, pre-employment checks cannot be conducted until after the job has been offered to the applicant. EEOC regulations also provide that employers:

"may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment based on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry), regardless of disability."¹⁹

An employer is not prohibited from requiring an initial medical examination or check prior to that employee

assuming the job-related duties. The key is to assure that the results and interpretations of pre-employment checks, including medical exams, will be used to determine if an applicant can perform job-related functions when making decisions about hiring, continuing fitness-for-duty and returning to work. They are not to be used as screening tools.

The Attorney General of Texas issued an Opinion (DM-124, June 9, 1992) concerning whether the ADA precludes the Texas Workers' Compensation Commission from disclosing job applicants' prior work injuries to prospective employers, pursuant to the Texas Workers' Compensation Act, Article 8308-2.33, V.T.C.S. The Opinion concludes: "To the extent they conflict, the ADA preempts the Texas Workers' Compensation Act..."²⁰

In response to the Texas Attorney General's interpretation of the ADA, the Texas Workers' Compensation Commission (TWCC) developed a form, TWCC-156, to receive employers' inquiries about an applicant's workers' compensation claim history. The form requires employers to submit a notarized statement from the applicant allowing the release of previous claim information to the employer. It also requires the employer to certify that a job offer has been made and that the claim history of all applicants in the same job category is being checked.

Pre-employment medical exams may only be conducted if:

- a job offer has been made; and
- all employees in a job classification are subjected to the same exam.

Drug tests are not considered to be a medical exam and do not qualify as a pre-employment check.²¹ An employer can insist that employees comply with the Drug Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*) and the drug free workplace policy requirements of the Texas Workers' Compensation Act (Article 8308, §7.10), and may prohibit the illegal use of drugs and alcohol in the workplace by all employees.²²

The ADA requires a high degree of confidentiality regarding the release and recordkeeping of medical information. Information should be kept on separate forms and in separate files from general personnel information and may only be shared in specific instances.

Withdrawing a Job Offer

A withdrawal of an offer of employment, when based on the results of an employment check, (such as medical exams, background, reference, or workers' compensation claims checks), must be based on one of the following three reasons:

When a medical professional determines that the individual is:

- a threat to themselves or others; or,
- is unable to perform the essential functions of the job (with reasonable accommodation, if requested); or
- If an employer discovers the person knowingly provided a false answer to a legal post-offer inquiry about his/her own condition or workers' compensation history.^{11,17,23}

PUBLIC SERVICES: TITLE II

Title II of the ADA, 'Public Services', prohibits discrimination by state and local governments in providing public services and program access to individuals with disabilities. No qualified individual with a disability may be excluded from participation in or denied the benefits of an entity's services, programs, or activities because its facilities are inaccessible. It also requires that certain forms of public transportation be made accessible to individuals with disabilities. Title II is divided into two Subtitles, A and B: Subtitle B contains Parts, I and II.

Subtitle A of Title II addresses general nondiscrimination requirements for providing public services. It is coordinated and enforced, if necessary, by the Department of Justice. Regulations entitled, 'Nondiscrimination on the Basis of Disability in State and Local Government Services', referenced at 28 CFR Part 35, give compliance enforcement authority to a number of federal agencies. These agencies are to cover all programs, services and regulatory activities within their functional area. The U.S. Assistant Attorney General is available to coordinate any compliance activities for eight (8) federal agencies listed below for policy guidance and additional ADA interpretations.

- Department of Agriculture
- Department of Education
- Department of Health and Human Services

- Department of Housing and Urban Development
- Department of the Interior
- Department of Justice
- Department of Labor
- Department of Transportation²⁴

The Department of Justice regulation, 28 CFR Part 35, addresses public entities' requirements for compliance with the ADA. The State of Texas also has architectural accessibility requirements that must be met by state agencies. The 'Elimination of Architectural Barriers Program' for Texas state agencies is administered and enforced by the Department of Licensing and Regulation.²⁵ The Governor's Committee For Person's With Disabilities provides technical assistance regarding the Department of Justice's regulations and State regulatory requirements.

The following list of ADA compliance requirements apply to public entities.

- Perform a self-evaluation of current agency programs, services, policies and practices, providing interested persons an opportunity to participate in the self-evaluation process, and maintaining on file for at least 3 years: (1) a list of interested persons consulted, (2) a description of the areas examined and any problems identified, and (3) a description of any modifications made. The self-evaluation is due in the office of the Governor's Committee For Persons with Disabilities by January 26, 1993 (Part 35.105).
- Providing notice to applicants, participants, beneficiaries, and other interested persons information about the ADA's applicability to its programs and activities (Part 35.106).
- Designating a responsible employee to coordinate the agency's efforts to comply with and carry out the ADA's requirements and making information on how to contact this person available to any interested individuals (Part 35.107).
- Adopting and publishing a grievance procedure providing for prompt and equitable resolution of complaints alleging actions prohibited by the ADA (Part 35.107).
- Providing a transition plan by July 26, 1992, if an agency must alter its facilities to make programs accessible (Part 35.150(d)(1)&(3)).

- Ensuring communications are effective (Part 35.160).²⁴

The Governor's Committee For Persons with Disabilities provides assistance for state agency ADA compliance and may be contacted for additional information at (512) 483-4381. The Governor's Committee For Persons With Disabilities is not a regulatory or enforcement body for the ADA. They provide a publication entitled, ADA Self-Evaluation Guide For Public Entities, which specifically addresses required ADA action for state agencies. The ADA Self-Evaluation Guide For Public Entities publication and the Department of Justice rule, 28 CFR Part 35, should be consulted and guidance should be sought from a state agency's legal counsel.

If structural modifications are necessary to meet accessibility requirements, state agencies are required to develop a transition plan which must:

- identify physical obstacles that limit access to its programs and services.
- describe in detail methods to be used to make the facility accessible.
- detail a schedule for removing barriers and making the facility accessible.
- indicate the official person responsible for implementation of the transition plan.

The transition plan and the first ADA Monitoring Report were due in the Governor's Office by July 26, 1992.

Subtitle B of Title II addresses discriminatory actions by public entities who provide public transportation. Part I addresses public transportation other than by aircraft and rail. Part II addresses public transportation by intercity and commuter rail systems. Subtitle B and the two Parts of Title II are implemented through the Federal Department of Transportation.

State agencies should refer to the following federal regulations for interpretive guidance on accessibility requirements for Title II. These regulations also apply to covered private employers under Title III, a number of which went into effect prior to the ADA's effective date.

- ADA - Accessibility Guidelines for Transportation Vehicles, 36 CFR Part 1192; effective September 6, 1991.
- Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 49 CFR Part 27;

effective January 26, 1992.

- Transportation Services for Individuals with Disabilities (ADA), 49 CFR Part 37; effective October 7, 1991.
- ADA Accessibility Specifications for Transportation Vehicles, 49 CFR Part 38; effective October 7, 1991.

The U.S. Department of Health and Human Services (DHHS), Centers for Disease Control, published a list of infectious and communicable diseases that can be transmitted through food handling. That list was published by the Federal Register (FR) on August 16, 1991, as a requirement under Section 103(d) of the ADA, and may be referenced at 56 FR 40897, Aug. 16, 1991.

A summary of Title II's program access requirements for state and local governments is provided in highlighted form below. The information provided in the three following sections is taken from a Department of Justice' publication entitled, ADA Highlights/ Title II, State and Local Government Services.

Program Access

- State and local governments must ensure that individuals with disabilities are not excluded from services, programs, and activities because buildings are inaccessible. Physical barriers, such as stairs, need not be removed in all existing buildings, as long as programs are accessible. However an individual with a disability may not be carried as a method of providing program access, except in "manifestly exceptional" circumstances.
- Provide services, programs and activities through alternative methods, if physical barriers cannot be removed. Alternative methods include:
 - Relocating a service to an accessible site, e.g., move a public information office from the third floor to the first floor of a building.
 - Providing an aide or personal assistant to enable an individual with a disability to obtain the service.
 - Providing benefits or services at an individual's home, or at an alternative accessible site.

There is no requirement to take any action that would result in a fundamental alteration in the nature of the service, program, or activity or would cause undue financial and administrative burdens. State agencies are required, however, to take any available action that would not result in a fundamental alteration or undue burdens to ensure that individuals with disabilities receive the benefits or services.²⁶

Integrated Programs

- State agencies may not provide services or benefits to individuals with disabilities through programs that are separate or different, unless the separate programs are necessary to ensure that the services or benefits are equally effective.
- Even when separate programs are permitted, an individual with a disability has the right to choose to participate in the regular program.

For example, it would not be a violation to offer recreational programs specially designed for children with mobility impairments. It would be a violation to refuse to allow children with disabilities to participate in its other recreational programs.

- State agencies may not require an individual with a disability to accept a special accommodation or benefit if the individual chooses not to accept it.²⁵

New Construction and Alterations

- State agencies must ensure that newly constructed buildings and facilities are free of architectural and communication barriers that restrict access or use by individuals with disabilities. All new construction and modifications started after January 26, 1992 must be accessible.
- When alterations are made to existing structures, the alterations must be accessible.

The ADA does not require retrofitting of existing buildings to eliminate barriers, but does require new buildings to establish a high standard of accessibility.

State agencies can choose between two technical standards of accessible design: The Uniform Federal Accessibility Standard (UFAS), established under the Architectural Barriers Act, or the ADA Accessibility

Guidelines, adopted by the DOJ for places of public accommodation or commercial facilities covered by the ADA. The elevator exemption for small buildings under ADA Accessibility Guidelines does not apply to state agencies covered by Title II.²⁵

PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES: TITLE III

Title III, 'Public Accommodations', addresses prohibitions for private sector employers in providing and operating public accommodations and services for individuals with disabilities. It requires that commercial facilities and public accommodations ready for occupation after January 26, 1992 be accessible to individuals with disabilities.

Department of Transportation regulations listed in the previous section, Public Services: Title II, also apply to covered private employers under Title III.

Architectural and Transportation Barriers Compliance Board (ATBCB) regulations became effective July 26, 1991, and are entitled, 'ADA Accessibility Guidelines For Buildings and Facilities' (36 CFR Part 1191). An amendment to the final rule was published on September 6, 1991. The guidelines ensure that newly constructed or altered portions of buildings and facilities covered by Title III of the ADA are readily accessible to and usable by individuals with disabilities, in terms of architecture, design and communication.

The State of Texas also has architectural accessibility requirements that must be met by state agencies. The 'Elimination of Architectural Barriers Program' for Texas state agencies is administered and enforced by the Department of Licensing and Regulation.²⁶

Department of Justice regulations entitled, 'Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities', (28 CFR Part 36), became effective on January 26, 1992.

TELECOMMUNICATIONS: TITLE IV

Title IV addresses telecommunications provisions and requires that common carriers of interstate wire or radio communications provide technological accommodations for individuals with speech and hearing impairments.

Companies offering telephone service to the general public must offer telephone relay service to individuals who use telecommunication devices for the deaf (TDD) or similar devices.

Federal Communications Commission (FCC) regulations implement and enforce this title and are entitled, Telecommunications Services For Hearing and Speech Disabled, 47 CFR Parts 0 and 64, and will become effective July 26, 1993.

In 1989, the 71st Texas Legislature authorized the Public Utility Commission (PUC) and a thirteen (13) member Advisory Committee to begin work to establish a statewide relay service. 'Relay Texas' is a service that provides telephone network access to persons who are deaf, hard-of-hearing, or speech impaired. It also assists persons without a speech or hearing disorder who wish to contact users of telecommunications devices for the deaf. 'Relay Texas' operates 24 hours a day, seven (7) days a week.

State agencies are required to provide communications services to persons with disabilities that are at least as effective as those available to persons without disabilities. Information on Relay Texas can be obtained from SPRINT by calling 1 800 RELAY TX. There is no charge for the service if it is used within a local calling area and the cost of long distance calls are reduced.

