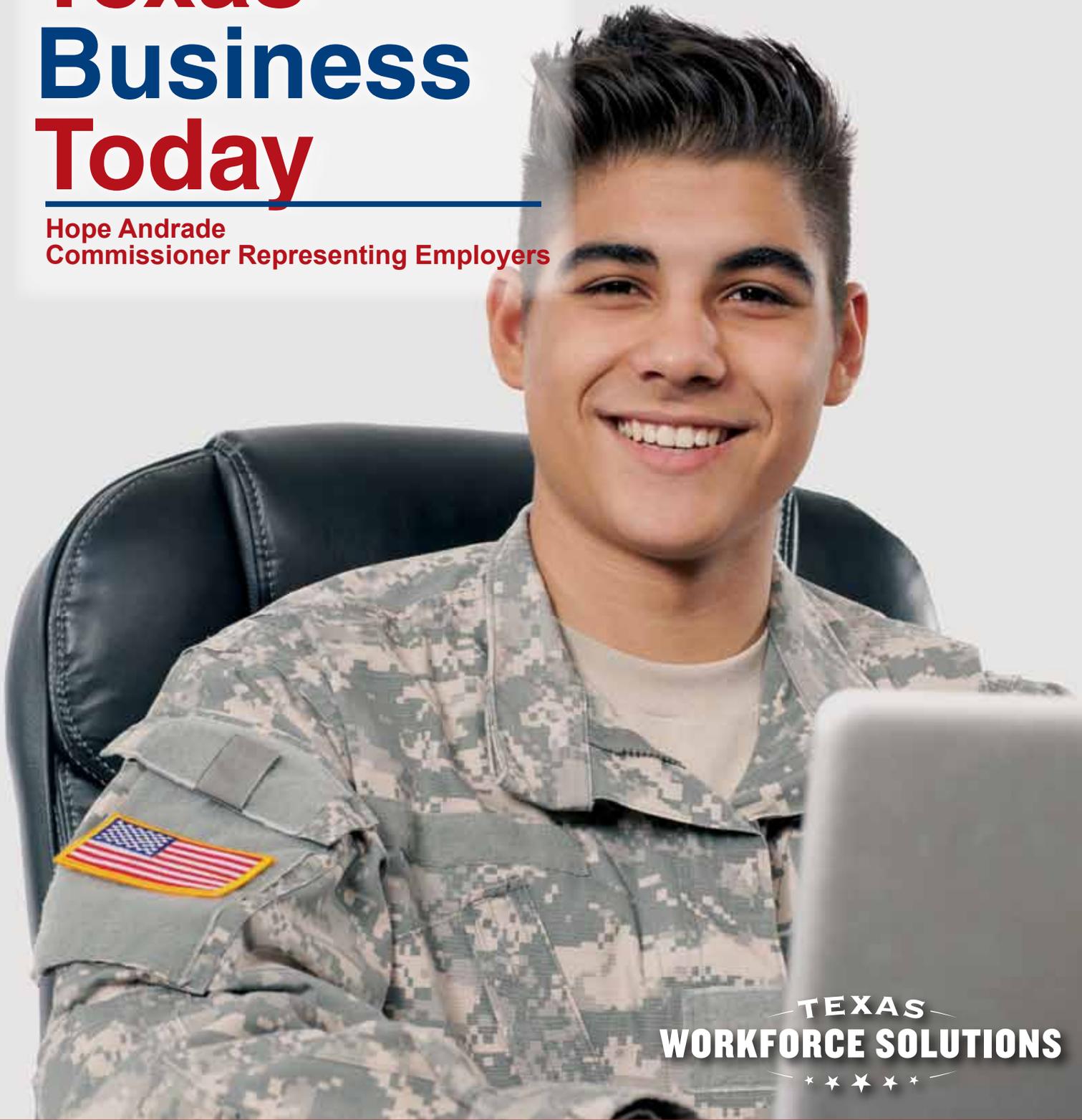


Fourth Quarter 2013

Texas Business Today

Hope Andrade
Commissioner Representing Employers



TEXAS
WORKFORCE SOLUTIONS
* * * * *

Employer Commissioner Andrade Acknowledges Outstanding Employers

- 2014 Employer Handbook Released • Connecting Texas' Veterans & Employers •
- Communicating with Employees • Electronic Devices in the Workplace •

Employer Commissioner Andrade Acknowledges Texas' Outstanding Employers and Looks Forward to 2014

This past year we have seen some exciting developments for business, industry, and workforce in the state of Texas. We are proud to have maintained our position as the number one job creator in the country, adding more jobs in the past year than any other state (260,600 private sector jobs added from November 2012 – November 2013). Texas is known for creating opportunities for jobs, success, and prosperity.

Last month, the Texas Workforce Commission (TWC) held our 2013 Annual Statewide Conference in San

Commissioner's Corner

Antonio. Over one thousand workforce developers, educators, business and industry representatives, economic developers, and government employees and leaders came together for a week of great discussion, sharing of successful ideas, and strategizing for 2014 and beyond.

