Second and Third Quarters, 1998

TexasBusinessToday

Commissioner Ron Lehman Texas Workforce Commission

TEN COMMANDMENTS OF KEEPING YOUR JOB

Many readers of Texas Business Today will remember an article from the second quarter 1997 issue called *"The 10 Commandments of Firing"*. After that article came out, we received many suggestions, some meant seriously, some in jest, that we do a similar article on ways to keep a job. Here it is - we hope that it will prove useful to both employers and employees.

1. Be on time, whether it is with showing up for work, returning from breaks, going to meetings, or turning in assignments.

2. Call in if you know you will be tardy or absent. Most companies treat absences or tardiness without notice much more seriously than simple absence or tardiness.

3. Try your best; always finish an assignment, no matter how much you would rather be doing something else. It is always good to have something to show for the time you have spent.

4. Anticipate problems and needs of management - your bosses will be grateful, even if they do not show it.

5. Show a positive attitude - no one wants to be around someone who is a "downer".

6. Avoid backstabbing, office gossip, and spreading rumors - remember, what goes around comes around - joining in the office gossip may seem like the easy thing to do, but almost everyone has much more respect for people who do not spread stories around.

7. Follow the rules. The rules are there to give the greatest number of people the best chance of working together well and getting the job done.

8. Look for opportunities to serve customers and help coworkers. Those who would be leaders must learn how to serve.

9. Avoid the impulse to criticize your boss or the company. It is easy to find things wrong with others - it is much harder, but more rewarding, to find constructive ways to deal with problems. Employees who are known for their good attitude and helpful suggestions are the ones most often remembered at performance evaluation and raise review time.

10. Volunteer for training and new assignments. Take a close look at people in your organization who are "moving up" - chances are, they are the ones who have shown themselves in the past to be willing to do undesirable assignments or take on new duties.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Different Benefits for Different Employees

Many employers ask whether it is legal to give different benefits to employees, depending upon what jobs they have. The answer to that question is both complex and simple. Some companies and types of benefits might be covered by the Employee Retirement Income and Security Act of 1974 (ERISA), a federal law governing pension and welfare benefit programs ("welfare" in this context basically means benefits other than retirement-type benefits). ERISA mainly governs how company benefit plans are administered, how changes are made and employees notified, and how employers have to make reports in order to satisfy IRS regulations relating to taxability of benefits. ERISA does not require an employer to offer any particular kind of benefits to employees. The design of a company benefit plan is left up to each employer to determine for itself. There is only one small exception known as the "1000-hour rule", which states that a company that has a retirement plan must make that plan available to any employee who has worked at least 1000 hours in a twelve-month period. Once the benefit plan is designed, ERISA may apply, and in that case it is important to be aware of those rules (which can be obtained by calling the U.S. Department of Labor's COBRA and ERISA information number in Texas at 1-214-767-6831, or by accessing DOL's World Wide Web site at "http://www.dol.gov").

If ERISA does not specify what types of benefits must be offered to employees, what law does? Certainly, no law in Texas obligates employers to offer any particular kind of benefits to employees. Some federal laws mandate certain "benefits" for certain employees; for instance, employers with 50 or more employees within a 75-mile radius may have to allow up to twelve weeks of paid or unpaid leave to employees with medical conditions or problems covered under the Family and Medical Leave Act (for information on that law, see the DOL Web site cited above). However, such federally mandated "benefits" do not really count as part of an employer's benefits plan, and the fact remains that no Texas or federal law requires an employer to offer things like retirement plans, paid vacations, paid sick leave, paid holidays, paid parental leave, or severance pay.

So, back to the initial question: can an employer give different benefits to different employees? The most common way this issue comes up is in the area of extra "perks" for salaried exempt employees that non-exempt employees do not receive. Simply put, an employer can give extra benefits to its salaried exempt employees that it does not give to non-exempt hourly and non-exempt salaried employees. This assumes, of course, that the employer has correctly classified the employees as exempt or non-exempt from overtime pay under the Fair Labor Standards Act, an area that is beyond the scope of this article (for information on this issue, see the wage and hour law articles on TWC's Web site (http:// www.twc.state.tx.us) and Part 541 of the wage and hour regulations on the DOL Web site cited above).

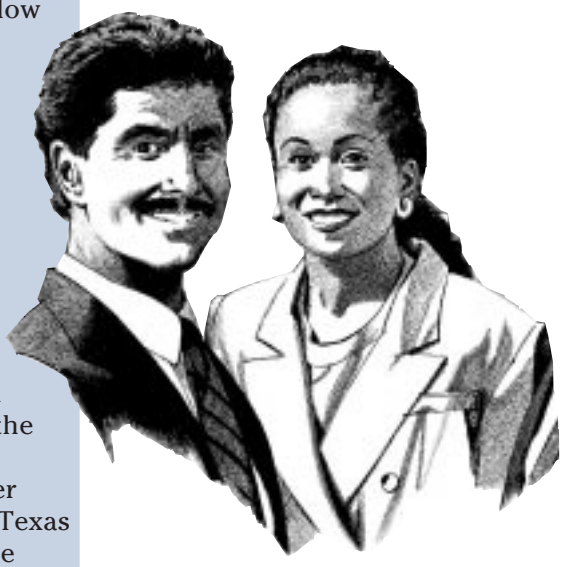
For example, an employer might have a vacation pay policy under which employees accrue 8 hours of vacation leave for every month worked. The company might need an extra incentive to attract and keep qualified employees at the exempt level, so it might decide to provide that salaried exempt employees accrue paid vacation at the rate of 10 or 12 hours per month. Another difference could come in the area of severance pay. A benefits plan could provide that

severance pay will be awarded under specified circumstances to salaried exempt employees, without making the same provision for non-exempt employees.