MISCELLANEOUS PROVISIONS: TITLE V

Title V of the Act contains miscellaneous provisions that address the following issues:

- Attorneys' fees
- Insurance
- Illegal use of drugs
- Transvestites
- Dispute resolution as an alternative to legal action
- Prohibitions against retaliation and coercion
- Coverage of Congress and agencies of the legislative branch
- Amendments to sections of the Rehabilitation Act of 1973 to exclude current alcohol and drug abusers from coverage
- Forfeiture of sovereign immunity by states charge with violations of the act

Section 501(d) of Title V of the ADA prohibits an entity from forcing "an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that such individual chooses not to accept." This should be communicated during manager or supervisor training.

Retaliation and Coercion Prohibited Under the ADA

'Retaliation, interference, coercion or intimidation' of individuals who have 'opposed any act or practice made unlawful by this Act, or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this Act' are specifically prohibited in Title V.²⁷ State agencies may avoid exposure to this liability risk by ensuring that managers and supervisors are aware of this section of the ADA as it applies to 'qualified individuals with disabilities'. This information can be referenced at Section 503 of the ADA.

Exceptions to ADA Coverage

The ADA specifically states that certain individuals are excluded from the definition of disability and are not currently covered under the Act. Exceptions to coverage under the definition of 'disability' include:

- Current users of illegal drugs, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 USC 812).
- Individuals who have successfully completed, or are currently participating in, a supervised drug or alcohol rehabilitation program, and are not currently engaging in the illegal use of drugs or alcohol are covered under the disability definition (Part 1630.3). Before any employment related action is taken against an individual who is suspected to be using alcohol or drugs in the workplace, a state agency should consult legal counsel for advice on documenting the employee's misconduct.
- Certain behavior disorders are specifically excluded from the definition of 'physical' or 'mental impairment'. These include, but are not limited to, the following conditions: obesity, quick temper, prison record, kleptomania, lack of education, transvestism, transsexualism, pedophilia, exhibitionism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.

- Homosexuality and bisexuality.
- Temporary impairments or impairments that are not chronic, such as broken bones, sprains, concussions, appendicitis or influenza.²⁸

Recordkeeping and Reporting Requirements

EEOC rules and regulations for records and reports required under Title VII of the Civil Rights Act and the ADA can be referred to at 29 CFR 1602 & 1627, entitled, 'Recordkeeping and Reporting Under Title VII of the Civil Rights Act of 1964 and the ADA'. These reporting requirements for the ADA became effective on July 26, 1992.

Article 6252-16b, Vernon's Annotated Civil Statutes, requires state agencies to include statistical information relating to the number of individuals with disabilities employed by the agency in the agency's equal employment opportunity reports. Additional information on reporting requirements may be found in the "Inventory of Texas Basic Human Resource Management Statutes," published by the Texas Research League in January, 1992.

PRACTICAL LOSS CONTROL STEPS FOR ADA ADMINISTRATION

The following loss control outline presents an overview of the major steps that should be taken to comply with the ADA's provisions in the employment process. The list is not exhaustive but does provide loss control suggestions that may minimize an agency's liabilities under the ADA. The agency's legal counsel is the best source of legal advice on compliance with the employment provisions of the ADA.

The employment process includes the following:

The Job Description
The Application Process
The Job Interview
The Hiring Decision

- Establish an ADA Compliance Task Force
 - Comprised of persons with disabilities and persons interested in ADA compliance, including

outside counsel when needed

- Include education as a primary component
- Formulate a corporate internal policy towards compliance
- Obtain commitment from top management

- Review All Employment Practices

- Policies
- Applications and forms
- Interviewing
- Testing
- Medical confidentiality
- Job segregation
- Barriers to advancement
- Pay differentials
- Contractual situations
- Benefit plans
- Workers' Compensation procedures
- Workplace accessibility

- Review and Revise Forms and Records

Review Applications and Remove Questions Regarding:

- Disabling conditions
- Workers' Compensation claims
- Family and friends
- Consult legal counsel when complete

Review all Employment-Related Records:

- Separate medical records from personnel files
- All internal and external forms

- Develop Job Descriptions

Identify Essential Functions of Each Job Prior to the Interview:

- Required for critical decisions
- Needed for medical evaluation
- Needed for reasonable accommodation
- Needed for definition of qualified individual
- To provide a defense against future challenges of discrimination

Involve all Knowledgeable Parties:

- For broad-based agreement
- To avoid exaggeration or loading of non-essential duties
- To defend against challenges
- Consult legal counsel when complete

- **Train Interviewers**
 - In Legal Inquiries, such as:
 - Essential Function based questions
 - Applicant initiated reference to disability and reasonable accommodation

- In Disability Etiquette and Attitude Awareness:
 - To enhance comfort levels
 - To ensure appropriate language and behavior

- **Medical Examinations**

- Perform only Post-Offer Examinations:
 - Test all post-offer candidates for similar positions
 - Stay within the limited scope of medical testing

- Develop Procedures for Negative Medical Tests
 - A no-hire decision should not be based on medical tests alone
 - Complete a reasonable accommodation evaluation
 - Be aware that the applicant may challenge the decision

- **Medical Confidentiality**

- Develop Procedures
 - Maintain separate records
 - Establish authority and responsibility
 - Train supervisors and coworkers in confidentiality standards
 - Establish need-to-know standards for disclosure of medical records
 - Consult legal counsel

- Drug Testing Programs
 - The ADA does not encourage or prohibit drug testing. However, to avoid unnecessary liability, any testing should be conducted according to specifications outlined in the Federal Drug Free Workplace Act of 1988, if applicable, and the Texas Workers' Compensation Act, Article 8308, V.T.C.S., Section 7.10.
 - Consult legal counsel before initiating any drug testing programs.

- **Review Contractual Situations**
 - Temporary agencies
 - Leases
 - Training/ apprenticeship
 - Collective bargaining agreements
 - Off-site event contracts

- **Centralize Applicant Screening**

- Establish One Source for Final Human Resources Review, because:
 - ADA has many decision points
 - Decisions must be uniform throughout
 - Decision makers must be advised and trained

- **Return-To-Work Issues**

- Added responsibilities
- Interdepartmental communication
- Reasonable accommodation

- **Public Accommodations**

- Develop 'Readily Achievable' plan as soon as possible
- Develop auxiliary aids and services plan as soon as possible
- Review all upcoming modifications to existing facilities
- Review all plans for new facilities

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**ADDITIONAL RESOURCES AVAILABLE TO
TEXAS STATE AGENCIES**

The following publications and agency resources will provide Texas state agencies with valuable information for ADA compliance and administration.

Publications

The ADA Handbook, represents a combined effort by the EEOC and DOJ to provide information and assistance on the ADA to the public and is intended to be used as a basic resource document. EEOC and DOJ have also published ADA technical assistance manuals. These are available through the U.S. Government Printing Office.

The ADA Self-Evaluation Guide, developed by the Governor's Committee on Persons with Disabilities.

"The Americans With Disabilities Act: Answers To Commonly Asked ADA Questions," available from the Society of Human Resource Managers.

Supplement No. 92 - The Americans With Disabilities Act, Government Risk Management Manual, Risk Management Publishing Company, 2030 East Broadway, Suite 106, Tucson, Arizona, 85719. February, 1992.

Technical Assistance Manual of the Employment Provisions (Title I) of the Americans With Disabilities Act, available from the Equal Employment Opportunity Commission Publications Office, which also provides other ADA publications.

Inventory of Texas Basic Human Resource Management Statutes, is published by the Texas Research League and summarizes the basic human resource management laws.

Regulations to Implement the EEO Provisions of the ADA, 29 CFR 1630.

ADA Technical Assistance Manual (Title I), Equal Employment Opportunity Commission, January 28, 1992.

Nondiscrimination on the Basis of Disability in State and Local Government Services, Department of Justice, 28 CFR Part 35, July 26, 1991.

**Agencies and Organizations
Providing Assistance**

Governor's Committee on Persons With Disabilities
Sam Houston State Office Building
P.O. Box 12428
Austin, TX 78711
(512) 483-4381

**Southwest Disability and
Business Technical Assistance Center**
2323 S. Shepherd Blvd., Suite 1000
Houston, TX 77019
(713) 520-0232 (Voice)
(713) 520-5136 (TDD)

Texas Commission on Human Rights
P.O. Box 13493, Capitol Station
8100 Cameron Rd., #525
Austin, TX 78711
(512) 837-8534

Texas Commission For the Blind
4800 North Lamar Blvd.
Austin, TX 78711
(512) 459-2600

Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, TX 78751-2399
(512) 483-4761

Texas Department of Licensing and Regulation
E.O. Thompson State Office Building
P.O. Box 12157
Austin, TX 78711
(512)463-5522

Texas Department of Commerce
Work Force Development Division
P.O. Box 12728
Capitol Station
Austin, TX 78711-2728
(512) 320-9801

Texas Employment Commission
15th & Congress Avenue
Austin, TX 78778
(512) 463-2652

**The President's Committee on Employment of People
With Disabilities**

1331 F Street, N.W.
Washington, D.C. 20004-1107
(202) 376-6200 (Voice)
(202) 376-6205 (TDD)
(800) 232-9675

Equal Employment Opportunity Commission

1801 L Street, N.W.
Washington, D.C.
(202) 663-4900 (Voice)
(202) 663-4494 (TDD)
1 (800) 669-EEOC/ 1 (800) 800-3302
1 (800) USA-EEOC for taped message
The EEOC provides free copies of the EEOC regulations and
Interpretive Guidelines for Title I.

- **Dallas District Office**
8303 Elmbrook Dr.
Dallas, TX 75247
(214) 767-7015
- **El Paso Area EEOC Office**
4171 N. Mesa, Bldg.C, Suite 100
El Paso, TX 79902
(915) 534-6550
- **Houston District EEO Office**
1919 Smith St. - 7th Floor
Houston, TX 77002
(713) 653-3374
- **San Antonio District Office**
5410 Fredricksburg Rd., Suite 200
San Antonio, TX 78229
(512) 229-4810

U.S. Department of Justice

Office on the Americans With Disabilities Act
Civil Rights Division
Washington, D.C. 20530
(202) 514-0301 (Voice)
(202) 514-0381 or 0383 (TDD)
(202) 514-6193 for electronic bulletin board numbers on
specific ADA provisions.

U.S. Department of Transportation

400 7th Street, S.W.
Washington, D.C. 20590
(202) 366-9305 (Voice)
(202) 755-7687 (TDD)

**Architectural and Transportation
Barriers Compliance Board**

1111 18th Street, N.W., Suite 501
Washington, D.C. 20036
800-USA-ABLE (Voice/TDD)

Federal Communications Commission

1919 M Street, N.W.
Washington, D.C. 20554
(202) 632-7260 (Voice)
(202) 632-6999 (TDD)

Society For Human Resource Management

606 N. Washington Street
Alexandria, VA 22314
(703) 548-3440

ADA Communication Accommodation Project

Department of Justice funded project to answer questions
on auxiliary aids and services for deaf, hard-of-hearing or
vision impaired individuals.

