Texas Business Today

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What Can You Do Today to Affect Tomorrow's Unemployment Tax Rates? The Good, the Bad, and the Unknown

A large jump in new unemployment claims, especially those filed by recently laid off, highly paid workers, has battered the Texas unemployment insurance (UI) trust fund. The Texas Workforce Commission has already announced a small deficit tax increase for employers in 2002 to keep the fund solvent. And, you may have already read or heard news reports that even without considering the massive layoffs following September's terrorist attacks, Texas officials project the state's unemployment trust fund could face a shortfall of several hundred million dollars in 2002; this could trigger a potentially steep tax increase for employers in 2003.

Texas employers will receive their 2002 tax notices in December 2001. While final calculations are not yet available, to keep the UI trust fund solvent, higher taxes will result from an increase in the general tax rate for businesses that experienced layoffs during the last 12 months, the addition of a deficit tax, and an increase in the replenishment tax for all employers.

Along with unemployment insurance taxes, Texas employers have been contributing .10% of their taxable wages to a job training fund, the Smart Jobs Holding Fund. (The Texas Legislature passed a law during the last session which says the Fund will cease to exist on December 31, 2001). Current Texas law requires that funds in the Smart Jobs Holding Fund be transferred to the UI trust fund if the UI fund falls below an amount equal to 1% of the total taxable wages paid in Texas on October 1st of each year.

In September 2001, the Texas Workforce Commission projected a shortfall for the UI trust fund of $109.7 million. Fortunately, Governor Rick Perry and legislative leaders transferred money from the Smart Jobs Holding Fund to the UI trust fund before October 1st. Their actions reduced the shortfall to $27.4 million, thereby minimizing future tax rate increases for the greatest number of Texas employers.

And, Congress is currently grappling with ways to provide the States with significant additional funds to address increased unemployment benefit needs. It is no secret that in recent years, Texas and many other states have received far less in federal funds to administer their unemployment compensation programs than employers paid in federal taxes to support such purposes. To address that situation, the House of Representatives recently passed H.R. 3090, which will now be considered by the Senate. This bill would provide a "Reed Act" distribution of excess funds held in the federal unemployment trust fund to state unemployment accounts of $9.3 billion, of which Texas would receive about $644 million. This could help to keep employer taxes down in 2003.

These funds would be directly transferred into the state unemployment insurance trust fund, where they would be immediately available to provide regular unemployment insurance benefits for additional claimants; they could also decrease a tax hike on employers in 2003

The Good, the Bad, and the Unknown continued

and make it unnecessary to borrow from the federal loan account. (You may wish to contact both Senators Gramm and Hutchison regarding the positive impact the unemployment insurance provisions of H.R. 3090 could have on Texas.)

Paying state and federal UI taxes can certainly be a large expense for a business; that's the bad news. However, even in the midst of all this gloom, doom and economic turbulence, there is still some encouraging news: to a certain extent, this is one tax rate that you actually have some control over. How? By the way you hire, discipline, fire and manage unemployment claims. While state and federal laws prescribe how tax rates must be calculated, carefully handling each of these activities can have a dramatic impact on whether you will pay at the lowest tax rate – which 75% of all Texas employers did in 2001 – or at a higher rate. This article will focus on concrete suggestions to help you keep your tax rates as low as possible.

First, let's look at what your state employer tax rate means to your business in dollars and cents. In Texas today, the minimum UI tax rate is 0.24% which is paid on the first $9,000 of each employee's wages. If that's your tax rate, you will pay $21.60 per employee per year in state unemployment taxes. The maximum tax rate is currently 6.24%. If that's your company's tax rate, you will pay $561.60 per employee per year in state unemployment taxes. That's a $540 difference per employee between a Texas business paying at the lowest and the highest tax rates.

When an employee successfully draws benefits against your account, something called a chargeback occurs – and each chargeback has the potential to raise your tax rate. Every time your tax rate goes up by .1%, you will pay an additional $9 in state UI taxes. As of January 1, 2001, the weighted average tax rate for all 373,477 Texas employers was .94%.

What can you do to try to control these costs? Reduced to the very basics, how do you win the claims you should be winning? Without question, the federal and state unemployment compensation laws are remedial in nature and were designed to primarily help workers, not employers. There are only a limited number of ways a former employee can be disqualified, primarily by being fired for engaging in misconduct connected with the work or by quitting for personal reasons unrelated to the work. If the separation was due to misconduct, the employer will have the burden of proving it from start to finish.

To understand the unemployment insurance system in Texas, it is critical to understand a few key concepts. On the one hand, Texas remains an at-will employment state, meaning the employment relationship is indefinite in duration. An employer can fire an employee at any time, for a good reason, bad reason, or no reason at all, with or without notice. On the other hand, federal and state law define who is eligible to receive UI benefits after they have been fired. Here in Texas, the Legislature has given the Texas Workforce Commission the responsibility of determining which former employees will receive UI benefits within the statutory framework they have created. While you may have perfectly legitimate, business-related reasons for firing a worker, to prevail on an unemployment claim, you need to be aware of the legislative mandates the agency operates under.

