

The background of the cover is a blue-tinted photograph of a city skyline at night, with several skyscrapers illuminated. The text is overlaid on this background.

Texas

Business

Today

FALL 2005

Ron Lehman, Commissioner Representing Employers

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Identity Theft in the Workplace: What You Must Know

“Identity theft” occurs when one individual misappropriates another’s identifying information and uses that information for criminal or fraudulent purposes. The majority of identify theft cases involve some type of financial crime: taking out loans, opening new credit card accounts, accessing bank accounts, or obtaining long distance calling accounts or cell phones in another person’s name.

And, there are also more subtle forms of identity theft, such as using another person’s driver’s license, Social Security or employee identification number to pass background checks, get health insurance, gain security clearance or employment authorization, or to avoid automatic wage deductions for child support owed.

A Growing Problem

Called the “Crime of the New Millennium” in a 2001 U.S. Justice Department publication, reports of identity theft have only risen since then. While estimates of the exact numbers of victims vary, the common conclusion in all reports is that identity theft has already affected millions in the U.S. and is steadily climbing by millions annually:

- According to a June 2005 survey released by Deloitte & Touch LLP and Privacy & American Business (P&AB), about 44 million Americans have been the victims of identity theft at some point. P&AB points out that this number suggests that the number of victims of identity theft grew by 11 million people between 2003 and 2004.
- The *2005 Javelin Identity Fraud Survey Report*, published by Javelin Strategy & Research and the Better Business Bureau, estimated that 9.3 million American adults were victims of identity theft in 2004.

- Identity theft is the number one type of fraud complaint made to the Federal Trade Commission (FTC) according to that agency’s 2005 report, *National and State Trends in Fraud & Identity Theft*. In 2004, identity theft accounted for 39% of all complaints logged by the FTC. And, in only two years, identity theft complaints made to the FTC soared from 161,896 in 2002 to 246,570 in 2004, an increase of more than 50%.

The Cost to Business

A number of consumer protection laws help to limit the financial liability for the victims of identity theft losses. For example, the 2003 FTC and 2005 Javelin/BBB revealed that the majority of victims (63% and 67% respectively) reported that they did not incur any expense. Consequently, businesses wind up bearing the brunt of costs for account balances, goods, or services lost to identity thieves:

- In 2004, identity theft cost financial institutions and businesses an estimated \$52.6 billion, according to the Javelin/BBB survey. When adjusted for inflation, this total is comparable to the FTC’s estimate of \$47.7 billion in 2003.
- In 2004, the average cost of identity theft per victim was \$5,800 according to the Javelin/BBB report, an increase from the FTC’s 2003 finding of a mean cost of \$4,800 per victim. However, the Javelin/BBB study points out that the \$750 median cost per victim remained steady between 2003 and 2004.

There are also indirect costs to businesses and victims such as lost productivity and extra time off needed to resolve the identity theft. According to the FTC’s 2003 report, victims report spending between 15 to 60 hours restoring their ruined

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credit, settling financial accounts, and dealing with other fall-out from the theft. In 2003, the average amount time spent per victim was 30 hours, a number which dropped only slightly to 28 hours per victim in the later Javelin/BBB survey. Consider this: if every identity theft victim uses either work or leave time to settle the matter, nationally, the total result could be a staggering 300 million hours of lost productivity each year.

Employers and Employees as Identity Theft Victims

While many identity theft cases involve consumer data that is maintained by financial, retail and other businesses, negligent and dishonest co-workers at those companies are frequently guilty of providing access to sensitive records. Even businesses that do not maintain customer records have an abundance of employee data that can provide a tempting target for identity thieves. And, employers themselves can be misled when identity thieves use fraudulent documentation to qualify for employment with a company.

Because almost half of all victims never learn who stole their identities, exact statistics on workplace identity thefts are difficult to obtain. And, while many surveys ask victims how the theft occurred (i.e. intercepting telephone or Internet transactions, stolen credit card, wallet, or checkbook, etc.), many do not ask where (i.e., home, school, or office) it occurred. However, an examination of the data that is available suggests that identity theft in the workplace is a serious problem:



- Nearly one quarter (23%) of victims who learned the identity of the person who stole their personal information said that it was an employee at the financial institution or company that had their records according to the 2003 FTC survey.
- According to Judith M. Collins., author of the book “Preventing Identity Theft in Your Business: How to Protect Your Business, Customers and Employees”, and an assistant professor at Michigan State University’s School of Criminal Justice, at least 50% of all identity theft cases can be traced back to the workplace.

Establishing Anti-Theft Practices in the Workplace

While it is important for employers to take steps to limit access to and disclosure of any personal information that could result in identity theft, some types of personal details require more protection than others – for both legal and practical reasons.

Above all else, Social Security numbers must be protected. A Social Security number is a person’s permanent personal identity passport, remaining with that individual from birth until death, and even beyond. Names change frequently through marriage, divorce or court order; addresses change each time a person moves, and even birth certificates can disappear. That leaves a person’s Social Security number as the single most important means of identification in the United States for employability, creditworthiness, and eligibility for various government and non-government programs.