- American Foundation For the Blind
(202) 223-0101
- National Center For Law and the Deaf
(202) 651-5343

Job Accommodation Network

West Virginia University
809 Allen Hall
P.O. Box 6122
Morgantown, WV 26506-6122
1-800-526-7234

**Copies of the ADA and Congressional Committee
Reports may be obtained for free by writing:**

House Document Room
Room B18 -- Annex 2
Washington, DC 20515

**To obtain the text of the ADA in alternate formats
(braille/large print/cassette/flexible record) contact:**

- **American Printing House For the Blind**
P.O. Box 6085
Louisville, KY 40206

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CHECKLIST FOR TEXAS STATE
AGENCIES

1. Has the agency prepared a self-evaluation action plan, as required by the Department of Justice regulation, 28 CFR Part 35.105?
 Yes No
2. Has the agency self-evaluation plan been submitted to the Governor's Committee For Persons With Disabilities?
 Yes No
3. Are all agency programs accessible to persons with disabilities?
 Yes No
4. Are all agency facilities accessible to persons with disabilities?
 Yes No
5. If structural modifications are necessary to meet accessibility requirements, has the agency prepared a transition plan in accordance with the Department of Justice regulations 28 CFR, Part 35.150?
 Yes No
6. Has the agency transition plan been submitted to the Governor's Committee for Persons with Disabilities?
 Yes No
7. Does the agency comply with the requirement of the Department of Justice regulation, 28 CFR Part 35.106, to provide public notice regarding applicability of the agency's services, programs and activities to the ADA?
 Yes No
8. Has the agency reviewed all of its hiring forms, especially application forms to ensure that questions pertaining to an individual's disability or medical conditions are eliminated?
 Yes No
9. Has the agency reviewed all of its position descriptions to identify the essential job functions?
 Yes No
10. Has the agency designated a responsible employee and adopted a grievance procedure, as required by 28 CFR Part 35.107?
 Yes No

11. Has the agency provided access to effective communications for persons with hearing and/or speech-related disabilities?
 Yes No
12. Does the agency provide ADA compliance training to supervisory and managerial personnel?
 Yes No
13. Does the agency maintain separate records for employees' medical and personnel files?
 Yes No
14. Has the agency had all of its forms and ADA-related documents reviewed by legal counsel?
 Yes No

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## ENDNOTES

1. "Americans With Disabilities Act", Public Law 101-336, Section 502, July 26, 1990.
2. "Americans With Disabilities Act", Public Law 101-336, Section 2(b), July 26, 1990.
3. "Regulations to Implement the EEO Provisions of the ADA," 29 CFR 1630.2(g).
4. *Ibid*, 29 CFR Part 1630.2(h).
5. *Ibid*, 29 CFR Part 1630.2(j).
6. *Ibid*, 29 CFR Part 1630.2(i).
7. *Ibid*, 29 CFR 1630.3(k).
8. *Ibid*, 29 CFR 1630.2(l).
9. "Interpretive Guidance on Title I of the ADA," Appendix, 29 CFR 1630.
10. *Ibid*, 29 CFR 1630.2(m).
11. *Ibid*, 29 CFR 1630.2(n).
12. "The Americans With Disabilities Act", PL 101-336, Section 102(b)(5).
13. *Ibid*, 29 CFR 1630.9.
14. "Disabilities Act (ADA) Compliance 'Doable and Worth the Cost' Finds Some Small Businesses;" Risk Line; Risk Management Publishing Company; Tucson, Arizona; August 1992.
15. *Ibid*, 29 CFR 1630.2(p)(2).
16. *Ibid*, 29 CFR 1630.2(q).
17. *Ibid*, 29 CFR 1630.2(r).
18. *Ibid*, 29 CFR 1630.13(a).
19. *Ibid*, 29 CFR 1630.14(a).
20. Attorney General Opinion, DM-124, issued June 9, 1992.
21. *Ibid*, 29 CFR 1630.16(c).
22. *Ibid*, 29 CFR 1630.16(b).
23. EEOC Technical Assistance Manual (Title I), Chapter IX, Section 9.8, January 28, 1992.
  
24. "Nondiscrimination on the Basis of Disability in State and Local Government Services," Department of Justice, 28 CFR Part 35, July 26, 1991.
25. "ADA Highlights/ Title II, State and Local Government Services," Department of Justice.
26. "The Elimination of Architectural Barriers Act." Article 9102, Texas Revised Civil Statues.
27. "The Americans With Disabilities Act", PL 101-336, Section 503.
28. *Ibid*, 29 CFR 1630.3.

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Chapter 4

Discrimination

INTRODUCTION

Discrimination in employment decisions, whether intentional or unintentional, occurs when a person's race, color, sex, age, national origin, disability, or one's constitutionally protected beliefs and traditions, such as religion, factor into an employment decision. Title VII of the Civil Rights Act of 1964, as amended, prohibited many types of employment discrimination. The Americans With Disabilities Act of 1990 require public and private employers to make employment decisions without regard to an individual's disability. The Civil Rights Act of 1991 increased monetary awards available for lost wages and punitive damages for individuals who have been discriminated against in employment. The 1991 Act also permits employees of state and local governments to be taken to court for employment discrimination.

EQUAL EMPLOYMENT OPPORTUNITY

The Equal Employment Opportunity Act of 1972 created the U.S. Equal Employment Opportunity Commission (EEOC) and empowered the Commission to file civil suits

against organizations when acceptable resolutions to discrimination charges could not be reached within 30 days. The Act also expanded Title VII coverage to state and local governments, educational institutions, and labor organizations.¹

In 1972, the federal government began to exercise its influence in other ways. Companies who contracted with the federal government were required to go beyond the nondiscrimination prohibitions of Title VII by taking "affirmative action" to show results-oriented non-discrimination activities and not just passive compliance with Title VII.²

The mission of the Commission is to ensure equality of opportunity by enforcing federal laws prohibiting employment discrimination through investigation, conciliation, litigation, coordination, education and technical assistance. The Commission investigates discrimination charges and conciliates charges of employment discrimination if they are found to exist. If conciliation efforts fail, the EEOC considers litigation against respondents, or may recommend that the Department of Justice file suit.

This section of Risk Management for Texas State Agencies supplies general information regarding human resources liability management programs, and identifies specific resources available for managers and supervisors. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel. Legal counsel should always be consulted regarding rights and obligations under the law.

The EEOC and Department of Justice administer and enforce the following anti-discrimination laws:

- Civil Rights Act of 1866
- Civil Rights Act of 1871
- Title VII of the Civil Rights Act of 1964, as amended
- Age Discrimination in Employment Act of 1967 (ADEA)
- Equal Pay Act of 1963 (EPA)
- Section 501 of the Rehabilitation Act of 1973
- Pregnancy Discrimination Act of 1978
- Immigration Reform and Control Act of 1986
- The Americans With Disabilities Act of 1990 (ADA)
- Civil Rights Act of 1991

The text of many of these laws is available in the pamphlet entitled, Laws Enforced By the EEOC, and can be obtained by writing to the Office of Communications and Legislative Affairs, EEOC, Washington, D.C. 20507.

THE CIVIL RIGHTS ACTS

- Civil Rights Act of 1866: Provided all citizens the right to enter into contractual employment relationships and participate in legal proceedings.
- Civil Rights Act of 1871: Provided a remedy when discrimination takes the form of deprivation of constitutionally protected rights.
- Civil Rights Act of 1964: Title VII prohibited discrimination in all areas of the employer/employee relationship, from recruitment of new employees through termination and retirement, on the basis of race, color, religion, sex, or national origin.
- Civil Rights Act Amendment of 1967: Enacted the Age Discrimination in Employment Act, an amendment to the Civil Rights Act of 1964, made it unlawful to discriminate against employees or job applicants because of age when they are 40 or older.
- Civil Rights Act Amendment of 1972: Expanded coverage to include federal, state and local government employees and educational institutions with more than 15 employees.
- Civil Rights Act of 1991: Increased punitive damages and compensatory lost wages available to victims of intentional discrimination and permits suits against private sector employees.⁴

Information on the Civil Rights Acts can be found in a training manual by the Texas Commission on Human Rights entitled, Compliance With Equal Employment Opportunity Law for Supervisors and Managers.

THE TEXAS COMMISSION ON HUMAN RIGHTS

The EEOC works closely with fair employment practice agencies, also known as 'FEPA's' and '706' agencies because they come under section 706(c) of Title VII. 706 agency qualifications are addressed in Subpart H - '706 Agency Designation Procedures', 29 CFR Ch. XIV, section 1601-70. The Texas Commission on Human Rights (TCHR) is the fair employment practices agency for the State of Texas and was created by the Texas Commission on Human Rights Act of 1983. The Act is an important human resources statute governing employment discrimination in the State of Texas. The Act can be found in Article 5221K of Vernon's Annotated Civil Statutes (V.A.C.S.)

The general purposes of the Act are to implement the policies contained in Title VII of the federal Civil Rights Act, as amended, and to secure freedom from employment discrimination for persons employed in the state. The Act also establishes, in section 5.01, a six-member Governor appointed commission vested with the responsibility "to receive, investigate, seek to conciliate, and pass on complaints alleging violations of the Act, and file civil actions."⁵ The Texas Commission on Human Rights Act implements the anti-discrimination requirements in Title VII and applies to private employers, Texas state agencies and political subdivisions of the state. Section 5.05 of the Act prohibits employers from retaliating against an individual for exercising rights guaranteed under the statute.

TCHR employment laws are compatible with Title VII and EEO laws and are regulated by the Texas Commission on Human Rights. The Texas Attorney General may represent the Texas Commission on Human Rights in litigation under Article 5221K, V.A.C.S.⁶ This relationship is explained in Attorney General Opinion, JM-791-1987.

TITLE VII OF THE CIVIL RIGHTS ACT

Title VII of the Civil Rights Act is the most comprehensive of the anti-discrimination in employment laws. Title VII makes the following employment

practices unlawful:

- (1) to fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or,
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
- (3) to discriminate against any of its employees or applicants for employment ... because the employee has opposed any practice made an unlawful employment practice by this subchapter, or because the employee has made a charge, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this subchapter."⁷

The full text of the Act can be referenced at 42 USCA §2000e *et. seq.*

TYPES OF DISCRIMINATION

I. DISCRIMINATION ON THE BASIS OF RACE AND COLOR

Discrimination on the basis of race and color is prohibited by Title VII of the Civil Rights Act of 1964, as amended, and is also enforced by the Texas Commission on Human Rights. An employer may not deny employment opportunities in the following areas to any person based on race and color, in addition to religion, sex or national origin:

- Hiring and firing;
- Compensation, assignment or classification of employees;
- Transfer, promotion, layoff or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;

- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans and disability leave; or,
- Other terms and conditions of employment.

II. AGE DISCRIMINATION

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination against persons 40 years of age or older in hiring, discharge, promotions, compensation, terms, conditions, or privileges of employment. It applies to private, state and local government employers.

The ADEA provides a limited exemption that applies to appointed executive officials. Specific compliance requirements may be obtained from the Texas Commission on Human Rights.¹⁷ The complete text of the ADEA can be found at 29 U.S.C., § 621, *et. seq.*

III. DISCRIMINATION ON THE BASIS OF RELIGION

The Civil Rights Act of 1964, as amended, and Texas law provide that employers must reasonably accommodate applicants and employees relative to their religious needs, unless such accommodation would prove to be an undue hardship to the employer.¹⁸ These provisions may be referenced in section 2.10 of the Commission on Human Rights Act, Article 5221K, V.A.C.S. The EEOC has published "Guidelines on Discrimination Because of Religion" that can be found at 29 CFR, Ch. XIV, Part 1605.

IV. DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN

The Immigration Reform and Control Act of 1986 requires public and private employers to prove all employees hired after November 6, 1986 are legally authorized to work in the United States. An employer may not single out an individual of a particular national origin, or individuals who may appear to be foreign, to provide employment verification, since this would be a violation of both the Immigration Act and Title VII. Citizenship requirements, preferences, or a rule requiring

employees to be fluent in English or speak only English at work may be unlawful if they disadvantage individuals of a particular national origin and are not justified by business necessity.

Further information about employment rights and responsibilities under the Immigration Reform and Control Act, may be obtained by contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

V. DISCRIMINATION ON THE BASIS OF DISABILITY

Section 501 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped individuals in federal employment and promotes the hiring, placement and advancement of people with handicaps. Employment provisions in Section 501 of the Rehabilitation Act that initially applied to the federal sector, were extended to state and local employers through The Americans With Disabilities Act of 1990 (ADA).