In theory, the laws were designed to help workers who are out of work through no fault of their own. For example, if you have a layoff due to a work slowdown, that's not misconduct, and your former employees will be able to collect unemployment benefits. The same is true if an employee is simply unable to do the job to your company's satisfaction – they show up, go through training, come to work on time, but the quality of their work is never what it should be. Inability is not considered to be misconduct in either federal or state law, so you'll lose these cases.

However, there is an entirely different situation when an employee has violated your known policies, been chronically absent, insubordinate, rude, profane, violent, or negligent. These are the types of situations in which you can put a winning case for misconduct together. This is also one aspect of the employment relationship that you can – and must - be in control of from start to finish.

Here are 10 pointers to help you avoid making TWC claims harder to win than they already are while saving you tax dollars in the process.

1. **Hire carefully**. Get it right from the start by investing in the hiring process. Do your homework: do background and reference checks and preemployment drug screening before putting someone on the payroll. Don't make a bad hire assuming you're going to somehow "fix" it later. Businesses must be clearly aware of their goals up front and the kinds of skills, people, behaviors and competencies needed to meet those goals. Once you've defined your goals, finding the right person to hire may require you to interview job candidates longer and more often, asking more targeted questions

The Good, the Bad, and the Unknown continued

about job skills and attitudes and then listening carefully to their answers. You're looking for people with the skills you need; this includes both such hard skills as math, literacy and problem solving, as well as "soft" skills such as motivation and attitudes.

2. **Draft clear policies, get them out to everybody, and follow them consistently**. Have all employees sign a statement acknowledging that they have received and understood those policies, and then live with them, every time, with every worker.Clearly explain what the company expects of its employees in the simplest and most straightforward language possible. If you don't follow (or even know) your own progressive disciplinary policy, for example, you'll have an uphill battle showing how the claimant was on fair notice that he could lose his job for the reason given. On the other hand, failing to provide certain benefits promised in a written policy could possibly give an employee not only good cause connected with the work to quit, but could also lead to a successful payday law claim against you. Companies that carefully draft policies and warnings and just as carefully follow what they have put in writing are putting themselves into the strongest, most defensible legal posture possible.

3. **Document the case against the ex-employee while they're still employed**. Document, document, document. A simple rule of thumb: if it isn't in writing, the (mis)conduct didn't happen. All you've got then is a swearing match. If a claimant denies being warned or violating your policies and you don't have copies of warnings or attendance records, there's a good chance the claimant will win. If you fired an employee for policy violations, attendance problems, or violating warnings, submit copies of the policy, attendance records, or warnings that led to the separation. If the termination was due to poor performance, provide examples of the shoddy work, typos, grammatical or math errors that led to the separation.

4. **Do not fire employees without reasonable warnings.** Unless the misconduct involved is so serious that no reasonable employee could possibly expect to commit it even once and still have a job, TWC will look for evidence that the claimant knew his job was in jeopardy for the reason given by the employer. TWC hearing officers will look to see whether the employee had a reasonable chance to correct his poor performance or misconduct and save his job. Remember: an employee should never be surprised that (or why) they've been fired.

5. **Do not fire an employee when the urge arises**. Don't assume that what makes good business sense or what "feels right today" will be enough to convince TWC to disqualify a claimant or protect your account from chargeback. Remember: you've got to prove that the worker was fired for a specific act of misconduct connected with the work and that he either knew or should have known he could lose his job for such a reason. Take the time to do your homework while you still can. As an "at-will" employer, you can always fire a problem employee; however, once you've done so, you can't go back and put your case together.

6. **Do not miss a protest or appeal deadline**. A late protest to the claim notice means that you lose your appeal rights, including the right to protest chargebacks to your account. A late appeal means that TWC may not consider the reasons why a person no longer works for you no matter how compelling your case may be; without jurisdiction, TWC must simply dismiss the appeal. It doesn't always seem fair, but unless and until the law is changed, this is what employers will be confronted with. The solution? Respond to all TWC notices and rulings immediately. Treat every envelope from TWC like a ticking time bomb. If your business is going to be closed for an extended period of time during the holidays, for example, make sure that someone opens the mail at least once a week. Empower whoever is responsible for opening the mail with the authority to fax an automatic statement of protest to TWC so that you won't miss the appeal deadline. Develop a short form that simply says "We protest; more details will follow later," fill in the specifics of the claim (i.e., the claimant's name, social security number, etc.) and fax it to TWC immediately.

7. **If you need more time to gather information and witnesses or complete an investigation, say so.** To preserve your appeal rights, simply write a quick sentence or two of general protest stating that more information will follow later.

   If the person who ordinarily opens the mail is going out of town or if the office will be closed for several days, make sure that someone is still assigned to open your mail on a daily basis and authorized to take prompt action if needed.

8. **Do not assume that no news is good news**. Many employers mistakenly assume that if they don't hear back from TWC about a ruling or an appeal, the claimant has been denied benefits; closely related is

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New Texas Employment Laws

The dust from the 77th Session of the Texas Legislature is beginning to settle. Most of the labor and employment law bills that were filed have died leaving the employment law landscape in Texas virtually unchanged. However, a few bills did become law, and this article will update employers on *some* of those changes. Unless otherwise noted, all laws became effective on September 1, 2001.