There are only two real caveats here. One involves the possibility of discrimination claims. If salaried exempt employees get substantially better benefits, there is a low percentage of minority employees in the exempt ranks and a higher percentage in the non-exempt ranks, and the EEOC feels that the company does not have a demonstrably open and fair hiring/promotion process that complies with EEO guidelines, the disparity in benefits could be viewed as evidence of the discriminatory impact of company policies. Another caveat has to do with the Texas Payday Law. Certain fringe benefits promised in a written policy, including vacation leave, sick leave, parental leave, holiday pay, and severance pay (but not pensions), are an enforceable part of the wage agreement under that state law. Consequently, employers should be careful as to what benefits are promised and what conditions are put on those benefits. The benefits policy will be enforced as written, so if the employer carefully drafts it, there should be no unpleasant surprises in a wage claim. The subject of employee benefits can be very complicated, especially for employers with unusual benefits or several different benefit options for employees. While it might be possible for some employers that give only limited benefits to employees, such as paid vacation leave or paid holidays, to design their policies without outside help, it is generally advisable to seek the assistance of an employment law professional when developing a company benefits plan.

William T. Simmons
Legal Counsel to
Commissioner Ron Lehman

Look At the Facts Not At the Faces



Your Guide To Fair Employment

(Editor's note: This article is from the World Wide Web site of the Immigration and Naturalization Service of the U.S. Department of Justice (http://www.ins.usdoj.gov); the site contains many forms, including the I-9 form, and articles of interest for employers. This article is printed here for the benefit of employers who do not have access to the Internet.)

Introduction

This guide is designed to help you, the employer, understand and comply with the Immigration and Nationality Act (INA). In short, INA requires you to hire and/or retain only those persons authorized to work in the United States. It also requires you to protect workers against discrimination on the basis of immigration status, nationality, accent, or appearance. This guide provides the steps for both verifying employees' work eligibility and for ensuring that their civil rights are not violated-whether you are making hiring decisions.

First, the guide defines INA fully. It describes how the law affects you and explains how to avoid

From the Commissioner

Dear Texas Employer,

On July 1, 1998, I was appointed by Governor Bush to be your representative at the Texas Workforce Commission. I am very grateful for this opportunity and will work diligently to serve you well.

When Governor Bush discussed my appointment, he emphasized that an "employer needs-driven" workforce system is essential for the future of Texas. I believe such a system does more than place welfare recipients in jobs or refer other qualified workers to fill currently open jobs. It also creates and sustains a qualified workforce on an on-going basis. Over time, employers should see a workforce system as a network of partners listening to employers' needs, and working together to provide effective, affordable, workforce solutions on a timely basis. This system should help to promote global competitiveness and economic success for all employers in Texas.

So, what steps have been taken to bring about this type of system? In 1995, the Texas legislature took the bold step of merging more than twenty-five workforce programs from ten state agencies to form the Texas Workforce Commission. Further, they created twenty-eight local workforce development regions throughout Texas. These regions are to be governed by local workforce boards, with members appointed by Chief Elected Officials of those regions. By law, the board chair position must be held by an employer, and employers must constitute a majority of the membership of each board.

Each local workforce board is responsible for developing a workforce plan and strategy for their service area, establishing at least one "one-stop" Texas Workforce Center, obtaining resources, and contracting with various providers (including for-profit companies) to implement various workforce programs, and holding each accountable for results. The role of the Texas Workforce Commission is to promote and support this network of local workforce boards, assist in training and support, and hold them accountable for results. It also retains accountability to operate certain statewide programs not under the control of the local boards.

To date, twenty-one of the twenty-eight boards have met necessary requirements and are fully operational. There are ninety-four Texas Workforce Centers established in these workforce regions. Several more boards will be operating by the end of the year. This structure will give you, the employer, much greater input to those who decide which training programs and services will be offered in your area. I encourage you to familiarize yourself with your local workforce board, its Workforce Centers, and its plans to address your needs. These boards are a key resource to you in solving your workforce development needs.

To support this emerging Texas workforce system, TWC has downsized the number of state positions from a high of 6,077 to a current level of 4,243 positions, thereby reducing the amount of overhead at the state level, and moving more funding and resources under local control. Many of these experienced people are now closer to you as their customer, and are operating under local, not state level, priorities.