“In the workplace, Social Security numbers cause the most problems” when stolen by identity thieves according to Beth Givens, director of the Privacy Rights Clearinghouse, a non-profit consumer advocacy and information organization based in San Diego, California. “On a day-to-day basis, HR departments and others don’t need to see an employee’s Social Security number,” she points out.

To protect this type of information, the first step employers should take is to do background checks on any employees who will be in a position to commit identity theft: human resources, payroll or accounting staff, computer technicians, mail handlers and managers. If your company

outsources any services that involve personnel records, require your contractors to do the same for their employees.

And, while background checks are important, they are not totally fail-safe measures. Many identity thieves have no prior criminal record, and some may actually be working under someone else's identity. Consequently, employers must be vigilant to take additional steps to protect against identity theft in the workplace.

One area where it is best to use extreme caution: assigning temporary workers. While sainthood is not a prerequisite for handling sensitive information, it's always best to use an experienced employee who has a proven track record with the company rather than a brand-new worker who hasn't made it past their introductory period successfully. And, all employees who handle personal information should receive copies of company security and privacy policies. Many organizations also require these employees to sign policies agreeing to follow access, disclosure and confidentiality protocols. Any worker with access to sensitive information should be required to participate in training on the company's security practices and privacy protections at the time of hire and receive refresher training on a periodic basis.

A great deal of workplace identity theft is the result of sheer carelessness, so reinforcing privacy and security policies through day-to-day reminders is especially critical. Many employers place posters and signs in key locations to remind employees of the necessary security practices which must be followed while others conduct regular spot checks to ensure that workers are following required procedures.

Train All Employees on Company Security Measures

All employees should be given information on their employer's security and privacy policies that outline what personal records are kept, who may and may not have access to those records, and how the business safeguards those records. Employees also need to know whom in the company they are to contact should they become the victim of workplace identity theft.

Employees should also get training on protecting their personal information in the workplace. For example, many workers pay their personal

bills at work and throw the statements in the trash without shredding them first. Other employees use their personal credit cards to register by telephone for continuing education classes or trips, thereby broadcasting their account information to anybody within earshot. And, employees often access various personal accounts using the employer's Internet connections without ever considering who else in the office might be observing the transaction. Employees must be made aware that they should not leave their vital personal information out on their desks or up on their computers, making themselves easy targets for identity thieves.

Unfortunately, very few companies are currently providing this type of training, according to an online survey conducted by the Society for Human Resources Management in 2004. Less than one-fourth of the employers responding to the survey (23.5%) said that their company educates their workers about preventing fraud in the workplace.

When educating your employees about preventing identity theft in the workplace, consider discussing the following:

- **Physical Security.** Stress the importance of keeping employees' purses, checkbooks, briefcases and wallets containing personal information in a locked cabinet or drawer. Stolen or lost wallets, credit cards, or checkbooks are the leading cause of identity theft, comprising 28% to 29% of all cases reported in the BB/Javelin survey in 2005 and the FTC study in 2004.
- **Personal Security.** Warn employees to take precautions if they are using company computers or telephones to make personal purchases. If an employee does not have a private office, anybody within earshot - or eyeshot - can get their personal credit card information. Workers should also be trained to shred any personal documents before putting them in any workplace trash can or recycling bin.
- **Password Security.** All workers should be trained to protect their passwords: prohibit employees from taping their passwords to their computer screens, sharing passwords with co-workers, or leaving them on a piece of paper in unlocked desk drawers. If an employee simply cannot remember their

passwords, that information should be kept in a locked drawer or cabinet.

- **Financial Security.** Workers (and employers) should be educated about the need to carefully review all monthly credit card statements for charges they don't recognize. Also, inform workers how they can get free copies of their credit reports annually, analyze those reports for discrepancies, and contact the three major credit bureaus when problems are found. If you have a company intranet, you may want to include a link to the FTC's credit Web page (<http://www.ftc.gov/bpc/conline/edcams/credit/index.html>) which provides additional information on protecting against identity theft and consumer rights.

Sample Identity Theft Policy

XYZ Corporation would like to remind all employees that anyone can become the victim of identity theft. Identity theft occurs when one individual takes another's personal data - usually name, driver's license or Social Security number, mother's maiden name, address and/or birth date - and uses it for their own illegal financial gain. That person may apply for credit cards, loans or phone service, buy merchandise, apply for a mortgage or lease apartments or cars. There have even been cases where identity thieves used another's identity to gain employment or obtain security clearance.

Sensitive Information. Social Security numbers, home addresses, driver's license numbers, mother's maiden name, date of birth, credit card numbers, and bank account and employee identification numbers are all considered to be sensitive information.

There are some common-sense actions that you can take in the workplace to lower your risk and XYZ Corporation's possible exposure to this crime:

1. Store all purses, wallets and checkbooks in locked cabinets while in the workplace.
2. Cross-shred all sensitive documents before throwing them away, especially those containing account or Social Security numbers.
3. If you are providing sensitive information over the telephone, make sure that your conversations cannot be overheard.