The Americans With Disabilities Act of 1990 protects individuals with disabilities from employment discrimination. An employer is prohibited from discriminating in employment against an individual with a disability who can perform the essential functions of a job with or without reasonable accommodation. The ADA became effective for public employers after January 26, 1992.

Provisions of the Texas Commission on Human Rights Act, Article 5221K, V.A.C.S., mirror requirements in the ADA to accommodate "qualified individuals with disabilities" in the workplace. State agency requirements under the ADA are discussed in considerable detail in Chapter 3, Section 2 of this volume of Risk Management for Texas State Agencies.

VI. DISCRIMINATION ON THE BASIS OF SEX

EQUAL PAY

The Equal Pay Act (EPA) of 1963 prohibits wage discrimination in cases where a member of one sex is paid less than a member of the opposite sex for performing

substantially equal work under similar conditions in the same establishment. The Act applies to state and local employers and most private employers. Allegations of sex-based wage discrimination may be violations of both Title VII and the Equal Pay Act.

This Act can be referenced at 29 U.S.C. §206, *et seq.* Specific compliance requirements with the EPA may be obtained from the Texas Commission on Human Rights and found in the Texas Commission on Human Rights Act.

PREGNANCY DISCRIMINATION

The Pregnancy Discrimination Act of 1978 is an amendment to Title VII, and prohibits employment discrimination on the basis of pregnancy, childbirth or other related medical conditions. Employers must provide female employees who are pregnant with the same benefits that male employees receive when disabled by illness or injury.

The Pregnancy Discrimination Act can be referenced at 42 U.S.C. §2000e(K). Specific compliance requirements may be obtained from the Texas Commission on Human Right and found in the Texas Commission on Human Rights Act.

SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination that violates Section 703, Title VII of the Civil Rights Act of 1964, as amended. The EEOC defines sexual harassment as:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."¹⁹

EEOC Guidelines define an employer's responsibility as follows:

"An employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."¹⁹

Employer responsibility extends to conduct between fellow workers and individuals involved may be current or previous co-workers, non-employees, or any person who has witnessed the offensive conduct. The EEOC considers the nature of the conduct and the context in which it occurs as key factors in determining whether a valid case of sexual harassment actually exists.²⁰

The EEOC has published "Sex-Based Discrimination Guidelines," which can be referenced at 29 CFR Part 1604.11(a).

GENERAL GUIDELINES REGARDING DISCRIMINATION

Bona Fide Occupational Qualifications

An employer is permitted to hire on the basis of sex, religion and national origin if the characteristics are bonafide occupational qualifications (BFOQ) reasonably necessary for the normal operations of the employer's business. There is no BFOQ exception for race and employers' BFOQ claims are strictly scrutinized by the EEOC.⁸

Disparate Treatment and Disparate Impact

Disparate treatment can take many forms. An applicant or employee who is treated adversely in employment decisions because of the person's race, color, religion, national origin, sex or age has experienced a type of discrimination known as 'disparate treatment.' Another example of disparate treatment is sexual harassment, when sexual advances are made a condition of employment, and the employer does not take appropriate action to stop the harassment. The employer is responsible even when a policy prohibiting sexual advances is established.³

It is difficult to present evidence about an employer's motive in cases involving disparate treatment, primarily because it is difficult to prove an employer's motive. In order to present a *prima facie* case of discrimination, or initial showing of Title VII discrimination, the person must belong to a protected group and have been a qualified applicant who was rejected despite having the right qualifications. Statistical comparisons are typically used to show that the violation occurred more than once.³

Disparate impact cases of discrimination involve situations where an employment practice or policy has a disproportionately adverse impact on a protected group. Job qualifications and employment rules that appear to be nondiscriminatory may actually have a disparate impact on selected groups with the effect of perpetuating past discrimination. For example, a job rule prohibiting inter-departmental transfers may be discriminatory if the lower-paid, lower-opportunity jobs are held predominantly by women or blacks. Seniority systems are frequently challenged because of their perpetuation of past discrimination.³

Penalties for Discrimination

Title VII of the Civil Rights Act of 1991 provides damages for employees who have experienced intentional employment discrimination. Such damages include:

- Payment of wages lost as a result of retaliatory or discriminatory action;
- Reinstatement of the employee in his or her previous job;
- Reestablishment of employee benefits (including tenure or seniority, pension rights and profit-sharing bonuses);
- Reasonable attorney fees;
- Punitive damages awarded to the employee, as well as compensatory lost wages.⁹

Section 102 of the 1991 Civil Rights Act permits jury trials to award punitive and compensatory damages to the complaining party who has a valid claim of unlawful intentional discrimination, which may include sexual harassment. Punitive damages may be awarded only when the plaintiff can prove that the employer acted with malice or reckless indifference to federally protected rights. Because of the potential for increased monetary awards to plaintiffs, Texas state agencies should take appropriate action to protect the agency from claims to reduce future liabilities.

Enforcement

Title VII provides for both administrative and judicial enforcement. Individuals who claim to be the victim of a discriminatory employment practice must file with either the EEOC or the Texas Commission on Human Rights (TCHR) within 180 days of the alleged unlawful practice. In Texas, the local fair employment practices agency (FEPA) is the Commission on Human Rights. Local FEPA's have 60 days to try to remedy the alleged discriminatory practice in the complaint.¹⁰

Filing the complaint with a FEPA within 180 days automatically enters the complaint as a charge with the EEOC. If the charge is not filed within 180 days of the alleged practice, litigation cannot be brought in the state's court system. However, if the charge is filed after 180 days, but within 300 days, it may still qualify under EEOC to enter into litigation in the federal court system.¹⁰

Title VII prohibits retaliation against a person who files a charge of discrimination, participates in an investigation or opposes an unlawful employment practice. For example, it would be unlawful to discriminate against an individual for filing written or oral complaints for alleged discrimination or for protest activities.¹¹

A state agency may avoid potential charges of retaliation by establishing procedures to demonstrate that disciplinary decisions had no connection with the filing of a charge of discrimination. Personnel actions involving the discipline of an individual who filed a charge should be reviewed by more than one level of supervision, including the agency's legal counsel. By demonstrating openness, sensitivity and responsiveness to the potential for retaliation claims, the agency may be able to reduce liability exposures. Suggestions for establishing a loss control program are provided later in this chapter.

AFFIRMATIVE ACTION

Affirmative Action typically involves increased recruitment or placement for members of protected groups. Often it means preference for minorities, women and people with disabilities. The kind of corrective action an employer takes depends on the particular circumstances of the employment situation.¹² Affirmative Action generally is optional for Texas state agencies. Unless a state agency has entered into a consent decree, or unless the agency is a federal contractor, an affirmative action plan is optional and not required.

According to the EEOC Guidelines, there are three reasons that an employer may have an affirmative action plan.

- Federal Contract -- The specific components of affirmative action plans for federal contractors are specified by the Department of Labor in the Office of Federal Contract Compliance Programs regulation, 41 CFR Part 60-3.
- Consent Decree -- A federal court can require an affirmative action plan if a discrimination suit brought against the organization through the EEOC has found evidence of past discrimination, either through disparate treatment or through policies that had the affect of discriminating against a particular group of persons. A consent decree is an organization's statement of specific affirmative action steps it will take to address discrimination.
- Voluntary -- An organization may voluntarily decide to establish hiring and promotion goals for women, minorities, and individuals with disabilities. The exact content of the affirmative action plan depends upon the organization, the area in which it is located, and the extent to which certain minority groups are under-represented.

There also may be reasons for an organization not to establish a voluntary affirmative action plan. Although the EEOC has stated that a voluntary affirmative action plan is not an admission of discriminatory employment practices within its work force, the affirmative action plan may serve as a signal to individuals who might be inclined to pursue a discrimination lawsuit. A voluntary affirmative action plan does not forgive past discriminatory actions and may adversely affect a different group of persons to remedy past discrimination.¹³

According to the Texas Commission on Human Rights, the typical affirmative action plan uses racial classifications in a disparate manner to correct for some past imbalance.¹³ This may create a potential liability by providing an admission of discrimination while concurrently setting up another disparate system to compensate for the initial system's bias. The EEO Coordinating Council provides additional affirmative action guidance in its document, Uniform Guidelines on Employee Selection Procedures, 29 CFR Part 1604.

WORK FORCE DIVERSITY PLAN

The Texas Commission on Human Rights recently published a document entitled, "Work Force Diversity: An Equal Protection Approach to Affirmative Action". A work force diversity plan is not a traditional affirmative action plan. The distinguishing factor between the two is that an affirmative action plan typically takes a remedial approach while work force diversity plans "provide similar treatment to all classes under similar circumstances and are strictly predicated upon principles of equality" that are lacking (by design) in the standard affirmative action plan.¹³

According to the Texas Commission on Human Rights, public employers are required to evaluate race-based classifications to determine if they are necessary to serve a compelling governmental interest or purpose. For equal protection purposes, the court has not provided any test to determine when an interest is compelling.¹⁴

The clearest case of compelling governmental interest is remedying the effects of past unlawful discrimination. The view of the Commission on Human Rights is "that the promotion of a diverse work force for public employers will be deemed a 'compelling governmental interest' for purposes of equal protection analysis."¹⁴ Further, "a legitimate goal for public employers is to create a diverse work force that brings to the public work place diverse viewpoints and perspectives, as well as diverse solution-sets to a wide range of intractable public policy issues and problems."¹⁴

MINORITY HIRING REQUIREMENTS FOR TEXAS STATE AGENCIES

Texas state agencies funded by the 1991-1992 Appropriations Act are required to file a report with the Texas Commission on Human Rights indicating the number of minorities hired and the total number of hirings. The minority hiring report must be submitted within 60 days of the end of the fiscal year. The Legislature set statewide percentage goals for the hiring practices of new employees. A minimum of 30 percent of each agency's employees should be comprised of minorities. For each job category on a statewide basis, the Legislature has set the following hiring percentage goals for Texas state agencies:¹⁵

Officials/Administration	14%
Professionals	18%
Technicians	23%
Protective Services	48%
Para-professionals	25%
Administrative Support	25%
Skilled Craft	29%
Service/Maintenance	52%

Each agency may consider the availability of qualified minorities in specific local hiring areas for each job category to determine agency hiring goals in those local areas. In addition, Article V of the Appropriations Act specifies that the job status of persons currently employed would not be affected by minority hiring goals. Thus, an agency should not terminate or discharge employees to achieve its percentage goals.¹⁵

The Texas Legislature has also specified that none of the funds appropriated in the Act may be expended by agencies that practice discrimination and establishes the Texas Attorney General as the agency responsible for enforcement of this section.¹⁶

This information may be referenced further in the Appropriations Act, H.B. 1, 72nd Legislature, 1st Called Session, Article V, Sections 54 and 105.7.

ESTABLISHING AN EFFECTIVE WORKPLACE LOSS CONTROL PROGRAM

An effective work place loss control program for human resources-related liability exposures includes education, training, and policies and procedures. Education and training for all levels of staff increases employee awareness and provides a measure of protection against future liabilities. Development and implementation of policies and procedures provide the framework for immediate and appropriate action to be taken when an employee complaint is received.

State agencies may use the following suggestions as general guidelines to limit the incidence of discrimination claims.²¹ This list is not all inclusive and results for agencies will vary. Therefore, no guarantees can be offered as to the outcome. Legal counsel should be consulted before implementing a workplace risk control program.