TWC is investing in more effective technology tools and systems to provide the information that you the employer need to succeed and that the workforce boards need to serve you better. For example, now you can access a rich variety of employment information, including labor law issues that you probably encounter. Next spring, an improved Internet-based labor exchange system will let you post your job and skill needs, and search for interested, qualified workers on a more timely basis. You will be able to see other forms of labor market information that may help you develop competitive advantage in recruiting and hiring.

Employers know that learning is a life-long endeavor. It is in business' best interest to engage in and support a workforce development system that takes a long-term view, and one that is closely linked to K-12 education, to post-secondary education, and to other workforce training and education providers. Employers need to work closely with workforce boards and training providers to implement strong programs for their incumbent workers, and for other adults seeking jobs and opportunities to become self-sufficient. There are many programs (including

money saving programs through the TWC) that can help address these needs. TWC's Skills Development Fund, a very flexible,responsive fund, assists employers by financing customized job training. In the past year, it enabled 247 businesses to train workers for over 15,000 jobs. Through the Work Opportunity Tax Credit, Texas employers will save approximately seventy-two million dollars this year by applying for tax credits when hiring certain types of workers.

It will take strong leadership and persistence from the business community, working with elected officials and leaders of public and private education and training organizations, to develop and implement the kind of comprehensive education and workforce system Texas needs.

While much progress has been made in many areas, there is still much to be done. I encourage you to become involved with your local workforce development board. A list of boards and board representatives is available on TWC's web site at http://www.twc.state.tx.us. Also, please write to me at employerinfo@twc.state.tx.us with your ideas and suggestions concerning the development of an "employer needs-driven" workforce system, or for statutory reforms that would benefit employers.

I am proud to serve you as your employer commissioner. I look forward to working with you in creating an "employer needs-driven"workforce system for Texas.

Sincerely,

Ron Lehman

Ron Lehman
Commissioner Representing Employers

Texas Business Conference Dates ——Winter 1998——

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include the Texas Payday Law, Hiring, Firing, the Unemployment Insurance hearing process, and Sexual Harassment in the Workplace.

To keep costs down, lunch will be on your own. The registration fee is $60 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend. We hope to see you in the winter season.

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immigration-related employment discrimination. It outlines easy-to-follow procedures for hiring employees and explains the "Employment Eligibility Verification Process" (Form I-9). The guide includes a list of documents that are acceptable in determining employment eligibility. Finally, it provides you with questions and answers to "tricky" hypothetical situations.

If you have further questions about how to comply with INA, please contact the Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices of the U.S. Department of Justice. Another excellent source of information on this topic is The Handbook for Employers published by the Immigration and Naturalization Service (INS). To obtain a copy of the Handbook, please contact the INS.

Staying in compliance with INA's antidiscrimination provisions-and avoiding costly penalties and fines-is a simple matter. Just "look at the facts, not at the faces" when making hiring decisions, and follow these three basic rules:

• Fill out an "Employment Eligibility Verification" form (INS Form I-9) for every new employee, including U.S. citizens.

• Allow your employees to show you documents of their choice-as long as the documents prove identity and work eligibility and appear on INS' list of acceptable documents. You may not ask for specific documents.

• Do not ask for more documents than required.

For more information on INA's antidiscrimination provisions, please contact OSC at the Civil Rights Division, U.S. Department of Justice, P.O. Box 27728, Washington, DC, 20038-7728, or call 1-800-255-8155. The TDD number for the hearing impaired is 1-800-362-2735.

For a copy of the Handbook for Employers, please contact the U.S. Immigration and Naturalization Service at 425 Eye Street, Washington, DC 20536.

What is INA?

The Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA) was the first Federal law making it illegal for employers to knowingly hire persons who are not authorized to work in the United States. The law was an attempt to reduce the stream of undocumented workers entering this country in search of jobs.

INA requires that you, as an employer, check documents to confirm the identity and work eligibility of all persons hired after November 1986. To remain in compliance, you must-

• Hire only those persons authorized to work in the United States.

• Ask all new employees to show documents that establish both identity and work authorization.

• Complete the INS Employment Eligibility Verification Form I-9 for every new employee-U.S. citizens and non-citizens.

Noncompliance with the Form I-9 requirements may result in sanctions against employers.

Congress also recognized that these employer sanctions might discourage you from hiring certain eligible workers if they looked or sounded foreign. Therefore, the law also prohibits discrimination in hiring and firing on the basis of citizenship status or national origin. Employers who discriminate may be required to pay fines and penalties, to hire or rehire the employee, and to pay back wages.

How Does INA Affect You?

As an employer:

• INA makes it unlawful for an employer to knowingly hire, recruit, or refer for a fee any individual who is not authorized to work in the United States. It is also unlawful to continue to employ an undocumented worker or one who loses authorization to work. (Those hired before November 6, 1986, do not fall within this category.)

• You may hire anyone whose documents prove identity and work authorization in accordance with the I-9 requirements. There are many documents and combinations

of documents that are acceptable, as long as they appear to be reasonably genuine. (For a list of acceptable documents, see the back of the I-9 form.)

• You must treat all job applicants and employees equally - whether they are U.S. citizens or non-citizens. This means you may not discriminate in hiring, firing, recruiting, or referring for a fee, nor are you permitted to retaliate against an employee who has filed a discrimination charge or participated in an investigation.