Each year at our conference we recognize an Employer of the Year – a business that is actively involved with Texas Workforce Solutions and, as a result, has benefited other employers, workers, and their community. Each of our 28 local workforce boards nominated an employer whose partnership with the board exemplifies the economic success that can be achieved through strong private-public partnerships. But one employer rose to the top. I am pleased to announce that the Texas Workforce Commission's 2013 Employer of the Year is Exxon Mobil Corporation.

ExxonMobil has championed science, technology, engineering, and math (STEM) initiatives and workforce and economic development statewide. They lead in STEM promotion by sponsoring the ExxonMobil Texas Science & Engineering Fair each year and by partnering with several school districts in the Gulf Coast region to provide volunteers and ignite student interest in STEM occupations.

And there's more great news: ExxonMobil is just one example of the many outstanding Texas employers whose innovation, hard work, and investment in the Texas workforce contribute to the state's thriving economy and our 12.7 million workers.

During our conference we also highlighted two of our community colleges with our Partnership Award. Alamo Community College District in the San Antonio area and Navarro College in north central Texas have



Commissioner Hope Andrade applauds Texas employers during the 17th Annual Texas Workforce Conference in her hometown of San Antonio. She is joined on stage by Chairman Andres Alcantar.

shown innovation in meeting the needs of local employers and supplying workers with specific skills needed in today's economy. These two schools are among the many community and technical colleges doing incredible work in our state, and they underscore the vital role our community colleges play in developing our state's talent pipeline.

I am appreciative of the many innovative partnerships and ground-breaking initiatives I am seeing on my travels throughout the state. Communities across Texas are stepping up to the challenge of increasing employer demand for a skilled workforce.

In Fairfield, I attended the grand opening of a new Career and Technical Training Center – a result of a strong partnership between the local industrial development corporation and the local community college – Navarro College. The community recognized a growing need for training and skilled workers and came together to strategically position their region for continued economic growth and workforce development.

And, in Corpus Christi, I visited the Coastal Compass Center – a pioneering new one-stop education and career resource center that offers all corresponding community

resources in one location. This collaborative effort between the region's institutes of higher education, training centers, and local workforce solutions represents a high-impact alliance that will make a tangible difference for Texans and employers in their community.

In College Station, I heard the announcement that Cognizant is not only relocating their North American headquarters and over 500 jobs to Texas, but also making a significant three-year donation to support STEM education programs at Texas A&M University. Our private sector continues to recognize the need to be involved in training and education.

I believe that no one knows their workforce needs better than the local communities. We must all continue to work together to meet employer demand for more skilled workers by identifying new opportunities for private-public partnerships that can continue to build the talent pipeline. To our private-sector partners, thank you for your commitment to workforce initiatives. At TWC, we are excited about 2014 and the opportunities it holds.

In 2014, I look forward to hosting more Texas Business Conferences than ever before, covering every region of the state. We will also be offering more Texas Business Webinars (which we debuted in 2013) for a more intensive employment law discussion that you can join right from the comfort of your office. Most excitingly, in 2014 we will roll out our new online registration and payment site to make your conference registration process

easier and more convenient than ever.

Also, this year will see the completion of the transfer of the Adult Education and Literacy program from the Texas Education Agency to TWC. We are prepared to take advantage of this opportunity the Legislature has given us to better pair adult education with skills training and certifications. Our goal is to build an enhanced Adult Education system that will serve more of our Texans and link them to employment.

As we start a new year, I would like to reemphasize the Texas Workforce Commission's commitment to our Texas employers: We will continue to work diligently to listen, strategize, and respond to your workforce needs in order to help your business grow and succeed. 🇺🇸

Sincerely,



Hope Andrade
Texas Workforce Commission
Commissioner Representing Employers

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Cover image: U.S. Military soldier with laptop. *IStockphoto/Thinkstock*

New Edition of Employers' Handbook Released

The latest edition of *Especially for Texas Employers*, a free publication of Commissioner Andrade's office for the employers she represents, is available now both in print and online at <http://www.twc.state.tx.us/news/efte/tocmain.html>. That website has links for requesting a

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printed copy of the book, as well as for accessing the entire book online. There is also a link for downloading a PDF copy of the book, which can be either displayed on a full-size computer or on a mobile device, such as a smartphone, iPad, Android tablet, or one of the popular e-readers available from booksellers. The book has hundreds of topics relating to Texas and federal employment laws, organized into sections according to the four main phases of an employment relationship, i.e., hiring, pay and policies, work separations, and post-employment issues. There is also a section with sample forms and policies. The online edition features small apps that allow employers to estimate unemployment benefits and chargebacks, and how certain chargebacks might affect their unemployment tax rates. The online book also contains an app allowing quick estimates of overtime pay for employees who are paid at two different rates or who receive a fixed salary for fluctuating workweeks.