4. Avoid giving sensitive personal information by e-mail or over the phone.
5. Do not place your personal mail containing Social Security numbers, checks or account information in the unlocked outgoing mailbox located on any receptionist's desk.
6. Be sure to password protect your office computer. If you leave it unattended for even a moment, close the program you were working on.

If you become the victim of identity theft or believe that you might be:

1. Immediately call the three major credit reporting agencies to report the theft. Put a fraud alert on your Social Security number and ask them to send you copies of your credit reports. Examine those reports carefully to see if there are any inaccuracies or fraudulent activity.
2. Call your local police department so that they can take a report and provide you with a copy. Mail a copy of this report to your creditors.
3. Call and write all creditors that have opened fraudulent accounts using your stolen personal information. Be sure to send all correspondence by certified, return receipt requested mail. Let these creditors know that this is a case of identity theft,



and ask for copies of all applications and transaction information relating to the accounts.


XYZ Corporation is concerned about the physical and financial well-being of all employees. If you believe that you have been a victim of identity theft or if your purse, wallet, briefcase, etc. has been stolen, either in the workplace or elsewhere, we would like to know about it promptly.

XYZ Corporation understands that you might need some flexibility in your work schedule to repair the damage caused by the identity theft. Identity theft – in the workplace or elsewhere – is a serious problem, but can be controlled with immediate action. Your quick notification to XYZ Corporation will help us evaluate who is putting others at risk, and all reports will be handled confidentially to the extent possible.

Important Resources and Internet Links for Victims of Identity Theft

- Federal Trade Commission: www.consumer.gov/idtheft or 1-877-IDTHEFT
- Identity Theft Resource Center: www.idtheftcenter.org or 1-858-693-7935, voices123@att.net (Non-profit organization specializing in identity theft victim assistance).

Credit Reporting Agency Contact Information

- Equifax: www.equifax.com or 800-685-1111 (fraud division: 800-525-6285)
- Experian: www.experian.com or 888-EXPERIAN (fraud division: 888-397-3742)
- TransUnion: www.tuc.com or 800-888-4213 (fraud division: 800-680-7289) 

From the Dais – Fall 2005

Dear Texas Employer,

To those of you whose families, businesses, lives and property were affected by hurricanes Katrina and Rita, we at the Texas Workforce Commission and our partners around the state send our thoughts and prayers. These hurricanes have impacted thousands and caused billions of dollars in damage. However, I have no doubt that we are up to the challenge of rebuilding and will be creative at finding solutions.

Special thanks to the employers around the state who stepped up to the plate and offered evacuees jobs. Your efforts are to be commended.

The Importance of Small Business

I recently had the privilege of participating in four Small Business Summits hosted by Governor Rick Perry around the state. The events are designed to provide area small businesses opportunities for growth, as well as the tools for future success. The Summits were held in El Paso, San Antonio, the Rio Grande Valley and Tyler, with others planned around the state in the coming months.

At the Summit in the Rio Grande Valley, Governor Perry stated that, “When small business

prosper, Texas prospers,” pointing out that 98% of all Texas businesses are small businesses. “In the future, if Texas is to remain a place where jobs and opportunity are abundant, where the American dream is within reach and where government priorities are funded by a growing economy instead of a growing tax burden, then we must help small employers succeed today.”

Listening to his words, it occurred to me that as 2005 draws to a close, this might be a good time to look at just what “small business” has accomplished and how important your entrepreneurial spirit and businesses are to the success of both this great state and nation. It’s also a good time to say “thanks for what you do.”

While it’s certainly important for the state to continue to attract large national and multi-national corporations to the area – and the headlines announcing major industry expansions are always exciting – the importance of small businesses cannot be overemphasized. Here’s a brief overview.

National Small Business Overview

1. The federal government defines “small businesses” as companies with less than 500 employees. Using that definition, 99.9% of the approximately 24.7 million busi-

nesses in the United States in 2004 were small enterprises.

2. Nationally, small businesses employ half of all private sector workers, and account for 45% of the private payroll. In addition, these businesses employ 41% of all high tech workers in the country. Possibly most significant, small businesses created between 60% to 80% of net new jobs each year for the last decade.
3. Small businesses are responsible for creating more than 50% of the nation's non-farm private gross domestic product.
4. Small businesses are granted 13 to 14 times more patents per employee than large firms.
5. Contrary to popular mythology, the international marketplace is not the exclusive domain of huge corporations. Rather, 97% of exporters are small businesses, with 26% of export value coming from those small enterprises.

Small Texas Businesses Overview Based on Small Business Administration data for 2004

- According to the state comptroller's office, there were approximately 2.4 million businesses in Texas in 2004, 580,000 of which were incorporated. Of the total number, approximately 1,787,607 were small businesses. And, of the 404,683 firms that had employees, about 98.7%, or 399,323, were small firms.
- In 2004, the estimated number of employer businesses increased by 1.4%. The number of self-employed persons (including incorporated) increased overall by 1.7%, from 1.18 million in 2003 to 1.2 million in 2004.
- Non employer businesses numbered 1,388,284 in 2004, an increase of 5.2% since 2001, based on the most recent data available.