- Establish written policies that define and express the employer's strong disapproval for discriminatory activities. A policy should include statements of absolute confidentiality and non-retaliation, and should contain a description of the sanctions for violating the policy.
- Provide managerial and supervisory training which focuses on practical examples of how to address problematic workplace situations.
- Establish a complaint or grievance procedure which provides employees with a process that avoids personal confrontation with the person who is the subject of the complaint.
- Assign a trained representative to investigate and determine the validity of employee complaints. Training should be provided to the investigator on the proper method of questioning both parties involved in the incident.
- Establish internal guidelines on how to conduct an investigation and develop mechanisms to assure confidentiality. Employers who do not maintain confidentiality may be subjected to charges of invasion of privacy and/or defamation claims.
- Establish an EEO committee composed of women and men of diverse backgrounds to advise management regarding internal EEO procedures.
- Establish reporting mechanisms to determine the frequency and severity of incidences (reported and unreported). Reporting mechanisms could take the form of anonymous surveys of unreported workplace experiences, attitude surveys, and exit interviews.
- Focus on equal evaluation of employees and applicants. Employment-related forms and procedures, such as employment applications and performance reviews, should be screened for removal of discriminatory items.
- Employment-related communications that address employee performance should be framed in terms that are not discriminatory or personally offensive.
- Managers and supervisors should follow personnel procedures closely and document all employment-related processes covered under Title VII of the Civil Rights Act. Documentation should be performed in accordance with the advice and guidance of the

agency's human resources department and legal counsel.

- Personnel involved in hiring and supervision of state employees should receive procedural training on interviewing, documenting and evaluating employee performance, disciplinary action, and preventing sexual harassment, among others.^{20,21}

Chapter 2, Section 2 of Risk Management for Texas State Agencies is entitled "Personnel Policies and Procedures". The chapter addresses liability issues specific to recruitment, hiring and firing, benefits, leave provisions, classification, compensation, disciplinary procedures, training and employee relations.

General Guidelines For Investigating Discrimination Complaints

As part of prevention efforts, a Texas state agency should anticipate the possibility of future claims. The manner in which a complaint is handled will have a significant affect on the severity of future claims costs and liability losses. The investigation must focus strictly on the facts which gave rise to the complaint.

The following suggested investigation guidelines may reduce the severity of claims which arise from the complaint. These guidelines offer procedural protocol and, therefore, do not provide any guaranteed outcome. Legal counsel should always be consulted when investigating discrimination complaints.

- Act immediately upon receipt of a complaint or upon gaining knowledge that a problem exists.
- Consider all complaints. Treat each incident as if it were valid, until the facts prove otherwise.
- Treat each complaint separately. A determination on the allegation is made from the facts on a case-by-case basis. During an investigation, the entire record is inspected, including the nature and the context in which the alleged incidents occurred.
- Conduct a thorough investigation within a reasonably short time period of being advised of a situation or incident, and review everything relevant to that situation.
- The investigator should be objective and impartial.

- Confine the investigation to the relevant facts.
- Maintain confidentiality and privacy. Keep the investigation and the facts it uncovers under strict 'need to know' rules. Impress upon every participant the need to keep discussions strictly confidential, backing up the instructions with discipline, if necessary.
- Unnecessary information should not be disclosed to witnesses, particularly to those involved peripherally. Phrase questions in order to minimize disclosure of information and maximize responses. The facts or results of a given situation should not be revealed to others or be used as a training example.
- Take notes during each session with the parties. The notes should contain only the facts and should not contain value judgments or conclusionary statements.
- If possible, prepare a detailed factual chronology, set against a chronology of what occurred in the workplace at relevant times. The chronology may reveal certain events that triggered the complaint or possible motives on the part of the complainant.
- Orally brief management regarding the results of the investigation. A formal report that contains conclusions is not recommended; it is preferable to have only factual information documented.
- Take appropriate and immediate remedial action, as necessary.
- In the event that a discrimination charge or complaint against an agency is filed, the agency's human resources division is usually contacted by EEOC to provide additional information regarding the alleged discrimination issue. The individual charged with the alleged discriminatory act should only discuss the matter with the agency's designated EEOC officer, the designated internal legal counsel, and the attorney designated by the Office of the Texas Attorney General to represent the agency.

To request additional information on compliance with EEOC laws, contact the Texas Commission on Human Rights and reference the Texas Commission on Human Rights Act.

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## ADDITIONAL RESOURCES AVAILABLE TO TEXAS STATE AGENCIES

### PUBLICATIONS

Employee Handbooks From A To Z; Texas Employment Commission; Austin, Texas; 1992.

Equal Employment Opportunity Manual For Managers and Supervisors (2nd Ed.); Commerce Clearing House and the Society For Human Resource Management; Chicago, Illinois; 1991.

Guidebook to Fair Employment Practices; Commerce Clearinghouse; Chicago, Illinois; 1992.

Guidelines on Discrimination Because of Religion; EEOC; 29 CFR, Ch. XIV, Part 1605.

Guidelines on Sex-Based Discrimination; Equal Employment Opportunity Commission; 29 CFR Part 1604.11.

Hale, William M., Roland Castaneda, Esq. and Brooks W. Conover, III; Work Force Diversity: An Equal Protection Approach to Affirmative Action; Texas Commission on Human Rights; Austin, Texas; 1992.

Inventory of Texas Basic State Human Resource Management Statutes; Texas Research League; Austin, Texas; January, 1992.

Jackson, Gordon; Labor and Employment Law Desk Book and (1991 Cumulative Supplement); Prentice Hall; Englewood Cliffs; New Jersey; 1991.

Laws Enforced By the EEOC; can be obtained by writing to the Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission, Washington, D.C. 20507.

Compliance With Equal Employment Opportunity Law for Supervisors and Managers. Training Manual published by the Texas Commission on Human Rights.

Uniform Guidelines on Employee Selection Procedures; Equal Employment Opportunity Commission; 29 CFR Part 1604.

**AGENCIES AND ORGANIZATIONS  
PROVIDING ASSISTANCE**

Equal Employment Opportunity Commission  
San Antonio District Office  
5410 Fredericksburg Road  
San Antonio, Texas 78229  
(512) 229-4810  
1-800-RELAY-TX (TDD Access)

Immigration and Naturalization Service  
Office of Special Counsel for Immigration-Related Unfair  
Employment Practices  
P.O. Box 65490, Washington, D.C., 20035-5490  
1-800-255-7688

Texas Commission on Human Rights  
8100 Cameron Road, Bldg. B., Suite 5125  
Austin, Texas 78753  
(512) 837-8534

Texas Employment Commission  
101 East 15th Street AND  
1117 Trinity  
Austin, Texas 78701  
(512) 463-2222

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**CHECKLIST FOR TEXAS STATE  
AGENCIES**

1. Does the agency have an EEO Affirmative Action Coordinator?  Yes  No
2. Does the agency have a grievance administrator?  Yes  No
3. Do procedures exist regarding staffing?  Yes  No
4. Do procedures exist regarding performance appraisals?  Yes  No
5. Do procedures exist regarding complaints?  Yes  No
6. Do procedures exist regarding grievances?  Yes  No
7. Do procedures exist regarding disciplinary processes?  Yes  No
8. Do procedures exist regarding equal employment opportunities?  Yes  No
9. Do procedures exist regarding Affirmative Action?  Yes  No
10. Do procedures exist regarding the workforce diversity plan?  Yes  No
11. Do procedures exist regarding promotions?  Yes  No
12. Do procedures exist regarding transfers?  Yes  No
13. Do procedures exist regarding terminations?  Yes  No
14. Do procedures exist regarding reduction in force?  Yes  No
15. Are policies and procedures reviewed and revised on a regular basis?  Yes  No
16. Is legal counsel consulted during revisions?  Yes  No
17. Is a nondiscrimination statement contained in each human resources procedure?  Yes  No
18. As part of the grievance process is a form of 'alternative dispute resolution' utilized?  Yes  No
19. Does the agency have a Workforce Diversity plan, as recommended by the Texas Commission on Human Rights?  Yes  No
20. Do agency human resources policies and procedures comply with EEOC guidelines regarding nondiscrimination in race, color, age, religion, national origin, sex and disability?  Yes  No



21. Do administrative and agency human resources policies and procedures generally emphasize nondiscrimination in all employment practices?  Yes  No
22. Has legal counsel recently reviewed the employment application form?  Yes  No
23. Do managers and hiring supervisors receive EEO training (to include nondiscrimination in all employment practices on the basis of race, color, religion, national origin, sex, age and disability)?  Yes  No
24. Does the agency provide employee awareness training on workforce diversity?  Yes  No
25. Are all complaints of discrimination and human rights violations investigated in a timely manner?  Yes  No
26. Are job openings advertised in minority and business women's organizations?  Yes  No
27. Are EEO notices posted in appropriate locations?  Yes  No
28. Are supervisors and managers trained on procedures for conducting employee performance evaluations?  Yes  No
29. Is legal counsel consulted prior to terminating an employee?  Yes  No

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**ENDNOTES**

1. Robbins, Stephen P.; *Personnel: The Management of Human Resources*; Prentice-Hall, Inc.; Englewood Cliffs, NJ; 1978; p. 31.
2. Robbins; p. 32.
3. Topical Law Reports: Human Resources Management - Equal Employment Opportunity; Commerce Clearinghouse; Chicago, ILL; 1992.
4. Compliance With EEO Law For Supervisors and Managers; Texas Commission on Human Rights; Austin, Texas. 1991.

5. *Texas Commission on Human Rights Act; Article 56221K, Vernon's Annotated Civil Statutes.*
6. *Texas Attorney General Opinion; JM 791-1987.*
7. *Article 5221K, section 5.05.*
8. *42 U.S.C.A. 2000e-2(e)(1).*
9. Risk and Insurance; Article written by Donald Decarlo entitled, "Worker's Compensation Update: Workplace Discrimination." April, 1991.
10. Topical Law Reports: Human Resources Management/ Equal Employment Opportunity;
11. *Commerce Clearinghouse House, Inc.; Chicago, IL. 1992. p. 7313.*
11. *42 U.S.C.A. 2000e-3(a).*
12. Topical Law Reports: Human Resources Management; p. 3210.
13. *Hale, William M., Roland Castaneda, Esq. and Brooks W. Conover, III; "Work Force Diversity: An Equal Protection Approach to Affirmative Action"; Texas Commission on Human Rights; Austin, Texas; 1992.*
14. *Hale. p.11.*
15. *The Appropriations Act, H.B.1; 72nd Legislature, 1st Call Session, Article V, Section 105.7.*
16. *The Appropriations Act, H.B.1; 72nd Legislature, 1st Call Session, Article V, Section 54.*
17. *"Age Discrimination in Employment Act"; 29 U.S.C., section 631(c)(1).*
18. *Article 5221K, section 2.10.*
19. *"Sex-Based Discrimination Guidelines"; EEOC; 29 CFR 1604.11.*
20. *Mangan, Joseph F., C.P.C.U., Editor; "Finding Coverage for Sexual Harassment"; Best's Underwriting Newsletter; Volume 20, Number 12, December, 1991.*
21. *Segal, Johnathon; "Seven Ways to Reduce Harassment Claims;" Human Resources Magazine; January, 1992.*

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**CHAPTER 5**

**FAMILY AND MEDICAL LEAVE ACT**

**Introduction**

The Family and Medical Leave Act<sup>1</sup> (FMLA) became effective on August 5, 1993. The U.S. Secretary of Labor has issued regulations to implement the FMLA.<sup>2</sup> This chapter of Risk Management for Texas State Agencies summarizes those regulations, explaining the basic provisions of the new law and the rights and responsibilities of affected employers and employees. The information contained in this chapter is extracted from a U.S. Department of Labor publication entitled, Compliance Guide to the Family and Medical Leave Act<sup>3</sup>.

**Summary of the FMLA**

The Family and Medical Leave Act was enacted on February 5, 1993. The new law is effective on August 5, 1993, for most employers.

The Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration administers and enforces the FMLA for all private, state and local government employees, and some federal employees.

The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. An eligible

employee's right to FMLA leave begins on August 5, 1993. Any leave taken before that date does not count as FMLA leave. However, events qualifying under the Act for FMLA leave purposes (e.g., the birth of a child) occurring before August 5, 1993, still entitle eligible employees to the benefits of FMLA on and after August 5, 1993.

