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SPOTLIGHT ON WAGE and HOUR LAWS:

Deductions from Pay and Your Wage and Hour Policies under the Texas Payday Law and the federal Fair Labor Standards Act

One of the most frequent calls received on the employer hotline at the Texas Workforce Commission usually starts something like this: "I made a $500 loan to my employee, Susie, two weeks ago; she verbally agreed to pay me back, but we never put anything in writing. Now she's decided to quit and refuses to sign anything. Can I hold her last paycheck to cover the amount she owes me?" The short answer: without anything in writing, the employer is out of luck. Even with written authorization, the employee will generally still have to receive minimum wage for all hours worked.

There are also a number of other confusing, frustrating situations involving pay and overtime. For example, many employers simply can't believe that their employees must be paid if they work unauthorized overtime. Generally speaking, the federal Fair Labor Standards Act provides that employees must be paid for all hours worked, with or without their employer's permission. To make sure this doesn't become an ongoing habit, employers should create disciplinary policies that let employees know that all overtime must be authorized by the employer in advance. Such a policy could state that the first time an employee works unauthorized overtime, they will be given a disciplinary warning. If it occurs again, they will face discipline up to and including termination.

This article will address these and other frequently asked wage and hour related questions and suggest some sample policies which may be of use to you.

Deductions from Pay

The two main laws limiting deductions from an employee's pay are the federal Fair Labor Standards Act and the Texas Payday Law. A careful employer will watch for situations in which an employee's pay may be reduced for one reason or another and consider whether the deduction potentially involves a reduction below minimum wage and/or must be authorized in writing by the employee before the deduction is made. While some types of deductions are fairly predictable and straightforward, many other kinds of deductions are extremely complex and restricted. Before going ahead with a policy regarding wage deductions, it is advisable to have the policy and procedures reviewed by an employment law attorney who is familiar with both federal and Texas wage and hour laws.

It is best to have all employees sign a wage deduction authorization agreement listing the various types of deductions

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from pay that might be made and the amounts (as specifically as possible) that would be deducted if those situations were to arise. In addition to the wage deduction authorization agreement, certain deductions should be individually and specifically authorized in writing to give the employer the greatest amount of protection in case a wage claim is filed. These would include any type of loan or wage advance; before the money changes hands, the employer should have the employee sign a detailed receipt and repayment agreement specifying what the installment payments will be and what happens to a balance remaining when an employee leaves the company. Similarly, before an expensive piece of equipment is checked out to an employee, the employee should sign a form acknowledging receipt, promising return of the item in good condition, and specifically authorizing a deduction from pay in a specific dollar amount in case of damage or non-return of the item.

Here is a sample wage deduction authorization agreement. This sample is a general guideline only, and not specific legal advice. All company policies should be reviewed by private legal counsel before publication and distribution to your employees.

A. Sample Wage Deduction Authorization Agreement

I (name of employee) understand and agree that my employer, XYZ Corporation (XYZ), may deduct money from my pay from time to time for reasons that fall into the following categories:

1. My share of the premiums for XYZ's group medical/dental plan;
2. Any contributions I may make into a retirement or pension plan sponsored, controlled or managed by XYZ;
3. Installment payments on loans or wage advances given to me by XYZ, and if there is a balance remaining when I leave XYZ, the balance of such loans or advances;
4. If I receive an overpayment of wages for any reason, repayment of such overpayments to XYZ;
5. The cost to XYZ of personal long distance calls I may make on XYZ phones or on XYZ accounts, of personal faxes sent by me using XYZ equipment or XYZ accounts, or of non work-related access to the Internet or other computer networks by me using XYZ equipment or XYZ accounts;
6. The cost of repairing or replacing any XYZ supplies, materials, equipment, money or other property that I may damage (other than normal wear and tear), lose, fail to return or take without appropriate authorization from XYZ during my employment;
7. The cost of XYZ uniforms and of cleaning the uniforms;
8. The reasonable cost or fair value, whichever is less, of meals, lodging and other facilities furnished to me by XYZ in connection with my employment; and
9. If I take paid vacation or sick leave in advance of the date I would normally be entitled to it and I separate from XYZ before accruing time to cover such advance leave, the value of such leave taken in advance that is not so covered;
10. (Any other items appropriate for your company's situation – go over this with your attorney.)