Women-Owned Texas Businesses:

- In 2004, women-owned firms in Texas totaled 469,049, an increase of 23% from 1997, and generated \$66.8 billion in revenues.
- Texas firms owned jointly by women and men numbered 207,412 with revenues of \$53.5 billion.
- Women represented 32.7% of all self-employed persons in the state.

Minority-Owned Texas Businesses:

- Between 1997 and 2002, Hispanic-owned Texas firms grew 33%, to 319,460.
- During that same five year period, Black-owned firms numbered 88,777, an increase of 47%, Asian-owned firms numbered 78,018, an increase of 32%, American Indian and Alaska Native-owned firms numbered 16,863, an increase of 8%, and there were 1,543 Native Hawaiian and other Pacific Islander-owned businesses.

Employment:

- In the U.S., of 114.1 million non-farm, private sector workers in 2000, small firms with fewer than 500 workers employed 57.1 million, large firms, 56.9 million. Smaller firms with fewer than 100 workers employed 40.9M.
- **In Texas**, small firms with fewer than 500 employees employed 3,758,770 individuals, or 47% of the state's non-farm private sector, in 2004.
- Net job gains among Texas firms with fewer than 20 employees totaled 69,880, while large firms with 500 or more employees lost 186,869 jobs between 2001 and 2002.

Small Business Income:

- Texas non-farm proprietors' income, a partial measure of small business income, increased by 6.4%, from \$90.4 billion in 2002 to \$96.2 billion in 2003.

In summary, small companies dominate both the national and state business landscape, are a critical source of innovation and economic growth, create the bulk of new jobs, and play a substantial role in international trade. To those of you who are entrepreneurs and small business owners, I applaud your creativity and willingness to take risk. Thank you for being a Texas employer, and I look forward to cheering your success in 2006.

As always, it is a privilege representing you here at the Texas Workforce Commission.

Sincerely,



Ron Lehman

Commissioner Representing Employers

TWC Precedent Cases - Important Guides to UI Claim and Appeal Decisions

One of the most important resources for employers to consult when responding to unemployment claim notices, preparing for appeal hearings, or even when considering what personnel actions to take, is the Appeals Policy & Precedent Manual (AP&P, or precedent manual) used by the Texas Workforce Commission. Consisting of important cases designated as precedents over the years by the Commission, the precedent manual helps guide claim examiners, Appeal Tribunal hearing officers, and the Commission in deciding how individual cases should go. A working knowledge of the precedent manual will help any employer manage its UI claims better. In an effort to help employers better acquaint themselves with this essential resource, the employer Commissioner's office is highlighting some of the more important and frequently-cited precedent cases in this and future issues of Texas Business Today. In this issue, we emphasize a few of the most important precedent cases in several different areas in which employers are likely to have unemployment claims; each precedent case is presented in summary format. For the full text as it is found in the precedent manual, see the online version at http://www.twc.state.tx.us/ui/appl/app_manual.html.



Chargeback for part-time employees

Appeal No. 3229-CAC-75. If a part-time employee is still working on the same basis as always, and there has been no separation from the part-time work, there can be no chargeback ruling.

Appeal Hearing Procedures

Appeal No. 96-005851-10GC-051396. Ignoring the instructions for calling in for a hearing does not give a party good cause for missing a hearing.

Appeal No. 89-08533-10-081189. Misreading a hearing notice and assuming that the hearing officer will call the parties for the hearing does not give a non-calling party good cause for missing the hearing.

Quit or Discharge?

Appeal No. 96-001500-10-020697. If an employer accepts an employee's notice of resignation more than two weeks in advance of its effective date, but pays the employee through the end of the notice period, the work separation is still a resignation, not a discharge, and the case will depend upon whether the claimant had good cause connected with the work to resign.

Appeal No. 96-012206-10-102596. If an employer suspends an employee without pay for three days or less, and the employee chooses not to return after the end of the suspension, the case generally will be decided as a voluntary separation. A disqualification under Section 207.045 should be imposed unless it is shown that the employer did not act in good faith in imposing the suspension or that the manner in which it was imposed was extremely egregious.

Good Cause to Quit - Pay and Expenses

Appeal No. 97-003975-10-041697. The Commission considers all aspects of a change in pay and benefits to determine whether the overall changes were so substantial and adverse that any reasonable employee would leave for such a reason. Loss of a car allowance by itself is not good cause to quit, if the value of the benefit is only 11% of the total compensation, in view of the general rule that a cut in pay of 20% or more is good cause connected with the work to quit.

Appeal No. 2444-CA-EB-76. A claimant who is not paid for the actual number of hours he had worked, despite his several complaints to the employer, has good cause connected with the work for quitting.

Appeal No. 1123-CA-77. An employer who repeatedly ignores an employee's repeated requests for overtime pay that she had earned and for benefits promised in the hiring agreement gives the employee good cause connected with the work for resigning.