The new law contains provisions relating to employer coverage (including all state agencies); employer eligibility for the benefits of the law; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protections for employees who request or take FMLA leave. In addition, the law includes certain employer recordkeeping requirements.

**Purposes of the FMLA**

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain reasons. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and which minimizes the potential for

This chapter of Risk Management for Texas State Agencies supplies general information regarding state agency human resources exposures, and techniques and methods to manage and control those exposures. It also identifies additional resources that may be available to assist state agencies in developing or enhancing its human resources program. This chapter is not intended in any way to be a substitute for the advice and guidance of legal counsel, who should always be consulted regarding rights, duties, and responsibilities under the law.

employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

The enactment of the FMLA was predicated on two fundamental concerns - the needs of the U.S. workforce and the development of high-performance organizations. Increasingly, American children and growing numbers of the elderly are dependent on working family members who spend long hours on the job. When family emergencies arise, requiring employees to attend to their seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not need to choose between their job security and meeting their personal and family obligations or tending to vital needs at home.

### Employer Coverage

The FMLA applies to all

- Public agencies (including state, local, and federal employers) and local education agencies (schools); and,
- Private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers.

### Employee Eligibility for FMLA Benefits

To be eligible for FMLA benefits, an employee must

- Work for a covered employer;
- Have worked for the employer for at least a total of 12 months;
- Have worked at least 1,250 hours over the prior 12 months; and,
- Work at a location where at least 50 employees are employed by the employer within 75 miles.

### Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- For the birth or placement of a child for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or,
- To take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent "in-law") who has a serious health condition.

Leave for birth or adoption (including foster care placement) must conclude within 12 months of the birth or placement.

### Intermittent Leave

Under some circumstances, employees may take FMLA leave intermittently - which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

Where FMLA leave is for birth or placement of a child for adoption or foster care, use of intermittent leave is subject to the employer's approval.

FMLA leave may be taken intermittently whenever it is medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work. If the need for intermittent leave is foreseeable based on planned medical treatment, the employee is responsible for scheduling the treatment in a manner that does not unduly disrupt the employer's operations, subject to the approval of the health care provider.

In such cases, the employer may also transfer the employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave than the employee's regular job.

### Substitution of Paid Leave

Subject to certain conditions, employees or employers may choose to use or require the use of accrued paid leave (such as sick or vacation leave) to cover some or all of the otherwise unpaid FMLA leave.

The employer is responsible for designating if paid leave used by an employee counts as FMLA leave, based on information provided by the employee. In no case can an employee's paid leave be credited as FMLA leave after the leave has been completed.

#### Serious Health Condition

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves the following:

- Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;
- Any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or,
- Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.

#### Health Care Provider

Health care providers who qualify under the regulations to provide certification of a serious health condition for an employee or an immediate family member include the following:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or,
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of their practice under state law; or,
- Nurse practitioners and nurse-midwives authorized to practice under state law and performing within the scope of their practice as defined under state law; or,

- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

#### Maintenance of Health Benefits

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken, and on the same terms as if the employee had continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums while on leave. For example, if the group health plan involves co-payments by the employer and the employee, an employee on FMLA leave must continue making insurance premium payments to maintain insurance coverage, as must the employer. The employee and employer need to work out the method for the employee to pay his or her share of health insurance premiums while on unpaid FMLA leave.

An employer's obligation to maintain health benefits under FMLA will stop if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is used up.

In some instances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

#### Other Benefits

Certain types of earned benefits, such as seniority, need not continue to accrue during periods of unpaid FMLA leave. For other benefits, such as elected life insurance coverage, the employer and the employee need to make arrangements so that the benefits may be maintained during periods of unpaid FMLA leave. Except for accrued or earned benefits (such as seniority), the employee must be restored to the same benefits upon return from FMLA leave as if the employee had continued to work the entire FMLA leave period. Use of FMLA leave cannot result in the loss of any benefit that accrued before the employee's leave began. Accordingly, an FMLA leave period cannot be counted as a break in service for purposes of vesting or eligibility to participate in benefit programs.

## Job Restoration

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

## "Key" Employee Exception

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, the employer may refuse to reinstate certain highly-paid "key" employees after using FMLA leave during which health benefits are maintained. In order to do so, the employer must

- Notify the employee of his or her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- Notify the employee as soon as the employer decides it will deny job restoration and explain the reasons for this decision;
- Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and,
- Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

## Notice and Certification

Employees seeking to use FMLA leave may be required to provide the following:

- Thirty-day advance notice of the need to take FMLA leave when the need is foreseeable;
- Medical certifications supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;

- Second or third medical opinions and periodic recertification, at the employer's expense;
- Periodic reports during FMLA leave on the employee's status and intent to return to work; and,
- A "fitness-for-duty" certification to return to work.

When leave is needed to care for an immediate family member or the employee's own illness and is for planned medical treatment, the employee must attempt to schedule treatment so that it will not unduly disrupt the employer's operation.

## Employer Notices

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

~ ~ ~ ~ ~

## **ADDITIONAL RESOURCES FOR TEXAS STATE AGENCIES**

### Publications

"Developing Family-Friendly Benefit Policies: Compliance and Beyond"; Employee Relations Bulletin, Special Report No. 1796; November 21, 1993; Bureau of Business Practice.

Texas Employment Law Letter; FMLA Special Edition; P.O. Box 198867, Nashville, TN 37219-8827.

~ ~ ~ ~ ~

### Agencies and Organizations Providing Assistance

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division  
300 East 8th  
Austin, TX 78701  
(512) 482-5638

~ ~ ~ ~ ~

**ENDNOTES**

1. "Family and Medical Leave Act," Title 29, Code of Federal Regulations, Part 825.
2. The Family and Medical Leave Act of 1993; Federal Register; Vol. 58, No. 106; June 4, 1993; pp. 31794-31839.
3. Compliance Guide to the Family and Medical Leave Act; WH Publication 1421; U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division; June 1993.

~~~~~

**CHECKLIST FOR
TEXAS STATE AGENCIES**

1. Does the agency have a policy and procedures that address the FMLA? Yes No
2. Are notices posted in conspicuous places where employees are employed that explain the Act's provisions and provide information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division, U.S. Department of Labor? Yes No

~~~~~





# Your Rights Under The Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

## Reasons for Taking Leave:

Unpaid leave must be granted for any of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

## Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

## Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."

- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

## Unlawful Acts By Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- 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.

## Enforcement:

- The U. S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

## For Additional Information:

Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.



**Employer Response to Employee  
Request for Family or Medical Leave**  
*(Optional use form - see CFR 825.301(c))*

**U. S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division**

**Family and Medical Leave Act of 1993)**

(Date)

TO: \_\_\_\_\_  
*(Employee's name)*

FROM: \_\_\_\_\_  
*(Name of appropriate employer representative)*

SUBJECT: Request for Family/Medical Leave

On \_\_\_\_\_, you notified us of your need to take family/medical leave due to:  
*(date)*

- the birth of a child, or the placement of a child for adoption or foster care; or
- a serious health condition that you need care for; or
- a serious health condition affecting your  spouse,  child,  parent, for which you need to provide care.

You notified us that you need this leave beginning on \_\_\_\_\_ and that you expect leave to continue until  
or about \_\_\_\_\_. *(date)*  
*(date)*

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: *(check appropriate boxes; explain where indicated)*

1. You are  eligible  not eligible for leave under the FMLA.
2. The requested leave  will  will not be counted against your annual FMLA leave entitlement.
3. You  will  will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by \_\_\_\_\_ *(insert date)* (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We  will  will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (*Explain*)
- 5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (*Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.*)
- (b) You have a 30-day grace period in which to make payment. If payment has not been made timely, your group health insurance may be cancelled, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.
- (c) We  will  will not pay your share of the premiums for your health insurance while you are on leave.
- (d) We  will  will not do the same with other benefits (e.g. life insurance, disability insurance, etc.) while you are on FMLA leave. If we do, when you return from leave you will be expected to reimburse us for the payments made on your behalf.
6. You  will  will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until such certification is provided.
- 7(a). You  are  are not a "key employee" as described in 825.218 of the FMLA regulations. If you are a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.
- (b). We  have  have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous harm to us. (*Explain (a) and/or (b) below.*)
8. You  will  will not be required to furnish us with periodic reports of your status and intent to return to work every 30 days while on FMLA leave.
9. You  will  will not be required to furnish recertification every 30 days relating to a serious health condition. (*Explain below, if necessary.*)

**Certification of Physician  
or Practitioner**  
(Family and Medical Leave Act of 1993)

**U.S. Department of Labor**  
Employment Standards Administration  
Wage and Hour Division

1. Employee's Name

2. Patient's Name (If other than employee)

3. Diagnosis

4. Date condition commenced

5. Probable duration of condition

6. Regimen of treatment to be prescribed (Indicate number of visits, general nature and duration of treatment, including referral to other provider of health services. Include schedule of visits or treatment, if it is medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal schedule of hours per day or days per week.)

a. By Physician or Practitioner

b. By another provider of health services, if referred by Physician or Practitioner

**If this certification relates to care for the employee's seriously-ill family member, skip items 7, 8 and 9 and proceed to items 13 thru 20 on reverse side. Otherwise, continue below.**

Check **Yes** or **No** in the boxes below, as appropriate

7. Is inpatient hospitalization of the employee required?  Yes  No

8. Is employee able to perform work of any kind? (If "**No**," skip item 9)  Yes  No

9. Is employee able to perform the functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee)  Yes  No

10. Signature of Physician or Practitioner

11. Date

12. Type of Practice (Field Specialization, if any)

For certification relating to care for the employee's seriously-ill family member, complete items 13 thru 17 below as they apply to the family member and proceed to item 20.

13. Is inpatient hospitalization of the family member (patient) required?  Yes  No
14. Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?  Yes  No
15. After review of the employee's signed statement (See item 17 below), is the employee's presence necessary or would it be beneficial for the care of the patient? (This may include psychological comfort.)  Yes  No
16. Estimate the period of time care is needed or the employee's presence would be beneficial.

**Item 17 is to be completed by the employee needing family leave**

17. When Family Leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced leave schedule.

|                                            |          |                                                     |
|--------------------------------------------|----------|-----------------------------------------------------|
| 18. Employee Signature                     |          | 19. Date                                            |
| 20. Signature of Physician or Practitioner | 21. Date | 22. Type of Practice (Field Specialization, if any) |











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|--------|---------|----------------------|----------------------|----------------------|--------------------------------------------------------------------------------------------|
| III    | -----   | Table of<br>Contents | March 1997           | May 1997             | Revised to reflect<br>Chapter 2<br>amendments,<br>Chapter 7<br>amendments and<br>additions |
| III    | Two     | 2                    | Jan. 25, 1994        | May 1997             | Subchapter 2.9<br>revised to delete<br>references to form<br>TWCC-121                      |
| III    | Two     | 2                    | Jan. 25, 1994        | May 1997             | Subchapter 2.10<br>revised to reflect HB<br>1089 changes                                   |
| III    | Two     | 7                    | March 1997           | May 1997             | Subchapter 7.0<br>revised to reflect<br>subchapter additions                               |
| III    | Two     | 7                    | -----                | May 1997             | New guidelines:<br>Subchapters 7.15,<br>7.18, and 7.20                                     |