Types of Immigration-Related Employment Discrimination:

• Citizenship status discrimination refers to unequal treatment because of citizenship or immigration status.

• National origin discrimination refers to unequal treatment because of nationality, which includes place of birth, appearance, accent, and can include language.

• The Office of Special Counsel (OSC) enforces the provisions against discrimination. OSC covers all cases of discrimination based on citizenship status by employers of four or more employees. It covers national origin discrimination with employers of four to fourteen employees. The Equal Employment Opportunity Commission has jurisdiction over employers of 15 or more.

What Are INA's I-9 Requirements?

"I-9" is short for Form I-9, the "Employment Eligibility Verification" form developed by INS as a way for employers to document the fact that they are hiring only persons who are authorized to work in the United States. Over time, the term "I-9 requirements" has come to describe the entire process of verifying worker eligibility outlined out in INA.

As an employer, to comply with INA's I-9 requirements, you must:

• Complete the I-9 form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. You must also make the forms available for government inspection upon request.

• Verify, on the I-9 form, that you have seen documents establishing identity and work authorization for all your new employees-U.S. citizens and non-citizens alike-hired after November 6, 1986.

• Accept any valid documents presented to you by your employee. You may not ask for more documents than those required and may not demand to see specific documents, such as a "green card".

• Remember that work authorization documents must be renewed on or before their expiration date and the I-9 form must be updated - this is also called "reverification." At this time, you must accept any valid documents your employee chooses to present, whether or not they are the same document provided initially. (Note: You don't need to see an identity document when the I-9 is updated.)

Remember, you are free to hire anyone who can show documents establishing his or her identity and authorization to work. Any of the documents (or combination of documents) listed on the back of Form I-9 are acceptable as long as they appear to be reasonably genuine.

How Can You Avoid Immigration-Related Employment Discrimination?

As an employer, to comply with INA's antidiscrimination provisions, you should:

• Let the employee choose which documents to present, as long as they prove identity and work authorization and are included in the acceptable list on the back of the I-9 form.

• Accept documents that appear to be genuine.

As an employer, to avoid employment discrimination based on nationality or citizenship status, you must:

• Treat all people the same in announcing the job, taking applications, interviewing,

offering the job, verifying eligibility to work, hiring, and firing.

• Remember that U.S. citizenship, or nationality, belongs to all individuals born of a U.S. citizen and all persons born in Puerto Rico, Guam, the Virgin Islands, Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

• Avoid "citizens only" hiring policies or requiring that applicants have a particular immigration status. In most cases, these practices are illegal.

• Give out the same job information over the telephone, and use the same application form for all applicants.

• Base all decisions about firing on job performance and/or behavior, not on appearance, accent, name, or citizenship status of your employees.

What Would You Do?

Read each of the cases below. Circle "Yes" or "No". Answers are given below.

1. Saving Time

Your crew boss catches you before you start interviewing people for a job. He says, "Find out if those two near the door have their 'green cards' before you waste your time."

Did you discriminate in hiring?

Yes No

2. The Cooperative Executive

You are president of a company. After hearing about INA's penalties for hiring undocumented workers, you issue a memo stating, "Let's go along with the government on this one. Please be careful when hiring people who look like they crossed the border illegally."

Have you committed national origin discrimination?

Yes No

How about citizenship status discrimination?

Yes No

3. On the Way Out

The rainy spring caused your lettuce harvest to be less abundant than usual. You need fewer farm workers than you hired for the season. In deciding between Hector Fernandez and José Gonzalez, you keep Hector because he is a legal permanent resident and José, an asylee, only has a temporary work permit.

Have you committed citizenship status discrimination?

Yes No

4. A Stitch in Time

You gladly hire Lily Chou because she told you how she beaded sweaters in Taiwan. You are surprised when she hands you a California driver's license and an unrestricted Social Security card for the I-9 form. (Note: Some Social Security cards are restricted and bear the inscription "Valid Only with INS Authorization" or "Not Valid for Employment.") "Miss Chou," you say, "I must see a card from the INS."

Does Lily Chou have a case against you?

Yes No

5. Hire American

You manufacture precision cast parts. Ordinarily, any one of your 12 employees knows someone who can fill an open position. You tell them unofficially that you prefer that they bring applicants who are U.S. citizens-and you fill out the I-9 form for everyone they bring.

Are you in compliance with INA?

Yes No

6. Temporary Workers

You hire Billy, John, Paul, and Sam just for a weekend to clean windows in your office building. You would have hired Ngo except that he looked too "foreign."

Are you violating the antidiscrimination provisions?

Yes No

7. French Person With a Fault

Three men apply to manage the front desk of your four-star hotel. One has more experience than the other two, but you refuse to hire him because all he has for the I-9 form is an unexpired French passport with an unexpired work authorization

stamp. You ask him for "a driver's license, anything." The next person has only a temporary resident card that expires in nine days. That's too close for comfort. So, you hire the third applicant, who has a valid Canadian driver's license.

Are you discriminating?