Recent Developments in OSHA Rules for Safety Training and Recordkeeping Requirements

OSHA recently released information and training materials on how it has harmonized hazard communication systems with global standards. Employers that have not yet trained their workers on the new standards should visit the OSHA website at <https://www.osha.gov/dsg/hazcom/index.html> and review the various resources linked from that page.

OSHA has also proposed new rules for reporting health and safety incidents at the workplace. Initially, employers with more than 250 employees will be required to submit their injury and illness reports electronically on a quarterly basis. It is foreseeable that the reporting requirement will be extended to smaller businesses as time goes on. OSHA plans to post the information online. Any businesses or industry groups that are concerned about displaying company-specific incident data online

will have a chance to offer comments on the proposed rules. The period for offering public comments ends on February 6, 2014. More details on the changes are available at https://www.osha.gov/pls/oshaweb/owadis.show_document?p_table=NEWS_RELEASES&p_id=25047.

W-2 Information from the Social Security Administration

The SSA issued an alert on November 26, 2013 concerning W-2s due in early 2014. According to the SSA, the agency will accept files for tax year 2013 (and prior years) beginning December 23, 2013 via the Business Services Online site (see the link at <http://www.ssa.gov/employer/>), and will begin processing files received after December 20, 2013 on February 11, 2014. The agency also noted that it introduced some changes to the EFW2 file format for tax year 2013. The changes are outlined on the SSA website at <http://www.socialsecurity.gov/employer/EFW2&EFW2C.htm>. Finally, the alert reminded employers to update their payroll systems to reflect the 2014 taxable wage base figures. That information is online at <http://www.ssa.gov/pressoffice/factsheets/colafacts2014.html>. The following deadlines apply: 1) for providing W-2s to employees is January 31, 2014; 2) for filing paper W-2s, the deadline is February 28, 2014; and 3) for filing electronic W-2s, the deadline is March 31, 2014.

New Wrinkle on Contingent Workers

At least one web-based temporary employment service has been mentioned in national online media in which candidates for temporary jobs bid for positions across a wide range of occupations. Whether that is an anomaly of the current persistent recession in some parts of the country, or a sign of trends to come, is a subject for debate and further analysis in the future. The phenomenon is discussed in great detail in an article online: <http://prospect.org/article/task-rabbit-economy>. Regardless of whether the overall results are favorable or unfavorable for the workforce, employers entering into contingent staffing relationships must, as always, remain very careful to comply with all applicable Texas and federal laws, including wage and hour, discrimination, worker classification, and payroll tax laws. In general,

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hiring workers directly, even if only for one day, makes a company the employer of such workers unless the company can prove that the workers are independent contractors. Obtaining such workers through a staffing service, such as the one mentioned in the linked article or one of the more well-known staffing firms, allows the client company to avoid at least the payroll tax aspects of the employment relationship, because the staffing firm is considered to be the employer of such workers. However, even the client companies may be liable under various employment laws due to the concept of “joint employment”. More on the many issues involved with contingent staffing is available in *Especially for Texas Employers* online: http://www.twc.state.tx.us/news/eftel/alternatives_to_hiring.html.

New Affirmative Action Guidelines for Federal Contractors

Vice-President Joe Biden recently announced that new rules for federal contractors will establish hiring targets of 8% for veterans and 7% for disabled individuals. Copies of the final rules and additional guidance materials for employers is available on the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) website at <http://www.dol.gov/ofccp/VEVRAARule/> and <http://www.dol.gov/ofccp/503Rule/>.

New Requirements for Unemployment Claim Responses

Although specific rules have not yet been adopted, employers should begin preparing for TWC’s implementation of SB 1537, the new law that prohibits chargeback protection for employers that have been found to have a “pattern” (at least two confirmed prior occurrences) of late or inadequate claim responses, and that fail to submit a timely or adequate response to a claim notice, lose the first determination, and then successfully appeal. Such a situation produces an overpayment of benefits that the claimant must repay. Under the new law, the claimant will still have to repay the overpayment, but the employer’s account will retain the chargeback, which can make the company’s unemployment tax rate go up for three years. The solution is to immediately make it a practice to always file timely and adequate responses to claim notices for claims in which the company feels that benefits should be denied. An adequate claim response is one which has enough detail to put TWC on reasonable notice of why the company feels that benefits should be denied. More information on this law will appear in the newsletter once the rules have been adopted.

Updated Disability Law Handbook Available for Free Download

An updated version of the ADA National Network Disability Law Handbook is now available for free download at <http://adata.org/lawhandbook>. Published by the Southwest ADA Center, on behalf of The National Network of ADA Centers, this 110-page handbook is written in a practical frequently-asked questions format. It provides answers to common questions about the ADA, the ADA Amendments Act, the Rehabilitation Act, Social Security, the Air Carrier Access Act, the Individuals with Disabilities Education Act, the Civil Rights of Institutionalized Persons Act, and the Fair Housing Act Amendments.