WAGE LEGISLATION

House Bill 533 raised the Texas minimum wage. The Texas minimum wage was $3.35 per hour. House Bill 533 now ties the Texas minimum wage to the Federal minimum wage of $5.15 per hour. The Texas minimum wage will rise each time the Federal minimum wage rises.

House Bill 691 requires employers to deduct court ordered spousal maintenance (alimony) from the wages of employees. An employer is prohibited from refusing to hire or to fire an employee because the employee is under a court imposed withholding order. Employers are required to report to the court when an employee subject to a spousal maintenance withholding order is separated from employment. House Bill 691 imposes substantial penalties for employer noncompliance.

House Bill 2028 amended Chapter 61 of the Texas Labor Code. Chapter 61 provides a mechanism for employees to file claims for unpaid wages against their current or former employers. The Texas Workforce Commission (TWC) is required to adjudicate such claims and collect unpaid wages. House Bill 2028 indicates that when TWC files a lien against the property of an employer who has failed to pay wages that are due, the lien is superior to any other lien on the same property, with the exception of a lien for ad valorem taxes.

UNEMPLOYMENT LEGISLATION

House Bill 567 changed the yardstick by which the maximum and minimum amounts of unemployment benefits are calculated. In the past, benefit amounts were determined yearly based on a percentage of the Average Weekly Wage for Manufacturing Workers. House Bill 567 now requires that maximum and minimum unemployment benefit amounts be calculated each year based on a percentage of the Average Weekly Wage in Covered Employment.

House Bill 1109 changed the state unemployment insurance tax filing requirements for employers of domestic employees. In the past, these employers were required, like all other employers covered by unemployment insurance tax filing obligations, to file their wage and tax reports on a quarterly basis with TWC. House Bill 1109 eases that burden by simply requiring employers of domestic employees to file an annual report with TWC.

House Bill 1757 sets out a separate maximum unemployment insurance tax rate for one type of employer. Employers of "crop preparation services for market" will pay the lower of their experience tax rate or 5.4 percent. All other private taxed employers, with the exception of cotton-ginning employers, pay their experience tax rate, which is currently capped at a maximum of 6.24 percent. House Bill 1757 also does away with the requirement that cotton-ginning employers must file an annual request in order to receive a 5.4 percent rate.

New Texas Employment Laws continued

GENERAL EMPLOYMENT LEGISLATION

House Bill 2600 made numerous changes to the Workers' Compensation system in Texas. From a general employment law perspective, the most important change may be the provision dealing with waiver of an employee's right to sue. Under Section 406.033 of the Texas Labor Code, employees may sue an employer for negligence if they are injured and the employer does not have worker's compensation insurance. The Texas Supreme Court recently ruled that nothing in the Texas Labor Code prevented an employee from waiving their right to sue in exchange for the employer providing them with an alternative injury compensation package. House Bill 2600 amends Section 406.033 to override the Court's holding. Section 406.033 now makes it clear that an employee who is working for an employer who has not purchased workers' compensation insurance may not, in advance, waive their right to sue for work-related injury or death, regardless of whether the employer is providing them with an alternative injury compensation package. *This bill became effective June 17, 2001.*

House Bill 3473 prohibits an employer of a "professional" employee from discharging that employee for reporting (in good faith) child abuse or neglect. A professional employee means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. Employees who are wrongfully terminated under this law have substantial legal rights to sue and recover a variety of damages.

Aaron Haecker
Attorney at Law

Texas Business Conference Dates 2001/2002

Texas Business Conference

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

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Texas Payday Law, the Unemployment Insurance Hearing Process, Workers' Compensation, Hiring, Firing, Sexual Harassment and Policy Handbooks. To keep costs down, lunch will be on your own. The registration fee is $75 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend.

For more information, go to **www.texasworkforce.org/events.html**

- **Galveston - November 30, 2001**
- **Dallas - December 5, 2001**
- **South Padre - January 31 - Feb. 1, 2002**
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- **Lubbock - April 19, 2002**
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Advanced Strategies for Success in Unemployment Hearings

The essence of the employment relationship is that an employer exercises direction and control over employees; this includes the right to fire an employee at any time, for any reason that does not violate an employment contract or have a discriminatory purpose. However, the employment relationship changes dramatically once a worker is fired and becomes a claimant by filing an unemployment claim. At that point, state statute controls, at least to the extent of determining whether the claimant will receive benefits and if your account will be subject to chargeback. Your success in the appeals process depends on your ability to understand the laws the Texas Workforce Commission is charged by the legislature to interpret when determining which claimants will receive benefits. Please recognize that due process requires TWC to always allow the claimant an opportunity to contradict any facts you present, and you must anticipate and expect that the claimant will contradict your version of the work separation. Here are some examples:

Employer: "We fired him because he had a bad attitude."
TWC (to claimant): "Did you have bad attitude?"
Claimant: "No. In fact, my attitude was excellent."

Employer: "We fired the claimant for excessive absence and unacceptable attendance."
TWC (to claimant): "Were you excessively absent?"
Claimant: "No."
TWC: "Was your attendance acceptable?"
Claimant: "My attendance was excellent."