I agree that XYZ may deduct money from my pay under the above circumstances.

_____	_____
Employee Signature	XYZ Corporation Representative
_____	_____
Date	Date

The Fair Labor Standards Act (FLSA) – What It Does and Does Not Do

The FLSA **does** cover:

- Minimum wage and overtime. The federal minimum wage is currently $5.15 per hour; overtime is generally paid at time-and-a-half for all hours worked in excess of 40 in a seven-day workweek. The FLSA provides two different ways for coverage to apply to a business: 1. Individual coverage – an individual whose work affects interstate commerce is covered as an individual. However, the federal courts have defined "interstate commerce" so broadly that practically anything fits, including ordering, loading or using materials, equipment or supplies from out of state, accepting payments from customers by credit cards issued by out-of-state banks, and so on; **or** 2. Enterprise coverage – for most businesses, enterprise coverage applies if the business is involved in interstate commerce and the gross annual business volume is at least $500,000. In that case, all employees working for the business are covered. For all practical purposes, businesses can assume that all of their employees are covered under the federal wage and hour laws.

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- Equal pay for men and women – the Equal Pay Act – men and women who perform the same job at the same levels of skill, experience, and responsibility must be paid the same amount. Violation of this law raises a gender-discrimination issue, which is why such complaints are investigated by the Equal Employment Opportunity Commission. This is not the same as "equal pay for comparable work" – a rule followed by only a handful of individual states (not including Texas).
- Child labor. In most situations, children younger than 14 may not be employees. Children ages 14 and 15 may work, but only in non-hazardous occupations and only during non-school hours. There is also a substantial limitation on the number of hours they can work each day and week. Children ages 16 and 17 may work any hours they want, but may not work in hazardous occupations. Once a person reaches age 18, there is no limitation on either hours or duties. (see the Texas Workforce Commission website for further details: www.texasworkforce.org).

The FLSA does **not** require:

- Optional employee benefits and payroll practices such as breaks, lunch breaks, smoking breaks, premium holiday and weekend pay, raises, shift differentials, or pensions. These types of benefits are creations of an employer's company policies, and should be clearly explained and outlined in the employee handbook.

Your Wage and Hour Policies

Here are a few sample policies you may wish to add to your company handbook on the subject of wage and hour. These samples are nothing more than general guidelines, not specific legal advice. All company polices should be reviewed by private legal counsel before publication and distribution to your workers.

It is extremely important that you read the sample policies carefully and make any necessary changes to suit your specific situation. For example, the "UNAUTHORIZED OVERTIME" policy assumes that your company has defined its seven-day workweek to be Sunday through Saturday. If your workweek is something else (e.g., Wednesday through Tuesday), you will need to make that change before including the policy language in your handbook. The "notes" following each policy are provided as explanations only, and should not be included in your policy handbook.

UNAUTHORIZED OVERTIME

"Working unauthorized overtime is prohibited; you must have your supervisor's prior approval or request to work such additional hours. Overtime occurs when you work more than 40 hours during any seven-day workweek. Your workweek begins on Sunday and ends at midnight on Saturday. You are responsible to record and report the number of hours you have worked during each workweek."

Note: If an hourly, non-exempt employee works more than 40 hours during any seven-day workweek, federal law requires the employer to pay the overtime premium, even if the worker did so in violation of your policies. Your remedy for this policy violation is the same as for any other policy violation: a clear written warning on the first offense, and potential discharge for any further offense.