Shared Work Plan Requirements

HB 2035, which applies to any shared work plan claims filed on or after September 1, 2013, introduced several new requirements for shared work plans, as outlined below:

- TWC will waive charges to an employer's tax account for shared work benefits to the extent that the federal government reimburses TWC for the benefits.
- The plan must describe how the employees will be notified in advance, if possible.
- The plan must be an alternative to layoffs. The employer must provide an estimate of the number of employees who would be laid off in the absence of such a plan.
- An employer who currently provides fringe benefits must continue to provide these benefits for the employees in the shared work plan as long as those benefits are still provided to employees not participating in the plan. Fringe benefits include health insurance, retirement benefits, paid leave or holidays, or other employee benefits.
- The plan must permit eligible employees to participate in training, such as employer-sponsored training or Commission-approved training, to enhance their job skills.
- Part-time employees must be allowed to participate in the shared work plan.

For more information, see <http://www.twc.state.tx.us/ui/bnfts/shared-work.html>.

Full Schedule of Texas Business Conferences for 2014

Commissioner Andrade’s office is sponsoring a full series of the popular Texas Business Conferences for employers in 2014. The first one is scheduled for January 24, 2014 in Grapevine, and the Rio Grande Valley will have back-to-back conferences in McAllen and

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Brownsville on February 12 and 13, 2014, respectively. Many more conferences will be held in various Texas cities around the state. The agenda features topics such as hiring issues, employment law updates, personnel policies and handbooks, workers' compensation, independent contractors and unemployment tax issues, the unemployment claim and appeal process, and Texas and federal wage and hour laws. Employers who attend will receive a printed copy of the book *Especially for Texas Employers*, plus a CD with electronic copies of the book in web page and PDF / mobile-ready formats. The CD also features full copies of all of the speakers' presentations, back issues of this newsletter, *Texas Business Today*, going all the way back to 1998, required posters, and copies of official guidance and

other materials from Texas and federal agencies that are too numerous to list here. Every employer is strongly encouraged to attend at least one of these conferences every year, since the topics are updated whenever new laws, regulations, or court cases come out that are important to know about, and being there affords a unique opportunity to ask employment law questions in person of attorneys whose primary duty is helping Texas employers understand and stay in compliance with employment laws. The list of scheduled conferences is online at <http://www.twc.state.tx.us/events.html#tbc>. 

William T. Simmons
Senior Legal Counsel to Commissioner Andrade

Connecting Texas' Veterans and Employers

The Texas Workforce Commission (TWC) along with its 28 Workforce Solutions partners, the Texas Veterans Commission and the employers participated in its 2nd Annual Hiring Red, White & You! job fairs for veterans and military spouses on November 14, 2013.

For the second year in a row, Hiring Red, White & You! connected Texas veterans and their spouses with Texas employers who value the experience, discipline and other exceptional qualities inherent with a military background. The statewide job fair encouraged Texas employers to help veterans in Texas transition to the civilian workforce. The events were held at 27 venues throughout Texas.

There are more than 1.7 million veterans in Texas. With the recent end of America's involvement with the war in Iraq and the current drawdown of U.S. troops in Afghanistan, a mass of unemployed veterans are now ending their military service. The U.S. Bureau of Labor Statistics reports that the national unemployment rate for all veterans is 6.3 percent. In contrast, for those veterans who served in the military post-9/11, the unemployment rate is 10.0 percent.

Here are more programs assisting employers and veterans:

Work Opportunity Tax Credit: The Work Opportunity Tax Credit (WOTC) is a federal income tax benefit administered by the U.S. Department of Labor (DOL) for employers who hire individuals from specified target populations. WOTC reduces a business's federal tax liability, serving as an incentive to select job candidates who may be disadvantaged in their efforts to find employment. More information about WOTC can be found here: <http://www.twc.state.tx.us/svcs/wotc/work-opportunity-tax-credit.html>.

Skills for Veterans: The TWC Skills for Veterans initiative addresses the unique challenges and training needs of post-9/11 veterans entering the Texas workforce. TWC has set aside \$1 million to fund this initiative to enhance the skills of veterans, which will benefit employers. Learn more about the initiative here: <http://www.twc.state.tx.us/svcs/funds/skills-veterans-initiative-program-overview.html>.



Commissioner Hope Andrade greets U.S. military servicemen at the Hiring Red, White & You! job fair event at Fort Hood. Hiring events took place at 27 venues throughout Texas on Nov. 14, 2013.

College Credit 4 Heroes: The College Credit for Heroes initiative seeks to maximize college credits awarded to veterans for their military experience in order to expedite each veteran's transition into the Texas workforce. More information here: <http://www.twc.state.tx.us/svcs/vetsvcs/college-credit-heroes.html>.

Texas Veterans Leadership Program: The Texas Veterans Leadership Program is a TWC resource and referral network that connects returning veterans of Iraq and Afghanistan with the resources and tools they need to lead productive lives and enjoy the full benefits of the society they have willingly served. More information here: <http://www.twc.state.tx.us/tvlp/tvlp.html>. 🇹🇽

Say What You Need to Say: Communicating with Employees

Communicating with your employees is essential to your business' success. Many of the employers who call our Employer Hotline often ask how they should communicate a policy, instruction, or issue a disciplinary action to an employee. Usually, the employer has arrived at this point because the employer, admittedly, has not adequately communicated with its employees.