Good Cause to Quit - Distance to Work

Appeal No. 1892-CA-76. A change in work location that would have increased the claimant's commute by ten miles did not give the claimant good work-connected cause for resigning, particularly since the claimant could have ridden with any one of several coworkers.

Appeal No. 2672-CA-76. An increase in commute from 30.8 to 40.6 miles did not give the claimant good cause to quit, since the inconvenience of the commute was not measurably increased. Likewise, the 33% or so increase in mileage expenses did not constitute a substantial cut in pay.

Appeal No. 886-CA-71. In the absence of a prior agreement to work at any of the employer's stores in the trade area, a claimant had good cause to quit rather than transfer to a store in a town twenty miles away.

Good Cause to Quit - Demotion

Appeal No. 98-001381-10-021099. A demotion resulting from the claimant's illegal actions or other serious misconduct does not give a claimant good cause connected with the work for resigning.

Good Cause to Quit - Shift Change

Appeal No. 13201-AT-70 (Affirmed by 119-CA-71). A claimant who has been working as a cook on the day shift for four years and, because of family responsibilities, cannot work nights, has good cause to quit rather than transfer to the night shift.

Good Cause to Quit - Denial of Promised Raise

Appeal No. 452-CA-68. A claimant has good cause to quit a job after the employer assigns her additional responsibilities and promises her a raise and such raise is not forthcoming after a reasonable period of time (in this case, ten months).

Good Cause to Quit - Dissatisfaction with Working Conditions

Appeal No. 2610-CA-77. Dissatisfaction with working conditions is generally not considered to be good cause connected with the work for quitting unless the claimant can show that the conditions were intolerable. Although such a showing was not made in this case, the fact that the claimant had been forced to perform janitorial duties which her job description of bookkeeper did not include, when considered in combination with deteriorating working conditions, provided the claimant with good cause connected with the work for quitting.

Appeal No. 3613-CA-76. A claimant who quits work because of some dissatisfaction with working conditions without affording the employer any opportunity to resolve the situation thereby voluntarily quits without good cause connected with the work.

Good Cause to Quit - Job Stress

Appeal No. 87-2369-10-021988. Ordinary job stress, by itself, does not constitute good cause connected with the work to quit.

Misconduct - Prior Warnings

Appeal No. 97-004948-10-050997. Although the claimant had received numerous verbal warnings for tardiness, none of the warnings specifically advised the claimant that his job was in jeopardy due to tardiness. Nonetheless, where the employer's repeated warnings are sufficient to put claimant on notice that certain behavior is unacceptable, it is unnecessary for the employer to further warn claimant his job is in jeopardy.

Appeal No. 86-04275-10-031387. Mere refusal to sign a reprimand which the claimant felt was unjustified does not rise to the level of misconduct, where the claimant was not warned that he could be fired simply for failing to sign the reprimand, and the reprimand form did not contain a space for the claimant to enter his own comments regarding the problem.

Misconduct - Negligence and Poor Judgment

Appeal No. 87-07750-10-050887. In trying to get a forklift operator's attention, the claimant threw a rock at the fender, but hit and shattered the rear window without injuring the operator. He was discharged the next day for the incident. He had

seen other drivers in the past throw rocks at the forklift and knew that they had been reprimanded for it. The claimant's act constituted misconduct connected with the work because it damaged the employer's property and placed in jeopardy the well-being of the forklift operator. Also, the claimant was aware that this type of conduct was not condoned by the employer. Further, the following day's discharge was in fact proximate in time to the incident.

Appeal No. 2175-CA-76. The claimant was discharged for breaking an air-knife by using it to beat a pipe to attract attention to the fact that he needed help. **HELD:** Although the claimant may not have used good judgment, the evidence failed to establish that he had intended to damage the employer's property. Accordingly, the claimant's use of poor judgment did not constitute misconduct connected with the work.

Suitable Work - Distance to Work

Case No. 141500 (2000). Distance, travel time, and community customs are all factors that determine if a job location is suitable. A claimant

in Midland does not have good cause to decline a job in Odessa, only 20 miles away, since such commutes are common in the area.

The foregoing cases are only a sample of the wealth of valuable guidance on unemployment insurance issues found in TWC's Appeals Policy & Precedent Manual. Success in defending against a UI claim can often depend upon being able to quote a relevant precedent case in a claim response or appeal letter, and so every employer should be familiar with the most important precedent cases found in the Manual. By the same token, precedent cases can also give an early indication that a certain type of case may not be winnable at all, and the employer can then decide whether the case will be worth its time and attention. Employers are always welcome to call Commissioner Lehman's toll-free number, 1-800-832-9394, with questions about the applicability or relevance of a particular precedent case.