Employer: "We fired him because he committed a violation of our policies."
TWC (to claimant): "Did you violate the policy?"
Claimant (response #1): "I did not violate the policy."
Claimant (response #2): "I did what they say I did, but I didn't know that there was a policy."
Claimant (response #3): I did what they say I did, and I knew about the policy, but I was just following my supervisor's instructions."

Employer: "We fired him because of numerous customer complaints."
TWC: "What were the complaints?"
Employer: "The customers said the claimant was rude and drove our vehicle recklessly."
TWC (to claimant): "Were you rude and driving recklessly?"
Claimant: "No."
TWC: (to employer): "Are your customers available to give a statement about what they saw the claimant do?"
Employer: "No."

In each of these situations, the claimant would likely be paid benefits based on a lack of evidence to support a disqualification. Success in unemployment hearings requires you to anticipate that the claimant will deny any misconduct. Your task then is to present evidence to overcome the claimant's denials. The savvy employer recognizes that it is impossible to obtain evidence after the work separation occurs. Therefore, you must realize the risks involved if you discharge an employee before you have sufficient evidence to prevail in a hearing.

EASY CASES

Regular readers of *Texas Business Today* and all employers experienced in TWC's unemployment appeals process know all too well the value of firsthand testimony, or testimony based on personal observation. Any witness who can truthfully testify under oath in a hearing that the witness personally observed the claimant's conduct that caused the discharge is essential to the employer's success at the hearing. These are the easy cases: employers who have firsthand witnesses present the witnesses at the unemployment hearings and enjoy a high rate of success. But what about the employers who simply don't have firsthand testimony to prove the claimant's bad acts?

HARD CASES

The reality of today's workplace is that many workers are not subject to continuous, direct supervision. The most common form of evidence is circumstantial evidence. You didn't actually watch the employee commit the bad act, but you've reviewed documentation, and the employee has been warned in the past for the same bad conduct. You're convinced that the employee committed the bad act, but you also know that the employee will deny to TWC any wrongdoing. What's an employer to do?

One consideration is how you choose to tell your "story." Consider an employee who is given an assignment of calling five customers on the telephone. The employee leaves work without finishing the assignment. This worker has been warned before for failing to complete work. You're free to tell TWC that the worker was discharged for failing to complete assigned work, but the worker may readily admit that the work was unfinished at the end of the day. This is not the end of our analysis: we will always go on to ask the worker: "Why did you fail to complete the work?"

Advanced Strategies continued

"WITHIN THE REALM OF ALL POSSIBILITY"

You must recognize that there often exists *within the realm of all possibility* a legitimate explanation for almost any bad conduct a worker could commit. In the current example, the worker could simply claim that the worker didn't complete the assignment of calling five customers because the worker was serving other customers. The worker doesn't work under immediate supervision, so you have no way to disprove the worker's statement. A worker who fails to call customers because he's busy serving other customers will probably not be held to have committed misconduct.

CHANGING YOUR STORY

Tell a story that leaves the worker little or no opportunity to present a legitimate explanation for his actions. "We fired him because he left without telling anyone in authority that his assignment of calling five customers was not finished." The story has changed: it is now much harder for the worker to explain why he left work without at least letting someone know that the assignment was not finished. Nobody can reasonably expect a worker to complete ten hours of work in an eight-hour shift. But no worker should be excused from the expectation to report to a supervisor before leaving for the day and say: "I didn't complete the assignment."

NOT QUITE FINISHED

You should complete the entire analysis laid out above before you discharge a worker. You've outlined an accurate story that the worker can't reasonably wiggle out of, but you're not yet ready to discharge the worker. With an observer present, sit the worker down and ask why the assignment wasn't completed and why the worker didn't tell someone in authority before leaving. It's entirely possible that the worker will tell you that a supervisor told the worker not to complete the assignment and that the supervisor had already checked with you. Before going any further, you may confirm that the worker is telling you the truth, and suddenly this worker is no longer your problem. Instead, you may have to discipline a supervisor!

The two key points at this stage are to have an observer present and ask the worker to explain the worker's actions before you carry out the discharge. The presence of the observer provides you with the evidence to prove what was said between you and the worker. You and your observer can corroborate each other's version of the discharge meeting. Offering the worker a chance to explain the situation gives you information that may stop you from carrying out the discharge, or it gives you the evidence you'll need later at a hearing, specifically that the worker was given a chance to explain and could offer no legitimate reason for his actions.

Finally, recognize that this situation will play out in your favor only if you gave the original assignment the right way. Give the worker a deadline and tell the worker what's expected if the deadline won't be met: "Talk to me before you leave if you don't call all five of these customers."

"I WATCHED HIM STEAL"

No reasonable employer would stand idly by and do nothing but watch as an employee stole the employer's property. Nevertheless, many employers believe that an employee has stolen, and they want to fire that worker. The worker will never openly admit to a TWC hearing officer that he stole your property. The employer's statement that the claimant stole the

Advanced Strategies continued

employer's property, based on nothing more than circumstantial evidence, will not support a disqualification.

Consider the worker who carries out the following theft. The worker's job duties include completing documentation used to produce a custom-made product for customers. The worker is also responsible to complete documentation used to charge the customers later when they pick up their finished order. However, the worker doesn't complete the second half of the documentation for the customers who happen to be the worker's own family members. As a result, the worker's family takes delivery of the finished products without making payment.