In 2010, Towers Watson, a leading global professional services company, found employee communication satisfaction correlates with “employee engagement, agency, and retention.” Therefore, one can argue that you can tie back almost every employee issue - performance, attendance, attitude, and productivity - to communication.

No matter how good a communicator an employer may be, communication can almost always be better. Employers simply need to have the willingness to improve, which includes being honest, respectful, and trustworthy toward its employees. Without these three factors, employees will not take what an employer says seriously.

The following are some tips you can apply in any employee situation.

1. **Make Communication Part of the Workplace**

- a. **Engage with Employees** - Even if you are the owner of the company, try interacting with your employees by simply asking them how their day is going. Employees will appreciate that the owner or, for example, a boss two levels up is taking the time to speak to them. If you have managers, be sure to train them in understanding the importance of interacting with their teams. Showing employees you care about their daily activity will help in developing a healthy employee-employer relationship, which will keep the lines of communication open.
- b. **Communicate Frequently** - Communicating with your employees at the start of the day (i.e., 10-15 minutes) to review, for example, the day's goals, will make employees comfortable communicating with you. Employers can consider having a companywide meeting every quarter or once a year in order to provide employees, for example, an update on the



Communicating with your employees at the start of each day for a few minutes to review the day's goals or even to see how their day is going can make employees more comfortable communicating with you. *iStockphoto/Thinkstock*

business. Always have time for a question and answer session.

2. **Listen to Your Employees**

- a. **Establish Feedback Options** - Successful communication is a two-way street, so employers need to listen to their employees' input. Creating a comment box, an e-mail address they send input to, or a hotline are some ideas. Keeping their comments anonymous is best.
- b. **Taking Feedback Seriously** - Address any suggestions your employees have, especially if you are not planning on implementing them.

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Providing an explanation as to why a suggestion isn't implemented shows you care about your employees, which in turn will encourage them to communicate with you more often.

3. **Message Should Be Understood**

- a. **Choose a Good Messenger** - Who in your office has the personality to deliver a message that will be understood and followed by your employees? A confident, dominant individual, for example, can be a good messenger who will keep employees focused on the message. However, be sure you don't choose too dominant a messenger, since that might hinder the employees' willingness to provide input. A personality test, such as a Myers-Briggs Type Indicator, can assist your company in determining who should be the messenger.
- b. **Acknowledge Good Work** - If your communications with your employees are always negative, then they won't be taken seriously or respected. Balance business needs (e.g., criticism) with praising employees by thanking them personally for their performance.
- c. **Follow-Up** - If the policy, instruction, etc., does not seem to have been understood, follow-up with employees, for example, by issuing another e-mail reminder, or calling a meeting.

4. **Manner in Communicating**

- a. **In Writing** - Communicating with your employees in writing is probably the best way to keep record of what has been communicated. When communicating with an employee in writing, an employer should have them sign proving the issue, instruction, etc. was discussed. Having a witness present at the time

the written policy, disciplinary action, etc. is issued can be helpful if an employee refuses to sign the document. Written communication is very helpful, especially, in an unemployment insurance claim. For example, written policies and final warnings can make or break a case in an unemployment insurance claim. For more information on unemployment insurance claims, please see the following link from our online book, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/efte/ui_law_the_claim_and_appeal_process.html.

- b. **Electronic Communications** - E-mail is one way to disseminate important information to a large group of employees; however, you always run the risk of employees not reading e-mails. Therefore, if you want to deliver an important message to your employees, meeting with them face to face is best.
- c. **Face to Face** - Communicating with your employees in-person is key, especially during new hire orientations, when disciplining an employee, and when resolving employee conflict issues. Serious matters, such as an employee claiming a co-worker is harassing him/her, should be handled in person and immediately.

Remember communicating effectively with your employees will lead to an increase in their satisfaction with their job and will help encourage them to perform to a higher standard. While communicating effectively make take some planning and commitment, practice always makes perfect. 🇹🇽

*Marissa Marquez
Deputy Senior Legal Counsel to
Commissioner Andrade*

Drug Testing and Unemployment Claims

Having a drug-free workplace has become a commonplace goal for most businesses. Most people would agree that ensuring employees do not perform their job duties under the influence of drugs or alcohol makes perfect sense and contributes to the safety and productivity of the workforce. And while many employers have drug policies in place, they may not be aware of the requirements placed upon them when they try to defend an unemployment insurance (UI) claim in the event of a discharge due to violation of the employer's drug policy. If a claimant was discharged for drug use in violation of the employer's policy, and the employer has a positive drug test result to prove the violation, the employer may be shocked to lose the UI claim if the claimant denies the drug use. But how can this be? If the employer provided documentary proof of the positive test result, how can the employer still lose the case? Because not all evidence of a positive drug test is created equal for the purpose of an unemployment claim. As it states in Part IV of our employer handbook, *Especially for Texas Employers*, "TWC has adopted several precedent cases in the area of drug testing, all of which affirm that the employer must prove that the sampling, sample handling, and testing procedures were reliable enough to allow a reasonable conclusion that the claimant had prohibited substances in his system at the time of testing and knew he could be discharged for such an offense. Once that proof is offered, the Commission has shown that it will disqualify such a claimant, even in the face of a *sworn* denial of any drug use by the claimant. In general, the employer's burden of proof includes full documentation of every aspect of the policy, consent, testing, and chain of custody procedures."