Yes No

8. Useless Regret

The person you chose to run your jacquard loom was unable to show documentation for the I-9 form. She said she would send for it, but you turned her down because you didn't want to get into as much paperwork as Martha required the last time. You hired your second choice, a woman with less experience but valid papers in hand.

Did you violate INA?

Yes No

Answers

1. Saving Time

Yes. First of all, it is recommended that you wait until you hire an individual before asking him/her for papers to verify his/her identity and work authorization. However, if you ask for papers ahead of time only from people who appear to be "foreign," you are discriminating on the basis of national origin. You must treat all applicants equally, and, when you review their papers, you cannot insist on seeing particular documents if they have already shown you valid documents. Otherwise, you are engaging in document abuse.

2. The Cooperative Executive

Yes, you are engaging in both types of discrimination (national origin and citizenship status). When you ask new hires to fill out the I-9, you must do so for all new hires. Also, you must treat all new hires in the same way when verifying work eligibility, regardless of whether they are immigrants or members of a particular nationality.

3. On the Way Out

Yes. This is definitely citizenship status discrimination. You cannot fire a protected individual under INA because he/she has a temporary work permit as opposed to legal permanent residency. A protected individual is a U.S. citizen, national, permanent resident, temporary resident, refugee, or an asylee. In any event, your firing decision cannot be based on this factor. Otherwise, your actions will be considered discriminatory by OSC.

4. A Stitch in Time

Yes. Lily Chou has a very strong case against you. You should have let her choose which valid documents to present as proof of her identity and work authorization. A California driver's license proves identity and a unrestricted Social Security card proves work authorization. Your insistence on seeing an INS card is called document abuse, and this is a discriminatory practice.

5. Hire American

No, you are not in compliance with INA. Unless otherwise required by law, you cannot have "citizens only" hiring policies. If you insist on doing so, you are engaging in citizenship status discrimination.

6. Temporary Workers

Yes. You cannot deny work to individuals because they looked too "foreign." This is national origin discrimination. And, if you wrongly assumed that Ngo was unauthorized to work, you have also committed citizenship status discrimination.

7. French Person with a Fault

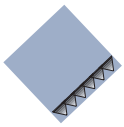
Yes, you are discriminating. The unexpired French passport, with an unexpired work authorization attached, is sufficient documentation to show that the applicant is work-authorized. So is the person with the temporary resident card. When the card expires in nine days, you can ask him/her to reverify work authorization in Section 3 of the I-9 form. The third applicant did not show sufficient documents to establish work authorization. A Canadian driver's license is a permissible document to establish identity, but it does not establish authorization to work in the United States. Therefore, the applicant would also need to show you a document from List C.

Remember, for reverification purposes, the individual again has the right to show the valid documents of his/her choice. These documents don't have to be the same ones that he/she

presented initially. If you insist on seeing the same documents, you are engaging in document abuse.

8. Useless Regret

Probably. Although you may choose not to allow applicants 3 days to present valid documents, you must treat all applicants equally. The paperwork requirements are the same for citizens and non-citizens alike.



New Hire Reporting Becomes Mandatory

On October 1, 1998, the "New Hire Reporting" provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) took effect. These provisions require all employers to report specific information about newly hired and rehired employees to a State Directory of New Hires. The primary purpose of the program is to increase the state's ability to locate non-custodial parents and enforce child support orders. Other state programs, such as Unemployment Insurance, Workers' Compensation, TANF and Medicaid, will use the information in this registry to detect fraudulent claims.

Under the PRWORA, the definitions of "employer" and "employee" are the same as those in the federal income tax code. In general, employers must report information about any individual who completes a W-4 (Employee Withholding Allowance Form) at the inception of the employment relationship and/or to whom the employer will issue a W-2 (Wage and Tax Statement). Employees who return to an employer after a recall from layoff or otherwise returning from a leave of absence must also be reported if the employee is required to submit a new W-4 to the employer. Employers are not required to report information about employees who were employed prior to October 1, 1998 and have subsequently remained in employment with that employer.

The federally required information employers must submit includes:

- Federal Employer Identification Number
- Employer name
- Employer address
- Employee Social Security number
- Employee name
- Employee address

Employers may voluntarily supplement their reports with each employee's date of hire, date of birth, expected salary or wages, and the employer's payroll address for mailing of notice to withhold child support.

Texas employers must report this information to a State Directory of New Hires within 20 days of each employee's first day on the job. Multi-state employers may choose to report all new hire information to a single state, but these employers must report new hires twice a month, with each report being not less than 12 and not more than 16

days apart. Additionally, multi-state employers opting to report all new hires to a single state must notify the Department of Health and Human Services in writing to designate the state it has selected.

Employers may submit the information by sending a copy of the employee's W-4, by using the State of Texas New Hire Reporting Form, by sending a printed report with all of the required information, or by calling the Texas New Hire Reporting Center at 1-888-TEX-HIRE and reporting the information verbally. Employers may also submit the information electronically in an approved format.

Additional information is available from the Texas Employer New Hire Reporting Operations Center, including Electronic Reporting Specifications and the New Hire Reporting Form. You may obtain these documents and other general information by calling (888) 839-4473, faxing your questions to (800) 732-5015, sending e-mail to txhires@flash.net, or visiting their web site at http://www.TexasNewHire.state.tx.us. The National Directory of New Hires also makes information available online at http://www.acf.dhhs.gov/programs/cse/newhire/nh/nh.htm.