In a case like this, the evidence will be in the form of the documentation produced by the fired worker to show that the worker knew how to correctly complete all of the documentation for any given transaction. Additionally, there will be documentation to show that the worker failed to collect payment from the worker's family members. And notice the most important aspect of this example: your story. This is not an example of a worker who is fired for stealing. This worker is fired for the offense of failing to carry out the worker's job duty of completing required documentation for a routine sale transaction.

TRAIN A TWC WORKER TODAY

Employers often fail to recognize that their operations are in no way "standard." Also, it's not the job of a TWC claims examiner or hearing officer to know how every Texas employer conducts business. That makes it your job to quickly explain the relevant parts of your business so that our employees can understand the acts of the claimant that brought about the discharge. Provide us with copies of your production reports, audit forms, sales summaries, or any other documents that will allow us to understand your business. Don't assume it's obvious, because it's not. If you have to train new workers when they're hired, you'll have to train us too. Only if we know how your business works will we be able to conclude, like you, that a claimant's conduct was misconduct.

THE END OF THE BEGINNING

This article is only the beginning. The important points to remember are that you must obtain your evidence before you actually carry out a discharge. Also, the way you tell your story can completely change the outcome of any given case. If you don't know how to present the facts of your case in a way that tells a story of misconduct, please call our office immediately at 800-832-9394 and speak to one of our staff attorneys. Many employers who do this find out that they don't have the facts necessary to prove misconduct, and they're left to issuing a warning and putting a worker back to work. That might not be the best outcome, but it's always better than being charged for an unemployment claim when you discharge a worker and can't prove misconduct. Future articles will cover other advanced strategies for unemployment hearings.

Jonathan Babiak
Attorney at Law

Breaking News: Free New Service Allows Employers to file Quarterly Tax and Wage Reports Online

Paying taxes isn't anyone's favorite task. However, the Texas Workforce Commission (TWC) has developed an electronic payment service that will at least make it somewhat more convenient. The Payment Online System is a free service that enables employers to submit quarterly tax payments to TWC by using the Automated Clearing House debit. Employers who file their quarterly tax and wage reports electronically will no longer have to mail in their remittance to TWC to complete the quarterly filing process.

Before using this new system, you must become a member of the Employer Tax Information Online System. Registration is free, and once you have registered, you will receive a logon ID and password in the mail. To register as a new online user, visit the agency's website at www.twc.state.tx.us/ui/tax/payonline.html and follow the instructions set out there. To register by phone, please call (512) 463-2699.

For security purposes, the registration confirmation, along with your new logon ID and password, will be mailed to your employer address of record within 3 to 5 business days. For additional information, view the "Things You Should Know About Payment Online" page at the agency's website, www.texasworkforce.com.

If you have suggestions on how we can better serve you, please do not hesitate to e-mail the Tax Department at tax_dept@twc.state.tx.us.

Observations from the Dais – Fall 2001

Dear Texas Employers,

The thoughts and prayers of all of us at the Texas Workforce Commission are with everyone who was touched by the tragic events of September 11, 2001. To any of you who were personally affected, we send our deepest condolences; you are in our hearts.

Having said that, I must tell you that I never cease to be amazed by the hard work, creativity, and positive contributions Texas employers make to the State and its people – in good times and bad. Yes, we have recently seen higher unemployment rates and a roller coaster ride on Wall Street. However, this is still a very good time to be in Texas, thanks in large part to your efforts. I firmly believe that we still have every reason to be optimistic about our future.

The Texas Workforce Network recently held its fifth annual workforce and economic development conference, "Better Together" in Houston. There were over 1200 attendees from all over the state. As a tribute to Texas businesses, it was truly a pleasure for me to participate in an awards ceremony honoring a number of Texas employers for their contributions to the Texas Workforce Network and their local communities. Today, as always, the key to the success of the workforce system is the involvement of employers throughout the state in providing direction to shape the system. In effect, these awards are the Texas Workforce Network's way of saying "Thank you" for a job well done to Texas employers who are helping us improve the state's workforce development system.

There were 28 regional winners of the 2001 Employer Awards of Excellence, each selected by their local workforce development boards. And, there were three statewide winners and one overall statewide winner – the 2001 Employer of the Year. The state level categories were:

Texas Current Workforce Award of Excellence
Texas Future Workforce Award of Excellence
Texas Transitional Workforce Award of Excellence
2001 Employer of the Year

The statewide award winners and their nominating workforce boards are:

Medical Plastics Laboratory, Inc.
Texas Current Workforce Award of Excellence
Central Texas Workforce Development Board

KARLEE – Texas Future Workforce Award of Excellence
WorkSource for Dallas County

Ron-Bar, Inc. – Texas Transitional Workforce Award of Excellence
West Central Texas Workforce Development Board

Seton HealthcareNetwork/St. David's HealthCare Partnership
2001 Employer of the Year
Capital Area Workforce Development Board

It is my privilege to announce the 2001 recipients of the Employer Award of Excellence and the local workforce boards that nominated them:

Advanced CallCenter Technologies
Cameron Works

Applied Materials, Inc.
Capital Area Workforce Development Board

Betty Hardwick Center
West Central Texas Workforce Development Board

The Boeing Company
Upper Rio Grande Workforce Development Board

Blue Cross/Blue Shield of Texas
Concho Valley Workforce Development Board

Budget Rent a Car Corporation
North Texas Workforce Development Board

Observations from the Dais continued

BWXT Pantex
Panhandle Workforce Development Board

Cargill Turkey Products
Heart of Texas Workforce Development Board

CitiCorp Data Systems
Alamo Workforce Development, Inc.