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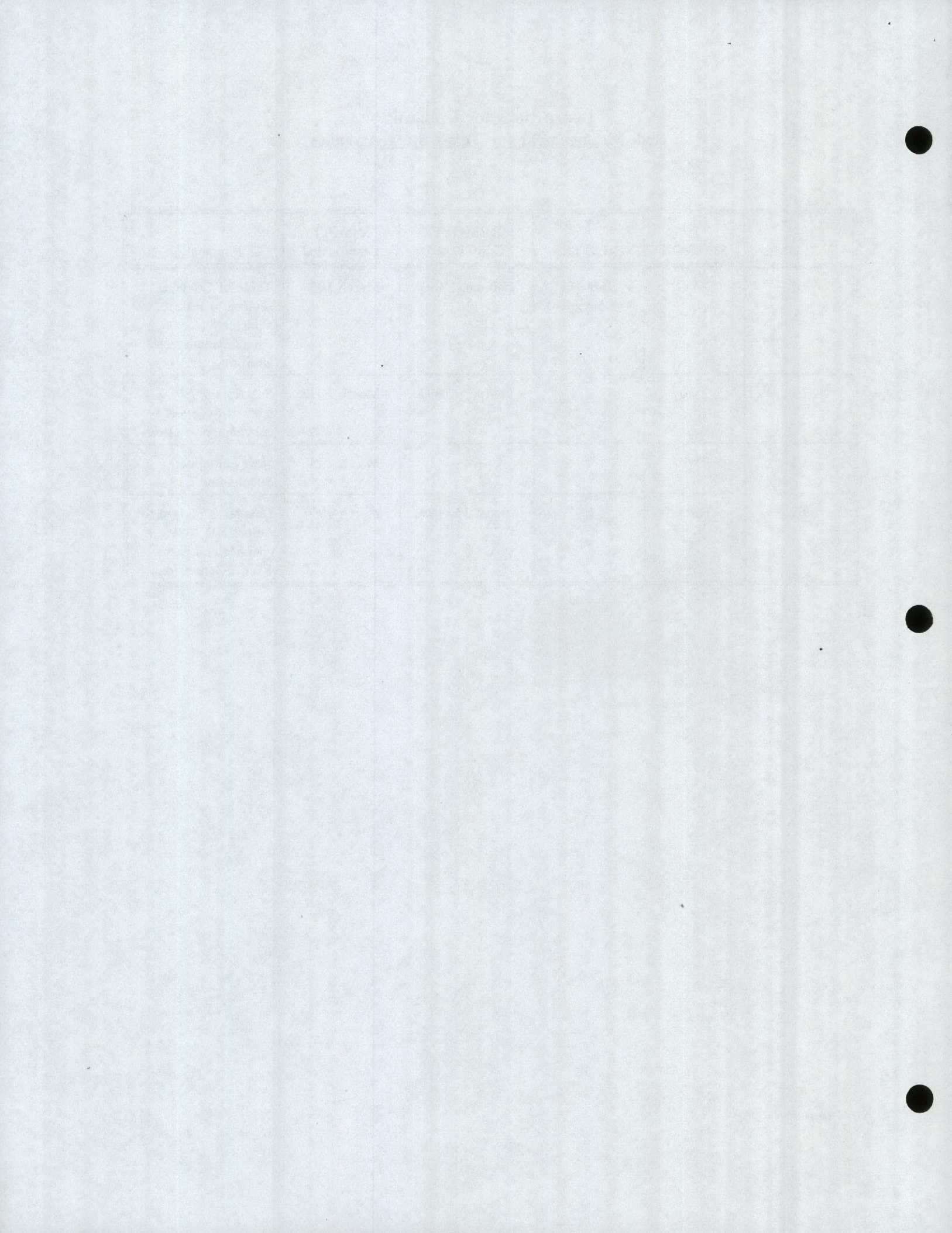
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|--------|---------|----------------------|----------------------|----------------------|------------------------------------------------------------------------------------|
| III    | -----   | Table of<br>Contents | February 1997        | March 1997           | Table of Contents<br>revised to reflect<br>Chapter 7<br>amendments and<br>addition |
| III    | Two     | 7                    | February 1997        | March 1997           | Subchapter 7.0<br>revised to reflect<br>subchapter addition                        |
| III    | Two     | 7                    | -----                | March 1997           | New guideline:<br>Subchapter 7.13                                                  |
| III    | Three   | 2                    | August 15, 1991      | March 1997           | Chapter 2 revised to<br>reflect HB 1089<br>changes and form<br>TWCC-3 revisions    |



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|--------|---------|----------------------|----------------------|----------------------|------------------------------------------------------------------------------------|
| III    | -----   | Table of<br>Contents | January 1997         | February 1997        | Table of Contents<br>revised to reflect<br>Chapter 7<br>amendments and<br>addition |
| III    | One     | 6                    | Jan. 1, 1995         | February 1997        | Chapter 6 revised to<br>reflect TWCC rule<br>amendment                             |
| III    | Two     | 7                    | January 1997         | February 1997        | Subchapter 7.0<br>revised to reflect<br>subchapter addition                        |
| III    | Two     | 7                    | -----                | February 1997        | New guideline:<br>Subchapter 7.19                                                  |

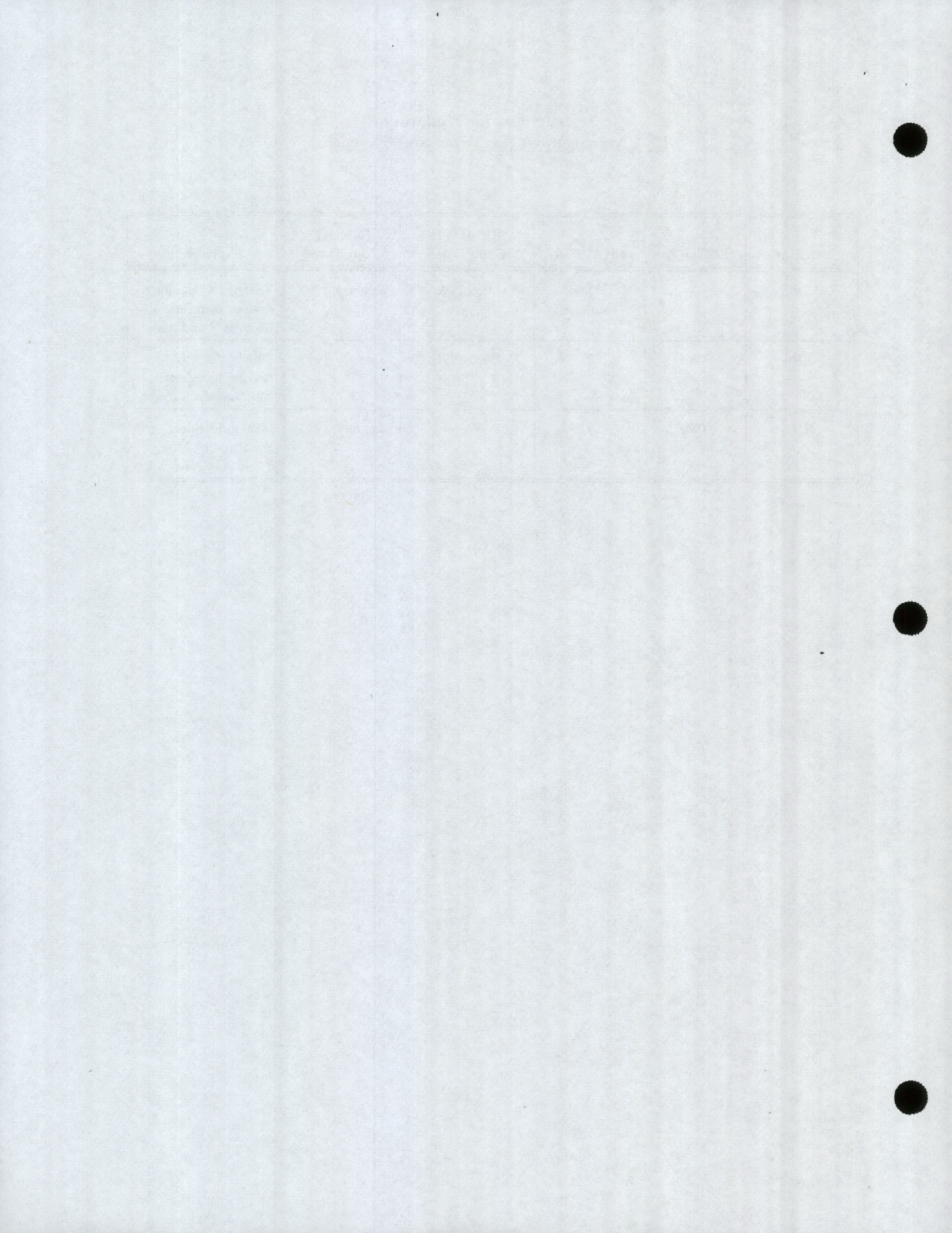




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| III    | -----   | Table of<br>Contents | Dec. 1996            | January 1997         | Table of Contents<br>revised to reflect<br>Chapter 7 additions |
| III    | Two     | 7                    | Dec. 1996            | January 1997         | Subchapter 7.0<br>revised to reflect<br>subchapter additions   |
| III    | Two     | 7                    | -----                | January 1997         | New guidelines:<br>Subchapters 7.11,<br>7.14, 7.16, and 7.17   |



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| III    | -----   | Table of<br>Contents | Nov. 1996            | Dec. 1996            | Table of Contents<br>revised to reflect<br>Chapter 7 additions |
| III    | Two     | 7                    | Nov. 1996            | Dec. 1996            | Subchapter 7.0<br>revised to reflect<br>subchapter additions   |
| III    | Two     | 7                    | -----                | Dec. 1996            | New guidelines:<br>Subchapters 7.5 and<br>7.12                 |

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| III    | -----   | Table of<br>Contents | October 1996         | Nov. 1996            | Table of Contents<br>revised to reflect<br>Chapter 7 additions |
| III    | Two     | 7                    | October 1996         | Nov. 1996            | Subchapter 7.0<br>revised to reflect<br>subchapter additions   |
| III    | Two     | 7                    | -----                | Nov. 1996            | New guidelines:<br>Subchapters 7.6,<br>7.8, 7.9, and 7.10      |

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| III    | -----   | Table of<br>Contents | Sept. 1996           | October 1996         | Table of Contents<br>revised to reflect<br>Chapter 7 additions |
| III    | Two     | 7                    | Sept. 1996           | October 1996         | Subchapter 7.0<br>revised to reflect<br>subchapter additions   |
| III    | Two     | 7                    | -----                | October 1996         | New guidelines:<br>Subchapters 7.2,<br>7.4, and 7.7            |

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|---------------------------|---------|----------------------|----------------------|----------------------|---------------------------------------------------------------|
| Main Table<br>of Contents | -----   | -----                | June 1996            | Sept. 1996           | Added Volume III,<br>Section Two,<br>Chapter 7                |
| III                       | -----   | Table of<br>Contents | June 1996            | Sept. 1996           | Table of Contents<br>revised to reflect<br>Chapter 7 addition |
| III                       | Two     | 7                    | -----                | Sept. 1996           | New guidelines:<br>Subchapters 7.0,<br>7.1, and 7.3           |

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|------------------------|---------|-------------------|-------------------------------------------------------|----------------------|---------------------------------------------------------------------------------------------|
| Main Cover Page        |         |                   |                                                       |                      | Cover page for all volumes. Insert prior to Volume I cover page.                            |
| Main Preface           |         |                   | Remove Preface from each individual volume.           |                      | Preface for all volumes. Insert immediately following the main cover page.                  |
| Main Registration Form |         |                   | Remove Registration Form from each individual volume. |                      | Registration Form for all volumes. Insert immediately following the main preface.           |
| Main Table of Contents |         |                   |                                                       |                      | Table of Contents for all volumes. Insert immediately following the main registration form. |
| I                      | ----    | Table of Contents | July 22, 1993                                         | June 1996            | Table of Contents revised to reflect changes in this volume.                                |
| I                      | One     | 1                 | June 1, 1994                                          | June 1996            | Chapter revised to reflect HB 1089 changes.                                                 |
| I                      | One     | 2                 | Aug. 16, 1991                                         | June 1996            | Chapter revised to reflect HB 1089 changes.                                                 |
| III                    | ----    | Table of Contents | Jan. 1, 1995                                          | June 1996            | Table of Contents revised to reflect changes in this volume.                                |
| III                    | Two     | 1.7               | Jan. 25, 1994                                         | June 1996            | Chapter revised to include new resources information.                                       |
| III                    | Two     | 1.8               | ----                                                  | June 1996            | New chapter.                                                                                |