Mark A. Fenner
Legal Counsel to
Commissioner Ron Lehman

CRITICAL WAGE AND HOUR NEWS: TWC ADOPTS RULES INTERPRETING THE TEXAS PAYDAY LAW

As many of you know, several years ago the Texas Legislature gave the Texas Workforce Commission (TWC) the authority to administer the Texas Payday Law. This law allows employees to file wage claims with the Labor Law Department of the TWC against their employers when they believe they have not been timely paid all wages that are due. The law is quite strict. Many employers have complained that because administrative rulings of agency hearing officers are not appealable to the three member Commission, there are no published precedents to prohibit arbitrary rulings. The TWC has responded to this call for action by adopting reasonable rules that interpret the Texas Payday Law. This article will outline some of the more notable provisions of the new rules.

The new rules address a variety of topics. For example, the rules deal with fringe benefits, commissions, draws, loans and deductions. The rules also address jurisdictional issues such as claim validity, claim withdrawal, appeals, etc.

The Texas Payday Law does not cover political subdivisions of the State of Texas. **Section 821.4** of the Payday Rules clarifies which entities constitute political subdivisions of the State. This section lists numerous examples of political subdivisions and also provides a definition for those entities that do not appear on the sample list.

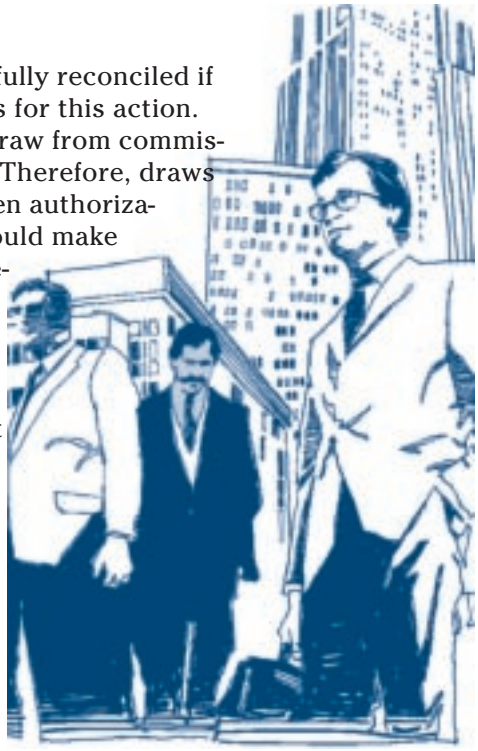
The Texas Payday Law applies only to employees, not independent contractors. **Section 821.5** of the Rules adopts a guideline to assist employers in determining whether workers are actually employees. The Rules incorporate the same criteria used by the TWC Tax Department to make employee/independent contractor determinations. This will allow employers some degree of consistency on this issue regardless of which program area is examining the question.

The Texas Payday Law specifies how long an employer has to pay final wages to departing employees. While the statutory provision of six calendar days is simple enough for terminations, the resignation provisions are a bit more complex. The Statute requires that employers pay employees who have resigned by the next regularly scheduled payday. The Statute was not clear on when wages were due if the resignation happened to occur on a payday. **Section 821.22** of the Rules clarifies that in this situation an employer has until the next regular scheduled payday following the resignation date in which to make final payment of wages.

For many years the Labor Law Department of the TWC had to analyze fringe benefit claims without much statutory guidance. The Texas Payday Law merely indicated that fringe benefits, like vacation and sick

leave, became a payable wage if promised in writing. The Statute did not address how written fringe benefit policies should be analyzed when an employee separated from employment. **Section 821.25** of the Rules clarifies this issue by indicating that no vacation and sick leave benefits are due upon separation unless the employer's written policy or agreement specifically requires that these benefits be paid upon separation. This provision of the Rules is consistent with the Labor Law Department's prior interpretation of the Statute. The Rules clarify that accrued leave time of an employee shall carry over to subsequent years only if a written agreement or policy specifically provides for such carryover. This section of the Rules also indicates that the sale of a business is equivalent to a termination for purposes of determining the payment of accrued fringe benefits. Finally, **Section 821.25** formalizes the Labor Law Department's practice of excluding expense reimbursements from the definition of wages.

Section 821.25 of the Rules deals with commission pay agreements. The basic thrust of this section is to encourage employers to address as many issues as possible in advance. Employers should define how and when commissions are due, both during and after employment. The Rules specify that commission agreements can be verbal or written, but that changes to written agreements must be in writing. The best provision in this section of the Rules indicates that draws against commissions may be recovered from the current or any subsequent pay period until fully reconciled if the commission agreement allows for this action. This clarifies that recovery of a draw from commissions is not a payroll deduction. Therefore, draws may be recouped without a written authorization. Nevertheless, employers should make it clear in their commission agreements that draws may be recouped at any time.