William T. Simmons
Legal Counsel to Commissioner Ron Lehman

Texas Employers Get Additional Resources for Customized Job Training

Texas employers now have access to additional resources for customized job training for their employees, thanks to the actions of the 79th Texas Legislature. During this year's regular session, the Legislature passed House Bill 2421 which established a new dedicated funding stream for the Skills Development Fund. With the new funding stream in place, legislative budget-writers were able to increase the appropriation to the Skills Development Fund from \$25 million in the 2004-05 biennium to \$40 million in the 2006-07 biennium.

What is the Skills Development Fund?

The Skills Development Fund supports the growth of Texas businesses by helping Texas workers acquire new or upgrade existing skills to meet the needs of their employers as well as advance their careers. The concept is simple. A single business or consortium of small- to mid-sized businesses works with a community or technical

college to develop customized training that will close existing skill gaps in its workforce. Skills Development grants fund the training; the college administers the grant and the training, while businesses guarantee jobs for graduates. Once developed, the curriculum can be used repeatedly - even in other communities - to ensure that Texas continually replenishes its supply of skilled workers to meet the needs of its businesses.

Since its inception in 1996, the Skills Development Fund has awarded \$106.4 million in Skills grants to almost 2,500 Texas employers. Nearly 55,000 workers have been trained for new jobs, while almost 85,000 current workers have been re-trained.

In 2004, the Texas Workforce Commission awarded nearly \$12.2 million in Skills Development grants. These grants served 165 employers and 18 business consortia, and were used to train

2,934 workers for new jobs and upgrade the skills of 10,537 current workers. The recipients of these training grants were widely dispersed across the state.

TWC pays particular attention when awarding grants to ensure that they are targeted to high-growth, high-demand industries, and that workers receive a locally competitive wage in every instance. Statewide, the average wage paid to workers trained with Skills Development grants has increased from \$10.33 an hour in 1996 to \$15.11 in 2004. In addition, all 13,471 of last year's trainees were offered one or more benefit options, such as health insurance, workers' compensation or 401(k) plans.



Some Success Stories

In the San Antonio area, a six-member consortium of hospitals and health-care providers partnered with the Alamo Community College District to train workers for 317 new and 593 upgraded

jobs as radiology technicians, registered nurses, licensed vocational nurses, pharmacy technicians and other health-care related positions. Upon completion of the program, some participants will receive hourly wages exceeding \$35.

Johns Manville, a manufacturer of building insulation, received a Skills Development grant allowing it to partner with Hill College to expand its workforce and train existing workers in the latest manufacturing techniques. Skills training helped the company streamline operations and positively affect its bottom line. The training funded through the Skills Development grant helped the company add 25 new positions and added roughly \$1 million in wages to the Cleburne/Johnson County economy.


As Governor Rick Perry observed, "This is a classic example of how public and private sectors work together to create jobs, to create wealth and to really give a strong foundation to our country."

What's Next?

The Skills Development Fund has a decade-long track record of outstanding results for Texas employers. The main challenge the fund has faced during that time has been limited financing. Since the fund's inception, the dollar value of proposals TWC has received have been nearly four times what TWC has been able to award.

Even with a highly competitive selection process, many proposals that would have produced significant gains for regional economies had to be turned down because there simply wasn't enough money to go around. But, with a 60% increase in the funds available over the next two years, hundreds of additional Texas businesses will have the opportunity to obtain customized job training each year.

If Texas businesses are to remain at the forefront of global competition, and if workers are to meet the ever-increasing demand for skills in almost every occupation, Texas must maintain its commitment to skills training. TWC will ensure that the Skills Development Fund continues to meet the workforce needs of Texas and bolster the state's overall economic development strategy.

For additional information on the Skills Development Fund, visit the agency's website at www.texasworkforce.org. 

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How Reporting Your State Unemployment Taxes Electronically Can Save you Money

While we can't completely eliminate the burden of paying state unemployment taxes, the way you file and pay them is now easier with more accurate results than ever before. Reporting employment information to the Texas Workforce Commission (TWC) electronically is more than just a convenience. It can actually save you money. Both Employer Tax Information Online (ETIO) and QuickFile are free tax solutions that allow you to avoid the limitations of yesterday's paper and pencil era.

Each year, thousands of Texas employers still file their Employer's Quarterly Reports on paper tax forms. Those forms are then processed by the TWC to get the employment information into the agency's data banks. Many times, the employment information is handwritten or printed in such a way that makes it hard - or impossible - to read. This loss of legibility requires manual intervention, which involves interpretation and the chance for human error. Erroneous information can lead to employer over-billing, time consuming investigations, and discrepancies with Internal Revenue Service wage matching. All of these outcomes can cost you, the employer, both time and money.

By using TWC's electronic reporting options, employers can control the accuracy of their employment information and assure themselves the

most favorable tax reporting possible. Employers with fewer than 100 employees can utilize the agency's ETIO option. And, employers with any number of employees to report, as well as agents filing for multiple employing units, can use TWC's QuickFile software with unlimited reporting capabilities.

Both electronic reporting options require prior registration to establish a fully secure employer tax account online. Names and social security numbers from previous online reports can be carried forward to help reduce errors and filing time. Payments can even be scheduled for automated debit over the Internet, and can be set for any date during the month. Registering for online access also allows employers to review and update their own tax account information.