A well-established TWC precedent case provides that in order for an employer to be able to overcome a sworn denial of employee drug use, the employer must submit proof of 5 individual factors.

According to [Appeal No. 97-003744-10-040997](#), to establish that a claimant's positive drug test result constitutes misconduct, an employer must present:

1. A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. Evidence to establish that the claimant has consented to drug testing under the policy;
3. Documentation to establish that the chain of custody of the claimant's sample was maintained;



Not all evidence of a positive drug test is created equal for the purpose of an unemployment claim. In general, the employer's burden of proof includes full documentation of every aspect of the policy, consent, testing, and chain of custody procedures. *Stockbyte/Thinkstock*

4. Documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. Documentation of the test expressed in terms of a positive result above a stated test threshold.

Evidence of these five elements is sufficient to overcome a claimant's sworn denial of drug use.

[Please note that drug tests subject to regulation by the US Department of Transportation are treated differently in unemployment cases and have a different proof standard. For more information about DOT drug tests, please see Part II of *Especially for Texas Employers*, or review the information found here: http://www.twc.state.tx.us/news/efte/drug_testing_in_the_workplace.html.]

Factor #1: **A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant.** Most employers are able to easily meet this requirement. Many policies notify employees that the Company will conduct drug and/or alcohol testing under certain circumstances, such as pre-employment, at random, after an accident or an incident which resulted in injury to person or damage to property, upon suspicion, if the employer observes impairment or strange behavior, etc. For example, in order to cover the majority of circumstances that might present themselves in the workplace, the sample drug and alcohol policy in Appendix II of *Especially for Texas Employers*, states

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that the employer will conduct drug and/or alcohol testing under any of the following circumstances:

- **RANDOM TESTING:** Employees may be selected at random for drug and/or alcohol testing at any interval determined by the Company.
- **FOR-CAUSE TESTING:** The Company may ask an employee to submit to a drug and/or alcohol test at any time it feels that the employee may be under the influence of drugs or alcohol, including, but not limited to, the following circumstances: evidence of drugs or alcohol on or about the employee's person or in the employee's vicinity, unusual conduct that suggests impairment or influence of drugs or alcohol, negative performance patterns, or excessive and unexplained absenteeism or tardiness.
- **POST-ACCIDENT TESTING:** Any employee involved in an on-the-job accident or injury under circumstances that suggest possible use or influence of drugs or alcohol in the accident or injury event may be asked to submit to a drug and/or alcohol test. "Involved in an on-the-job accident or injury" means not only the one who was or could have been injured, but also any employee who potentially contributed to the accident or injury event in any way.

[The entire sample drug policy can be found here: http://www.twc.state.tx.us/news/eftc/drug_free_workplace_policy.html.]

A drug policy should also notify employees that violation of the policy may subject them to appropriate disciplinary action, up to and possibly including discharge from employment. However, many employers who call our office with questions have a zero tolerance policy in place when it comes to violation of the drug policy. That means that an employee will lose his job with his first positive drug test result or with a drug test refusal. The appropriate consequences for violations are usually left up for the employer to decide, as long as no other regulations apply (such as DOT regulations).

Remember, it's important to have employees acknowledge having received a copy of the drug policy or acknowledge having reviewed the policy. If employees are not aware of a policy, then violation of that policy will not be considered misconduct connected with the work. Consider the facts in precedent case [Appeal No. 87-21507-10-122287](#) as an example that illustrates this point. In this case, the employer's policy prohibited possession, use, and being under the influence of drugs or alcohol, but did not provide for testing of employees. As a result of allegations of the claimant's drug use, the employer told the claimant he'd be fired if he refused to take a drug test. The claimant was discharged after testing positive for marijuana. The commission held that because the claimant

had no notice he would be required to submit to a drug test as a condition of employment, testing positive could not be considered misconduct connected with the work. The outcome of the case? The claimant was qualified for the receipt of benefits.