Section 821.27 addresses loan repayments. The Rule states that while written permission is needed to make deductions from wages for a loan made by the employer to the employee, the TWC will give credence to the agreed upon amount, even if that amount causes an employee's wages to fall below the federal minimum wage. However, an employer may not deduct an amount greater than the amount agreed upon in writing by the parties.

Employers have often been confused about the types of items they can deduct from an employeeís wages (assuming they have obtained the necessary written permission). The Payday Law merely indicates that deductions can be made for a 'lawful purpose'. **Section 821.28** of the new Rules indicates that a lawful purpose is one that is authorized, sanctioned, or not forbidden, by law. This essentially means that every purpose is lawful unless there is a specific law that prohibits the deduction. This is excellent news for Texas employers. However, employers need to be careful about several other provisions of **Section 821.28.** First, employers need to know that written authorization for deductions needs to be sufficient to give the employee a reasonable expectation of the amount to be withheld from wages. All existing deduction authorizations should be reviewed to determine if this element has been met. Second, employers would be wise to use a separate form, as opposed to a company handbook, to obtain deduction authorizations. The Rules indicate that employee handbooks and policies are sufficient authorization only when the employeeís signed acknowledgement of receipt of the policies specifically informs the employee of the deduction and includes language that the employee agrees to be bound by the authorization for deduction. This is a substantial requirement. Employers with existing authorizations found in company policies should do a thorough review to determine if their authorizations meet this new standard.

Section 821.44 of the Rules defines when an employee or employer acts in bad faith. Since the TWC can impose administrative penalties for acting in bad faith, employers should become familiar with both the Statute and the Rules. An employer acts in bad faith when the employer

acts with the knowledge that the failure to pay wages is in violation of the Act or in reckless disregard for the requirements of the Act. An employee acts in bad faith when he files a claim with the knowledge that the claim is groundless or solely to harass the employer against whom the claim is brought.

Section 821.45 of the Rules deals with Appeals. This section is a big change from past practice. In the past, employers who filed an appeal from an original ruling of the Labor Law Department were assured that the Special Hearings Department would not make a decision that would raise the amount of the wage order, unless the claimant also appealed. Under the new Rules, the amount of wages in controversy will be a part of all appeals. Parties who file an appeal could end up being worse off than leaving the original ruling in place.

In summary, the new Texas Payday Rules are generally good for business. However, employers need to become familiar with the new Rules because some provisions represent significant changes from past practices. Your knowledge of the Rules could mean the difference between winning and losing a wage claim. Copies of the Rules can be obtained by calling the Texas Workforce Commission's Labor Law Department at **1-800-832-9243.**

Aaron Haecker
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Ron Lehman

Legal Briefs

On June 26, 1998, the United States Supreme Court issued two landmark decisions concerning sexual harassment. These rulings are being heralded by some as a welcome clarification to what has often been a confusing and incomprehensible area of the law. On the other hand, the pair of 7-2 rulings not only raise a number of new questions, they have also increased the likelihood that an employer can be found vicariously liable for the sexually harassing conduct of their supervisors. Basically, the Court ruled that an employee can recover monetary damages from an employer even if the employer was not negligent and had no knowledge of the sexual harassment whatsoever.

Ellerth v. Burlington Industries, Inc., 1998 W.L. 336326 (1998) addresses the issue of whether an employer can be held vicariously liable when a supervisor sexually harasses a subordinate. While the supervisor threatened to take adverse job action, such threats were never carried out. However, the Court accepted the district court's reasoning that the supervisor's conduct was severe and pervasive enough to create a hostile working environment.

The Court went on to rule that employees may sue for sexual harassment even if they suffer no tangible employment action. Here, Ms. Ellerth, a salesperson, alleged she quit her job after 15 months due to a male supervisor's constant sexual harassment. The harassment allegedly consisted of offensive gestures and remarks, and several thinly veiled threats of what could occur if she was unreceptive to her supervisor's sexual overtures and comments. At one point, Ms. Ellerth's supervisor told her to "loosen up," and that he "could make (her) life very hard or very easy at Burlington." No adverse employment actions were taken against her, and in fact, she received a promotion during the period of alleged harassment. Even though no unfavorable employment actions were taken against Ms. Ellerth and she did not complain about her supervisor's conduct before quitting, the Court ruled that she could sue Burlington nonetheless.

The Court went on to say that if tangible employment action (i.e., demotion, firing, transfer to a less desirable job or denial of a promotion) has not taken place, in order to avoid liability, an employer must show that it "exercised reasonable care to prevent or correct promptly any sexually harassing behavior" and that "the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise."

That same day, the Court applied its reasoning in Ellerth in Faragher v. City of Boca Raton, 1998 W.L. 336322 (1998). Here, the Court held the employer liable for the actions of two male supervisors after two female lifeguards claimed they had been subject to years of lewd and disparaging remarks and

"uninvited and offensive touching." According to Beth Ann Faragher, she was repeatedly touched without invitation during her five years as a lifeguard for the city. One of her supervisors frequently put his hand on her buttocks and his arm around her, and made demeaning and crude comments about women in general. Ms. Faragher contended that a second supervisor engaged in similar conduct, including commenting on the bodies of female lifeguards, making vulgar references to women, and telling female lifeguards that he would like to have sex with them. Neither Ms. Faragher nor a female co-worker complained to higher management before resigning; however, one of the women did speak informally with another supervisor about the alleged harassment. This supervisor failed to report the complaint to his supervisor or to any other city official.