Cooper Power Systems
Deep East Texas Workforce Development Board

Cornell Corrections
Permian Basin Workforce Development Board

Doctor's Hospital of Laredo
South Texas Workforce Development Board

Halliburton Services
East Texas Workforce Development Board

H.E. Butt Grocery Company
Coastal Bend Workforce Development Board

Heldenfels Enterprises, Inc.
Rural Capital Area Workforce Development Board, Inc.

Integrated Health Services, Inc.
Tarrant County Workforce Development Board
dba Work Advantage

KARLEE
WorkSource for Dallas County

KGBT Radio 1530 AM La Primera
Lower Rio Grande Valley Workforce
Development Board

Madisonville State Bank
Brazos Valley Workforce Development Board

Nextel
Central Texas Workforce Development Board

NTS Communications
South Plains Workforce Development Board

Spherion Workforce Architects
Golden Crescent Workforce Development Board

Spherion
Southeast Texas Workforce Development Board

TCIM Services, Inc.
North East Texas Workforce Development Board

Texoma Healthcare System
Workforce Texoma

TYCO/Healthcare/Kendall-Commerce
North Central Texas Workforce Development Board

The University of Texas Medical Branch – Galveston
The WorkSource – Gulf Coast Workforce Board

Val Verde Correctional Facility
Middle Rio Grande Workforce Development Board

Congratulations to all 2001 Winners!

Sincerely,

Ron Lehman Commissioner Representing Employers

Legal Briefs – Fall 2001:

How Much Will Employment-Related Discrimination Cost In the Future? There's Good News and Bad News

When all is said and done, the vast majority of employment-related lawsuits come down to one thing: money. Just how many dollars in damages a plaintiff may recover in this type of litigation is a critical concern to businesses all over the country.

The United States Supreme Court recently issued a pair of decisions which address two very important types of damages: "front pay" and punitive damages. The good news for employers: the Court instructed the nation's federal appeals courts to closely examine the punitive damages a judge or jury have awarded. The bad news: the justices ruled that "front pay" awarded to a worker under federal discrimination law is outside the cap on damages. This second ruling serves to increase employers' financial exposure in these lawsuits; it may also encourage additional lawsuits because of the possibility of higher damages for a victorious plaintiff.

Front Pay: How the Debate Began

Prior to 1991, employees who successfully sued for employment discrimination in federal court could recover such remedies as lost benefits, back pay, reinstatement and attorneys' fees. Frequently, courts also awarded "front pay" to cover the period of time between the judgement and the worker actually being reinstated. In particularly acrimonious cases in which reinstating a worker to their former job was simply not an option, courts often awarded front pay for some period of time after the judgment while the worker looked for another job.

In 1991, Congress amended the Civil Rights Act to expand the types of damages available in these cases to include punitive damages (intended to punish an employer for engaging in discriminatory behavior and to deter others from doing the same) and compensatory damages (for pain and suffering). A limit or cap was set on these types of damages (increasing with the size of the employer) up to a maximum of $300,000. There are a number of types of damages specifically enumerated as covered by the cap including, "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." However, the amendments also state that punitive and compensatory damages are "in addition to" any previously available relief.

A thorny (and potentially expensive) question quickly arose: where does front pay fall in this new scenario? Was it a "future pecuniary loss" that would be governed by the $300,000 maximum, or was it a "previously authorized remedy," meaning it would be outside the cap? The recent Supreme Court decision demonstrates just how important this unresolved issue can be to an employer in dollars and cents.

The Facts

Sharon Pollard, a manager for E.I. du Pont de Nemours and Company, filed a lawsuit alleging that she had been subjected to such severe sexual harassment in the workplace that she was forced to take a medical leave of absence to seek psychological treatment. She went on to contend that she was fired when she refused to come back to work in the same hostile environment.

After trial, the judge awarded Ms. Pollard $300,000 for emotional distress (the maximum dollar amount of compensatory damages allowable under federal law), $253,000 in attorneys' fees, and $107,000 in back pay. Ms. Pollard asserted that she should also be entitled to $800,000 in front pay. The judge ruled that although "the $300,000 award is, in fact, insufficient to compensate (Ms. Pollard)," the cap covered front pay; he therefore denied her request. The Sixth Circuit Court of Appeals upheld the trial court's ruling, and Ms. Pollard then appealed to the U.S. Supreme Court. Last year, the Court agreed to consider whether Ms. Pollard might be entitled to an extra $800,000 in damages.