Factor #2: **Evidence to establish that the claimant has consented to drug testing under the policy.** Many employers include consent for the drug test along with the drug-free workplace policy and ask employees to sign both the acknowledgment and the consent at the same time. The consent would state that the employer agrees to submit to a drug or alcohol test and to furnish a sample for analysis upon request by the employer. A word of caution based on a recent case that came across our desks. In that case, the employer's policy and consent, which the claimant had signed, indicated that the employer could ask the claimant to submit a *urine or blood sample* for drug testing. The policy further provided that refusal to provide a sample would result in discharge. However, the employer had changed the method of collecting samples, and asked the claimant for a *cheek swab* instead of either a blood or urine sample. The claimant refused to provide the cheek swab and the employer discharged her based on her refusal to submit a sample. In the subsequent UI claim, the commission found that although the claimant had in fact refused the drug test, the claimant's actions did not rise to the level of misconduct because she had not been notified of – and had not consented to – providing a cheek swab as a sample. The lesson here: employers should make sure that they are following the terms of their drug policies. If the drug policies stop meeting the employers' needs, employers should change them and get employee signatures on the new and updated policies. [For a sample consent form, please see http://www.twc.state.tx.us/news/eftc/drug_and_or_alcohol_testing_consent_form.html.]

Factor #3: **Documentation to establish that the chain of custody of the claimant's sample was maintained.** This is important to maintain the integrity of a claimant's sample and to ensure that the sample has not been tampered with or possibly mixed up with another sample. Most drug testing labs which procure and test the samples onsite have established chain of custody forms and procedures that make it easy for employers to meet this requirement. However, failure to properly comply with this factor could result in the employer losing a drug testing UI case. Instead of having employees provide a sample at a drug testing lab, some employers take samples directly from their employees at the job site and store them on the employer's premises until the employer is able to transport them to the drug testing facility. If the employer does not have strict chain-of-custody procedures in place, the claimant can attack that part of the drug

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testing procedure and overcome a positive drug test result by simply denying drug use under oath. As examples of this factor at work, take a look at these TWC precedent cases which address this issue – the first is favorable to the employer and the second favorable to the claimant:

In Appeal No. 87-14496-10-081487, after testing positive for marijuana on one urine sample, the claimant submitted another sample for testing three days later. The employer's representative observed the claimant produce the specimen. The claimant handed the specimen to a clerical employee who affixed an adhesive band around the container lid while the claimant watched. The claimant initialed both the container label and the envelope in which the container was placed. The specimen was kept in a refrigerator in a locked building with a security alarm on the employer's premises over the weekend, then picked up by a representative of the testing lab. The tape used to seal the specimen bottle could not be removed without destroying the tape, and the envelope could not be opened and resealed without some showing of tampering. HELD: The claimant's allegations of possible tampering did not overcome the evidence that the employer maintained a proper chain of custody in connection with the second urine specimen. Disqualification under Section 207.044 of the Act.

In Appeal No. 86-04227-10-031187, the employer's policy required a physical examination, including a drug screen, for all employees returning to work from on-the-job injuries. Upon returning to work after a two-month absence, the claimant tested positive (74 ng/ml) for marijuana on a gas chromatography/mass spectrometry test and was discharged. The claimant's urine specimen was not sealed in the claimant's presence and he was not allowed a second test. At the time of the test, the claimant had been taking medication. HELD: As the claimant's specimen was not sealed in his presence, as his medication could have affected the testing and as he denied smoking marijuana, doubts were reasonably raised about the results of the test. Given these doubts, the Commission concluded that the employer had not shown misconduct connected with the work on the claimant's part.

Factor #4: **Documentation from a drug testing laboratory to establish than an initial test was confirmed by the Gas Chromatography/Mass Spectrometry (GC/MS) method.** According to Wikipedia, "GC-MS has been widely heralded as a 'gold standard' for forensic substance identification because it is used to perform a specific test. A specific test positively identifies the actual presence of a particular substance in a given sample. A non-specific test merely indicates that a substance falls into a category of substances. Although a non-specific test could statistically suggest the

identity of the substance, ***this could lead to false positive identification.***" (Emphasis added.)" In other words, requiring employers to submit test results confirmed by the GC/MS method should eliminate false positives, thereby providing stronger proof of drug use and test results that can withstand a claimant's attack on their validity. If an employer plans to use a positive drug test as the basis for an employee's discharge, the employer should ensure that the lab it chooses to use will confirm the results using the GC/MS method. Failure to have proof of such confirmation will result in the employer losing the unemployment claim due to failure to satisfy this important requirement.

Factor #5: **Documentation of the test expressed in terms of a positive result above a stated test threshold.** Many drug test results express a positive result by just stating that the claimant tested positive, without explaining or detailing the threshold amount of the substance that constitutes a positive result. The threshold will differ depending on the drug, but stated thresholds usually set out the level at which impairment of the individual becomes an issue. Compliance with this requirement strengthens the test results and helps overcome assertions from claimants that they were not under the influence while at work. As with factor number 4, ensuring that the lab testing facility documents the results in terms of a specific positive result above a stated threshold, and does not simply provide a generic "positive" result, will help employers prevail on UI claims.