Although the harassment was never officially reported to management and no adverse employment actions were taken against the women, the Court held that the City could still be held liable even though it did not know that the inappropriate conduct was occurring.

In order to constitute illegal harassment, the Court stated that the conduct must create a "sexually objectionable environment" that is "objectively and subjectively offensive." In English, this means that a reasonable person would find the conduct to be abusive or hostile and that the victim in fact perceived the conduct as such. The majority ruled that to make this determination, all of the circumstances must be reviewed, including: the frequency of the discriminatory conduct; its severity; whether it was physically humiliating or threatening (or merely offensive commentary); and whether it unreasonably interfered with an employee's work. The key issue before the Court was whether the City should be held liable for the supervisors' harassing acts. After a discussion of 'agency' law principles, the Supremes ruled that this employer could be held financially liable.

Writing for the majority, Justice Anthony Kennedy wrote, "the supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. For these reasons, a tangible employment action taken by the supervisor becomes "the act of the employer." The Court held that if tangible employment action has not taken place, in order to avoid liability, an employer must show that it "exercised reasonable care to prevent or correct promptly any sexually harassing behavior" and that "the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

The Court did give employers some semi-good news in this case: in order to avoid the risk of automatic vicarious liability, an employer can establish an affirmative defense to liability or damages by showing that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the complaining employee unreasonably failed to take advantage of any corrective or preventive opportunities an employer provides or to otherwise avoid harm.

The majority ruled that the City could not assert this defense because it (foolishly) never distributed its policy prohibiting sexual harassment to the lifeguards and made no effort to monitor its supervisors' behavior. The Court then held that as a matter of law, the employer did not exercise reasonable care to prevent the harassment. While Ms. Faragher was awarded only nominal monetary damages, she will probably be able to recover her attorneys" fees, which will undoubtedly be substantial.

What These Cases Mean to You

In both cases, the Court held that employers may be held liable for sexual harassment by their supervisors even when no tangible employment action (such as demotion or discharge) is taken. However, the Court also held that when a supervisor's act does not involve a tangible employment action, employers may defend themselves by showing they exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and the complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities.

According to Ernest Rossiello of Rossiello and Associates, P.C., the Chicago law firm which

handled Ms. Ellerth's case, the Court's decisions mean that "employers are going to be on the hook, they cannot bury their heads in the sand," when it comes to workplace sexual harassment. "The only way out (of vicarious employer liability for their supervisors' sexual harassment) is to have a strong policy in place and to educate supervisory people in advance."

Open lines of communication, well-trained supervisors, and consistent enforcement of workplace rules have never been more important. Once again, the importance of clear, understandable workplace policies which are written in plain English and distributed to and followed by all employees cannot be overemphasized.

Renée M. Miller
Legal Counsel to
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The Voluntary Contribution Option — is it right for your company?

Until now, private taxed employers could not avoid an increase in their state unemployment tax rate if they had a chargeback from unemployment benefits paid to former employees. However, a new law gives Texas employers the option of lowering their tax rate by voluntarily paying in all or part of their share of the benefits paid to a former employee. In return, their tax rate will be recalculated.

TWC will inform Texas employers of their 1999 tax rate in mid-December 1998. Those with chargebacks to their accounts will be able to analyze their particular situation to determine if it is cost effective to exercise the voluntary contribution option. An application for voluntary contribution will accompany the rate notice for accounts that have been charged with unemployment benefits in the three-year computation period from October 1, 1995 through September 30, 1998.
Any Texas employer who wishes to participate in this program will have 30 days to submit an election along with the desired reimbursement. The necessary adjustments will be made and a new rate notice recognizing the effects from the voluntary contribution will be issued.

To determine how a voluntary contribution could benefit your company, you need to examine where the break-even point occurs. The break-even point is found when the savings from a reduced tax rate equal a voluntary contribution. To better illustrate how a voluntary contribution works, consider these facts.

First, it might be prudent for an employer (with unemployment claims drawn only in 1998) to lower their general tax rate to zero. By buying back all of the charges, it is possible to break even in the first or second year while continuing to benefit by paying at the minimum rate through the third year. This example assumes that no additional claims are drawn subsequent to the election to participate.

Second, buying back 100% of the benefits drawn over a three-year period may not be cost-effective. In this case, an employer could elect to buy back a portion of those claims to reduce their tax rate. By following the instructions on the back of the voluntary contribution election form or visiting our web site, an employer can determine the smallest voluntary contribution necessary to lower their general tax rate in increments of 0.10%. Since a voluntary contribution is applied to the most recent quarterly charges first, it is possible for this allocation to help reduce subsequent annual rate computations. It is not, however, an absolute factor.

Every employer account is unique and each situation will require careful review to determine the optimum results. For more information on voluntary contributions, please visit our web site at http://www.twc.state.tx.us, call us at (512) 463-2756, or fax your questions to (512) 465-1221.

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