What the Court Just Did to Broaden Employers' Exposure

In a unanimous, 8-0 ruling, the Court held that front pay is outside the cap; they therefore sent the case back to the trial judge to reconsider Ms. Pollard's request for additional damages. The Court acknowledged that "future pecuniary losses" could appear to include lost wages suffered after a judgment was rendered. However, it ruled that congressional intent in passing the amendments in 1991 was to create *additional* remedies for employees who had been illegally discriminated against. The justices concluded that placing front pay within the cap could limit the availability of those damages.

The Court further reasoned that front pay is quite similar to back pay – which is expressly excluded from the cap. The justices noted that under the National Labor

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Relations Act, back pay is usually considered to include the period of time after a judgment is rendered and until the worker is reinstated in their job. *Pollard v. E.I. du Pont de Nemours & Company* No. 00-763, U.S. Supreme Court (June 4, 2001).

Punitive Damages To Get a Harder Look

Although the facts in the second crucial decision recently issued by the Supreme Court did not specifically involve an employment-related lawsuit, the case did involve a matter capable of striking terror in the most stalwart of employers: punitive damages. In reality, given the fact that some states (including Texas) do not cap the amount of damages available under state law coupled with the notoriously unpredictable nature of juries, punitive damages may very well constitute an employer's greatest financial nightmare.

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., No. 99-2035, U.S. Supreme Court (Mary 14, 2001) presented the question of how closely a federal appellate court should scrutinize a lower court's award of punitive damages. In the past, many courts have ruled that these awards should be reviewed only for "abuse of discretion;" this is a standard under which an award of punitive damages was seldom overturned.

The Supreme Court has now instructed federal appellate judges to examine punitive damages more closely. The justices held that federal appellate courts must engage in a "thorough, independent review" of the punitive damages if the defending party asserts that the damages violate constitutional guarantees (such as the prohibition against cruel and unusual punishment and excessive fines).

The Bottom Line for Texas Employers

The good news: the Supreme Court just gave employers a fighting chance to challenge excessive punitive damages on appeal. The bad news: the front pay issue has clearly been resolved in favor of workers and could make employment lawsuits even more expensive than they already are for employers.

Until now, the Court had not addressed the issue of whether front pay was outside the $300,000 cap; this meant employers could at least argue that there was a limit on the damages that could be recovered in federal court, especially for purposes of negotiating a settlement. That strategy has been totally eliminated. And, it may become far more difficult to even reach a settlement given employees' (and their attorneys') heightened expectations of monetary recovery.

There is no question that excluding front pay from the cap has just added a whole new element of uncertainty to employment-related lawsuits for employers. The actual amount of front pay may be extremely difficult to calculate; this will be especially true if the worker alleges that they cannot go back to work. This means that the front pay award may range from a relatively small amount to the $800,000 (or more) Ms. Pollard alleges she is entitled to.

Prevention: Once Again, The Best Course of Action

If Ms. Pollard's employer had taken the time to address her very serious allegations of sexual harassment and act on them while they had the chance to do so, this expensive, time consuming litigation never would have happened. Not only did they ignore her complaints, they fired her for refusing to return to work in the same hostile environment. The only safe policy is one of zero tolerance for all types of illegal discrimination. Not only is it absolutely critical to have written policies prohibiting illegal discrimination in your workplace, it is vital to actually follow them.

In addition to a clearly written policy, a serious anti-harassment/anti-discrimination effort must also include taking a hard look at the image and the corporate culture of the company. Too often, employers spend thousands of dollars and many hours drafting a written policy while totally ignoring what's really going on in the workplace on a daily basis. Corporate culture and reality must mirror the organization's self-proclaimed dedication to eradicating all forms of harassment. As we have recently learned, to do any less could be a whole lot more expensive in the future.

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The Good, the Bad, and the Unknown continued

the problem of failing to act immediately once notice arrives that a former employee is receiving benefits or that your tax rate has increased unexpectedly. There may be a problem with the mail system or with how TWC handled getting notice of the claim to you that would excuse a late response. However, once you have actual notice of a claim or a chargeback, the appeal deadlines start to run. The solution: don't hesitate to inquire about what happened with a claim. If you respond to a claim notice but don't get a ruling, or receive notice that a former employee is drawing benefits, call TWC immediately and ask why. If any of these inquiries show that benefits are going to a former employee who arguably should have been disqualified, you should write TWC a letter immediately, explain that you never received the ruling, and request a hearing.

9. **Present your best (firsthand) witnesses at all TWC hearings.** Like the rest of the American legal system, TWC gives the greatest weight to firsthand testimony from witnesses who have direct, personal knowledge of the events leading to the discharge or resignation. Remember that every single claimant that you fire will be able to give firsthand testimony: they're under oath and they're talking about what they experienced. While their version of the facts may be very different from any scenario you can recall, secondhand testimony based on reports from others won't be worth much in the face of uncontradicted denials of guilt from the claimant. Don't have the president of the company participate in the hearing to show how important you consider the matter to be or unleash the HR director with a wagon load of documents *unless* they've also got eyewitness information. Have the supervisor, manager, co-workers or other individuals who actually saw and heard what led up to the termination available to testify at the hearing.