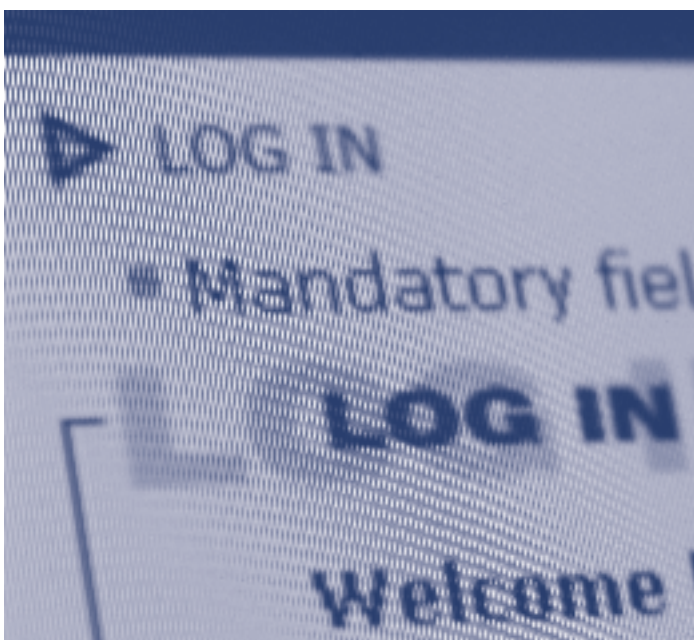
To see if this option is right for you, visit www.texasworkforce.org and click on "Businesses and Employers". Then follow the link to establish a new unemployment tax account online. You may discover that electronic reporting is a convenience that may just save you money.

New Home for Workers' Compensation

To find the new home page for workers' comp in the state of Texas, go to www.tdi.state.tx.us and click on the "Workers' Compensation" icon. You'll be directed to the new workers' comp home page. If you visit the old website at www.twcc.state.tx.us, you'll automatically be redirected to the new site. The Texas Workers' Compensation Commission was abolished effective September 1, 2005, and the Division of Workers' Compensation of the Texas Department of Insurance has assumed those duties.

Disaster Preparedness: Get Ready Now!

Every year, disasters of all kinds force thousands of businesses to close. Research shows that at least 25% of all businesses that close following events such as these never reopen; many that do manage to reopen struggle to stay in business. The threat of a disaster-related closure is especially great for small businesses because they often lack the financial resources, planning tools, ready access to alternative suppliers, and the ability to spread their risk across several geographic locations that larger companies often possess.



Fortunately, there are some excellent - and free - online tools that can help you develop a disaster planning toolkit now so that if the unthinkable should occur, you'll be prepared. You may wish to visit the Small Business Administration's Disaster Assistance website at <http://www.sba.gov/disaster/getready.html> to begin preparing your disaster preparedness toolkit. And, the Institute for Business and Home Safety, a nonprofit initiative of the insurance industry, developed *Open for Business*, a 61-page

publication specifically aimed at introducing small to mid-sized businesses to many of the disaster planning recovery processes used by much larger companies. Visit their website at www.ibhs.org/docs/openforbusiness.

Beyond the survival kit basics of clean water, food, first aid and warmth, be sure to take advantage of these free tools to do everything you can now to protect your business, your employees, and your customers from disaster loss. 🇺🇸

Paying Commission-Based Employees

Paying Commission-Based Employees under the Fair Labor Standards Act - And You Thought You Had It Covered...

We all know why employers love to pay employees on a commission basis - it boosts productivity by tapping the employee's ambition to earn a living. In using this feast or famine approach, many employers overlook their obligations under the federal Fair Labor Standards Act (FLSA), and assume that commission-based employees are not entitled to overtime. Many employers also think there is no reason to track the hours worked by their commission-based employees. Think again, because these are costly mistakes that undercut planned labor costs and create liability for audits, wage claims, and potentially payment of back wages for overtime.

Regardless of whether your employees are paid hourly, by salary or by commission, it is more important than ever to be FLSA compliant. The basic rule employers must remember about the FLSA is that all employees are entitled to a minimum wage, currently \$5.15 per hour, and payment of overtime, *unless the employer can show that an FLSA exemption from overtime or minimum wage applies to the employee.*

Commission-Based FLSA Non-Exempt Employees

Under the FLSA, non-exempt commission-based employees must be paid overtime, which is half the regular rate under the straight method, or time and one-half if calculated based on a 40 hour rate, when the employee works more than 40 hours in a 7 consecutive-day period. If a commission-based employee works overtime, the employer will have to include payment of overtime

over and above the commission arrangement. In other words, if the employer expects the commission-based employees to work overtime, the additional overtime expense must be considered when calculating the total labor costs and profit margins of the employer's business model.