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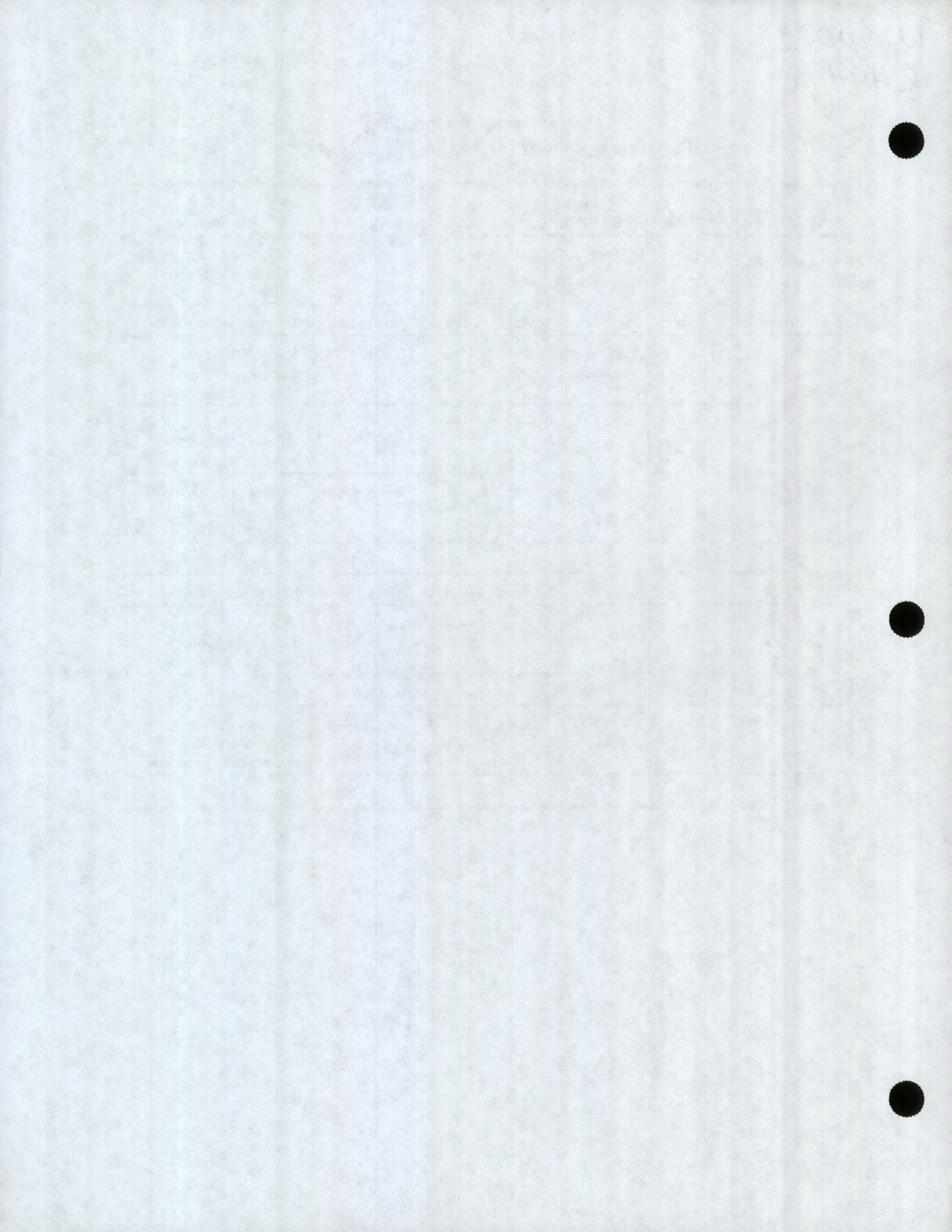
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|--------|---------|-------------------|----------------------|----------------------|-------------------------------------------------------------------|
| I      | -----   | Preface           | -----                | -----                | Preface revised to reflect codified TX Workers' Comp. Act.        |
| I      | Two     | 4                 | Aug. 15, 1991        | Jan. 1, 1995         | Chapter revised.                                                  |
| III    | -----   | Table of Contents | June 1, 1994         | Jan. 1, 1995         | Revised Table of Contents to reflect changes in this volume.      |
| III    | One     | 1                 | Aug. 15, 1991        | Jan. 1, 1995         | Chapter revised to reflect codified TX Workers' Comp. Act.        |
| III    | One     | 2                 | Aug. 15, 1991        | Jan. 1, 1995         | Chapter revised to reflect codified TX Workers' Comp. Act.        |
| III    | One     | 3                 | Aug. 16, 1991        | Jan. 1, 1995         | New page numbering.                                               |
| III    | One     | 4                 | June 1, 1994         | Jan. 1, 1995         | New page numbering.                                               |
| III    | One     | 5                 | June 1, 1994         | Jan. 1, 1995         | This chapter contains additional information. New page numbering. |
| III    | One     | 6                 | -----                | Jan. 1, 1995         | New chapter.                                                      |
| IV     | -----   | Table of Contents | July 22, 1993        | Jan. 1, 1995         | Revised Table of Contents to reflect changes in this volume.      |
| IV     | Two     | 5                 | -----                | Jan. 1, 1995         | New chapter.                                                      |



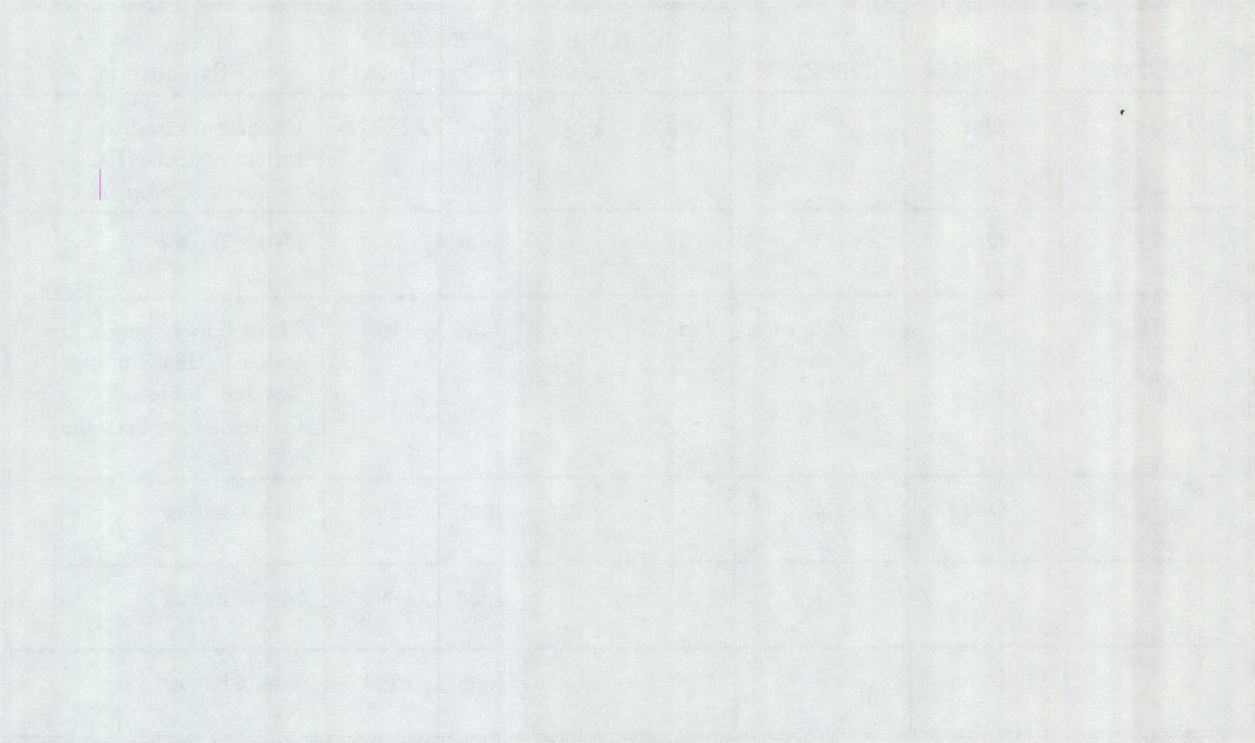
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| I      | One     | 1                 | Aug. 15, 1991        | June 1, 1994         | Chapter revised to reflect codified TX. Workers' Comp. Act                                        |
| I      | One     | 3                 | ---                  | June 1, 1994         | New Chapter                                                                                       |
| III    | ---     | Table of Contents | Jan. 27, 1994        | June 1, 1994         | Three new chapters are added to this Section. Revised Table of Contents to reflect the additions. |
| III    | One     | 4                 | ---                  | June 1, 1994         | New Chapter                                                                                       |
| III    | One     | 5                 | ---                  | June 1, 1994         | New Chapter                                                                                       |
| III    | Two     | 6                 | ---                  | June 1, 1994         | New Chapter                                                                                       |

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| I      | Table of Contents | -----   | Aug. 16, 1991        | July 22, 1993        | Chapters 4,5,7,8 of Section Three have been relocated to Volume IV |
| I      | Three             | 4       | Aug. 15, 1991        | -----                | This chapter has been included in Volume IV, Section One           |
| I      | Three             | 5       | Aug. 15, 1991        | -----                | This chapter has been included in Volume IV, Section One           |
| I      | Three             | 7       | Aug. 15, 1991        | -----                | This chapter has been included in Volume IV, Section One           |
| 1      | Three             | 8       | Aug 15, 1991         | -----                | This chapter has been included in Volume IV, Section One.          |
| IV     | Table of Contents | -----   | Feb. 2, 1993         | July 22, 1993        | New Section One Added                                              |
| IV     | One               | 1       | Feb. 2, 1993         | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 2       | -----                | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 3       | -----                | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 4       | -----                | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 5       | -----                | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 6       | -----                | July 22, 1993        | New Chapter                                                        |
| IV     | One               | 7       | -----                | July 22, 1993        | New Chapter                                                        |

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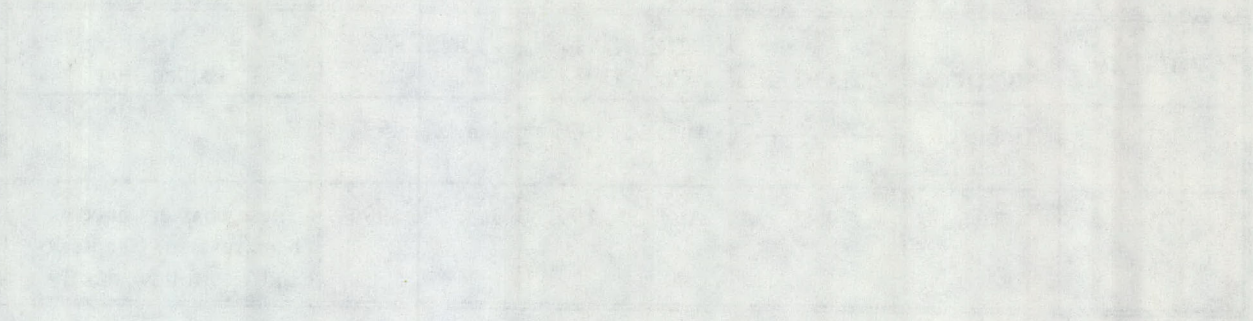
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|--------|----------------------|---------|----------------------|----------------------|---------------------------------------------------------------------------|
| III    | Table of<br>Contents | -----   | Aug. 15, 1991        | Jan. 27, 1994        | Revised                                                                   |
| III    | Two                  | 1-8     | Aug. 15, 1991        | Jan. 25, 1994        | These chapters have<br>been revised. Chapter 6<br>and 7 to follow shortly |

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Section Six



**Section Seven**