10. **Prepare thoroughly and participate fully in all hearings.** The Appeal Tribunal hearing is not a dress rehearsal; in fact, it is your only opportunity to fully present your case. If you miss the hearing, you may not have any chance to be heard. Provide copies of any and all exhibits you want to introduce into evidence in advance to both the hearing officer and the former employee. And, although it may temporarily disrupt business to pull key firsthand witnesses away from their work to testify in a UI hearing, it is better than an almost certain loss in the case. Think about it: which presents the bigger burden, letting someone else cover for the witness during the hearing or losing the case and receiving chargebacks that can increase the company's tax rate for three years to come? Most hearings are now held by telephone, allowing witnesses to participate by phone from remote locations; hopefully, this makes taking testimony from even the busiest witnesses more practical.

Following these pointers won't guarantee that you'll win every claim filed against you; the law simply doesn't work that way. However, consistently practicing common sense, following your written policies, and consulting legal counsel when in doubt will reduce your chances of losing a case unnecessarily. Avoiding the types of problems mentioned above will also help you avoid trouble with even more serious matters such as wrongful discharge lawsuits, allegations of employment discrimination, and employment tort liability.

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BUSINESS BRIEFS Fall 2001

Age Discrimination Claims on the Rise

After steadily declining during the 1990's, age discrimination claims have risen sharply according to the U.S. Bureau of Labor Statistics. These charges declined from 19,800 in 1993 to 14,000 in 1999. However, in 2000, age-based complaints jumped to 16,000, a 13.2% increase. And, in the first six months of the current fiscal year, such charges climbed another 15.4% to about 9,300 compared to 8,250 during the same time period last year.

Workers who have been fired or temporarily laid off file about half of all age discrimination complaints. "If you do look at the trends, you'll note that the number of age cases we have will increase when there are significant numbers of layoffs," according to Paul Boymel, a senior attorney in the Equal Employment Opportunity Commission's Office of Legal Counsel.

According to the labor statistics bureau, older workers in long-term employment tend to lose their jobs at a higher rate than their younger counterparts. For example, among workers who were 55 or older who had

BUSINESS BRIEFS continued

been in their jobs at least three years, approximately 5% lost their jobs in the late 1990's. Compare this to 3.5% of the youngest workers who lost their jobs.

These claims are filed pursuant to the Older Workers Benefit Protection Act of 1990 which is targeted at workers 40 and older. The Act requires employers to provide employees with age-specific information about who will remain on the job after early-retirement buyouts or layoffs and who is let go. The law goes into effect when businesses ask workers to sign an agreement not to sue the company in exchange for a more generous severance package. Workers are given 45 days and the age data to decide whether they will sign the waiver or if they believe they have the basis for a lawsuit.

Given the graying of the country's workforce, these claims may very well continue to increase in the future as more and more workers are covered by the Act. The median age of the American workforce has risen from 35.6 years old in the early 1980's to 39.2 years in 2000. The median age will reach 41 years by 2008 according to the U.S. Bureau of Labor Statistics.

Layoffs Affect All Industries

While layoffs in the high tech sector have gotten most of the public attention and headlines in 2001, workforce reductions have actually been higher in the "old-economy" sectors since 1997 according to a recently released survey by the outplacement firm of Challenger, Gray and Christmas.

The study reveals that computer, electronics, e-commerce and telecommunications are among the top five job cutting industries this year. High tech firms cut 267,907 jobs; this represents 41% of the total nationwide job cuts in 2001. However, while tech-related businesses lead in job cutting for 2001, they are responsible for only 20% of all total layoffs since 1997.

The firm analyzed more than 3 million job reductions between 1997 and May 2001. The retail industry was the leading job-cutting sector during that time, eliminating 285,846 positions. The automotive, industrial goods, financial and computer businesses complete the top five job-cutting sectors during the time period studied.

According to John A. Challenger, the firm's chief executive officer, the study indicates that overall, technology has been more stable than other industries since 1997: "The recent uptick in high-tech job cuts notwithstanding, this is still largely considered a growth industry. As a society, we are becoming more and more reliant on technology and all the conveniences associated with it. As a result, the technology industry will continually need highly skilled workers."

The study points to an April 2001 survey by the Information Technology Association of America reporting 425,000 unfilled information technology jobs in the U.S. as evidence of the ongoing demand for skilled tech-workers. While that figure is nearly 50% lower than in 2000, Challenger contends that the previous demand will resume once the current economic slump ends.

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The Voluntary Contribution Option – Is it Right For Your Company?

Here's some hopeful news for Texas employers and their tax rates: businesses have the possibility of lowering their state unemployment tax rate by voluntarily paying in all or a portion of their share of the benefits paid to former employees. In return, their tax rate will be recalculated.

The Texas Workforce Commission will inform employers of their 2002 tax rate in mid-December 2001. Those businesses 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 during the three-year computation period from October 1, 1998 through September 30, 2001.

Any Texas employer that 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 will 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 a business (with unemployment claims drawn only in 2001) 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 unemployment benefits are drawn subsequent to the election to participate.

Second, in some cases buying back 100% of the unemployment benefits drawn over a three-year period may simply not be cost-effective. However, in that 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 website (http://www.texasworkforce.org/ui/tax/uitaxrates.html), an employer can calculate 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 call us at (512) 463-2756, fax your questions to (512) 475-1221, or visit our website, texasworkforce.org.

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