In addition to addressing overtime, the employer must also ensure that the commission-based employee is earning at least minimum wage for the hours worked, which will require the employer to track the hours worked. Tracking the hours worked is not only for compliance with overtime and minimum wage, but also to comply with U.S. Department of Labor's recordkeeping requirements for non-exempt employees, no matter whether they are paid on an hourly, salary or commission basis. These requirements are set out under the FLSA regulations, 29 C.F.R. 516.2(a). For more information about non-exempt employees paid on a commission basis, see 29 C.F.R. Chapter 778, Subpart B (29 C.F.R. 778.117 to 778.122).

Exemptions from Minimum Wage and Overtime That May Apply to Commission-Based Employees

Luckily, the FLSA does provide options for employers to consider. These options come in the form of exemptions from minimum wage and overtime requirements. If an employer is going to choose to use one of these exemptions, it is critical that the employer performed due diligence in determining whether an exemption can be used under the employer's business model, and that the exemption is clearly understood by the employee. Documentation is key to demonstrating that the employer is FLSA compliant, and some of these exemptions do not relieve the employer

of obligations to track hours worked and commissions earned. The following are the most common exemptions used by employers for commission-based employees.

Employment by a Retail or Service Establishment under 29 U.S.C. §207(i)

Under the FLSA, this exemption is limited to commission-based employees of retail and service establishments. If the employer chooses to use this exemption, the employer must be compliant with the all three of following conditions:

- 1.) the commission-based employee must be employed by a retail or service establishment as defined in 29 C.F.R. Part 779, Subpart D;
- 2.) the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage rate ($\$5.15 \times 1.5 = \7.73); and
- 3.) more than 50% of the employee's total earnings in a representative period must consist of commissions. The representative period is not less than one month and not greater than one year, and must accurately reflect the employee's earning pattern.

If the employee's regular rate of pay results in less than \$7.73 per hour, then the employer may not use this exemption and overtime would have to be paid. The FLSA defines "retail and service establishments" as those businesses that have 75% of annual dollar volume of sales for goods or services, is not for resale, and is recognized as retail sales or service in the particular industry. Not every establishment engaging in retail sales of goods or services is consider a "retail or service establishment" under FLSA.

If the employer is considering this exemption, it is important for the employer to determine whether their business qualifies as a retail or service establishment under the FLSA regulations at 29 C.F.R. Part 778, Subpart D. Because it is the employer's responsibility to demonstrate that it is FLSA compliant, the employer is required to maintain documentation of the hours worked and commissions earned to prove the employer is meeting all of the conditions of the exemption.

Automotive Dealership Exemption under 29 U.S.C. §213(b)(10)

The FLSA provides for an overtime exemption of certain personnel of automobile dealerships. Under 29 U.S.C. §213 (b)(10), any salesman, parts-

man, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements is exempt from payment of overtime if the employee is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers. The overtime exemption also applies to sales employees primarily engaged in selling trailers, boats, or aircraft, if the employee is employed by a non-manufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers. Though these employees would be exempt from the payment of overtime, the employer is not exempt from the payment of minimum wage for hours worked. Thus, the employer is required to track the hours worked of these employees, and determine whether the employee is paid at least minimum wage for all hour worked. If the commission-based employee earned less than minimum wage, the employer must pay the difference.



Outside sales exemption under 29 U.S.C. §213 (a)(1)

Employees that are involved in outside sales are typically paid a commission. Under the outside sales exemption, the commission-based employee is exempt from both minimum wage and overtime, as well as the recordkeeping requirements under the FLSA. To use the exemption, the employer must demonstrate that it is FLSA compliant through meeting the following conditions:

- 1.) the employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

2.) the employee must be customarily and regularly engaged away from the employer's place or places of business.

For more information about the outside sales exemption, see 29 C.F.R. Part 541, Subpart F (29 C.F.R. 541.500 to 541.504).


Highly compensated worker exemption established under U.S. Department of Labor regulation 29 C.F.R. 541.601

A commission-based employee may also fall into the highly compensated worker exemption under the FLSA, 29 U.S.C. 213 (a)(1) and the U.S. Department of Labor regulation 29 C.F.R. 541.601. A highly compensated employee is exempt from minimum wage and overtime if the employer can establish the following conditions:

- 1.) the employee earns total annual compensation of \$100,000.00 or more, which includes at least \$455 per week paid on a salary basis;
- 2.) the employee's primary duty includes performing office or non-manual work; and
- 3.) the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Though the employer would have to pay \$455 per week in salary, the regulations specifically state that commissions may be used to satisfy to reach the \$100,000.00 "total annual compensation" requirement of this exemption.

FLSA exempt employees that qualify as administrative, executive, or professional employees under 29 U.S.C. §213(a)(1)

It is also possible to have a commission-based employee exempt from minimum wage and overtime if the employee is employed as a bona fide administrative, executive or professional employee under the FLSA. Each one of these exemptions requires that the employee performs all of the job duties of the specific exemption, and that the employee is paid a salary of \$455 per week. Commissions cannot be used to satisfy the salary requirement because the salary must be provided to the employee free and clear. However, the employee may earn commissions above and beyond the salary without the employer losing the benefit of the exemption. 

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