These five factors in support of a positive drug test, when taken together and proven by the appropriate documentation submitted by the employer in an unemployment claim, will defeat a claimant who swears up and down that he did not use drugs. Without them, an employer can still discharge an employee who tested positive for drugs in violation of the employer's policy. And while the employer's actions in terminating the employee will be lawful, and maybe even necessary in order to maintain a safe work environment, the employer will lose the unemployment claim. Bottom line: If employers expect to prevail on the unemployment claim, they must ensure that these five factors are met.

In a future issue, we will discuss the issues raised by the new law concerning drug testing for certain unemployment benefit claimants (SB 21). That article will appear soon after the U.S. Department of Labor issues its rules for states to follow in enforcing the legislation. The new rules are expected to be issued at some point in calendar year 2014, but will be dependent upon federal action. 

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Dealing with Personal Electronic Devices in the Workplace

The use of smart phones and tablets has become widespread and often poses problems for employers wanting to know how to handle the use of electronic devices in the workplace. Some of the most common issues are lost productivity, maintaining confidentiality, and what to do if the employer itself is the one requiring the use of these devices while performing job duties. It is up to each individual employer to develop its own policy regarding how and when employees can use personal electronic devices.

The most important thing to remember is that there is no federal or state law requiring employers to allow these devices at work. Therefore, an employer can prohibit cell phones, electronic readers, tablets, and laptops from entering the workplace. If an employer chooses to prohibit the possession of personal electronics, then it will be a good idea for employers to have a land line available so that employees can be reached in a true emergency. While employers are technically allowed to take possession of such devices during working hours, the employer would then become responsible for the device and may be liable to pay for or replace the device in the event of theft, damage, or loss.

Employers who wish to be less restrictive can allow the use of these devices only in certain areas of work, such as the break room or eating area. Of course, employers can restrict the use of cell phones and other electronics to the periods in which an employee takes a meal or rest break. However, if employees do not have assigned break time, be prepared to handle the problem of combating the excuse that the employee was on break when using the device.

Regardless of the other terms of your personal electronic device policy, it is a good idea to include a clause in the policy which requires employees to maintain confidentiality regarding the employer's business, customers, and business practices. The employer can subject employees to physical and digital searches of their personal electronic devices in order to ensure confidentiality. Employers may also prohibit the taking of any photographs in the workplace without management approval. In all cases, the employer should include in its policy a prohibition against taking photographs in



Employers who wish to be less restrictive can allow the use of cell phones and other electronic devices when the employee takes a meal or a rest break. *iStockphoto/Thinkstock*

private areas such as changing rooms, locker rooms, and bathrooms. Warn employees that improper photography is a crime in Texas and could result in jail time of 180 days – 2 years and a fine of up to \$10,000.

Also, be sure to prohibit the use of electronic devices while an employee is driving a company vehicle or while driving for business purposes. The policy should also cover any use that is prohibited by state or local law. Additionally, it is a good idea to prohibit the use of electronic devices while operating any type of machinery.

Finally, it is important that employers notify employees of the consequences of violating the policy. Discipline can include verbal and written warnings, suspensions, and even immediate discharge for more serious violations, such as using a device in a manner that violates safety rules or Federal, state, or local law. Employers can also discipline employees by taking away their electronic device privileges for as long as the employer deems necessary.

Special problems can arise when the employer provides electronic devices for the employees to use in the course of performing their assigned job duties. Employers should

Continued from page 13

be specific regarding acceptable usage when giving such devices to employees. Inappropriate use should be defined and the consequences of using the phone for inappropriate purposes made clear. Tell the employees if there is a limit on the number of minutes, text messages, or data usage on the device and be clear that the employee will be responsible for any overage charges that result from their personal use of the device. An alternative would be to prohibit personal usage of any company-owned devices.

If the employer wants to make deductions from the employee's pay for excess charges or loss or damage to a device, have the employee sign a wage deduction authorization agreement when issuing the phone. Remember the charges cannot take the employee's pay below minimum wage, plus applicable overtime, for all hours worked. Therefore, you may be required to take the deduction in installments to avoid violating minimum wage laws.

Frequently, employers give their employees company-issued devices because they expect the employees to be available to the employer outside of their normal working hours. Employers should be aware that, for employees that are not exempt under the Fair Labor Standards Act, time spent answering work-related calls or emails is

considered work time. Therefore, the employee must be paid for this time, and it must be used to calculate whether an employee is entitled to overtime pay. Employers should ensure that employees keep accurate record of the time they spend on such activities outside of work so that the employees are properly paid. This can be in the form of a log on which employees enter the time they begin and end a work activity. While this may seem like a lot of paperwork, since the U.S. Department of Labor places the burden of keeping accurate time records on the employer, such a log could be the difference between a favorable and unfavorable outcome in the event of an audit.

The best way to avoid problems in the workplace associated with electronic devices is to have a clear policy outlining acceptable use, and to ensure that all employees are aware of the policy. Enforce the policies consistently amongst all of your employees and document violations of the policy by issuing written warnings. Following these steps will give the employer the best chance of prevailing in an unemployment claim should an employee be fired as a result of using an electronic device at work. 

*Sonia J. Luster
Legal Counsel to Commissioner Andrade*

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