UNSCHEDULED WORK

"As a condition of employment, you may be requested and required to work beyond your regularly scheduled hours from time to time. XYZ Corporation will give as much notice as possible under the circumstances, but you may be required to work additional hours without advance notice at any time. You are responsible to arrange any necessary childcare or transportation in advance so that you may remain at work beyond your scheduled hours. Refusing to work beyond your regular schedule when requested is a violation of policy. If your personal affairs require that you be relieved of the potential for unscheduled work on any given day (or if you require a religious accommodation), you must request relief from unscheduled work as soon as possible."

Note: In a perfect word, every worker would have a reliable, consistent schedule of eight hours of work each day. However, real-world customer demands and business necessities often require employees to work beyond their regularly scheduled hours of work. If you don't notify your workers of this requirement in advance, they can decline unscheduled work on the ground that they didn't know that they might have to work after 5:00 PM, or that they have to go pick up their children, or that their bus stops running at a certain time. This simple policy addresses these potential problems. Again, be prepared to issue a clear written warning for the first offense before taking the step of discharge.

UNREPORTED HOURS – "WORKING OFF THE CLOCK"

"Intentionally or carelessly working off the clock is prohibited. You are required to punch in before you perform any work. You are not permitted to punch out before you actually stop working. Forgetting to punch the clock is not a legitimate reason for working off the clock. You are responsible to punch in before you begin working. You are responsible to stop working and punch out at your regularly scheduled time."

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Note: You may think it's obvious, but it's not: working off the clock does not relieve you from paying for the work that was done. However, you do have the authority to discipline a worker who does so in violation of your policies. Always start with a warning for the first offense.

STEALING TIME

"Stealing time and riding the clock are prohibited. Stealing time and riding the clock occur when employees are punched in, but are not actually working. Please finish drinking your coffee and reading the newspaper before you punch in. Engaging in personal matters while on the clock is prohibited."

Note: This should be obvious, but like so many other things, it's not obvious until you say so in your policies.

TIME RECORDS

"All employees of XYZ Corporation are required to maintain accurate records of their actual hours worked. Failure to maintain accurate records of your actual hours worked is prohibited. You are required to certify with your signature that your recorded hours of work are accurate. Failure to certify that your recorded hours of work are accurate is a violation of this policy."

"You are required to submit your weekly record of actual hours worked to your supervisor no later than 5:00 PM each Friday. You are required to make arrangements in advance to submit your weekly record of actual hours worked if your are absent from work. If your supervisor is absent, you must submit your weekly record of actual hours worked to the general manager. Intentional, negligent or careless failure to submit your weekly record of actual hours worked is a violation of this policy."

Note: Simply having a worker sign a time card or any time record may prove nothing. For the time record to be certified by the worker as accurate, the record should include a brief certification that should appear immediately above each employee's signature. Here's a sample:

"I certify that this is an accurate record of my actual hours worked."

_____ _____

Employee Signature Date

Another problem that employers tell us they frequently face is the employee who comes to them and claims to have worked hours several months earlier that were not included in the employee's originally submitted time records. The employee requests payment now for the time allegedly worked several months earlier, and the employer has no memory of whether the employee actually worked the hours claimed. Play it safe: pay the worker for the hours claimed, but discipline the employee for the previous and now inaccurate time record that they submitted earlier. The employee should be required to complete your form to correct the previous time record. Here's a sample:

"I, Mr/s. Employee, certify that my weekly record of actual hours worked for the period of August 1 through August 7, 2002, was not accurate at the time I submitted it. My actual hours worked for that period of time are as follows:"

_____ _____

Employee Signature Date

If the employee refuses to certify that the previous time record is not accurate, then you can decline to pay for the additional hours until the worker completes your form. Once the worker completes the form, you have genuine, documented proof that the employee submitted inaccurate time records in violation of your policies.

WAGE AGREEMENTS

Basic issues in the area of compensation and wage agreements include:

- Compensation agreements can be oral or written, with hourly, weekly, monthly, piece, book, flag, day, ticket or job rates;
- If unusual pay methods are contemplated (e.g., bonuses, commissions, overrides, etc.), the employer should have employees sign a written pay agreement that spells out the conditions for pay exactly in order to avoid misunderstandings or possible wage claims down the road;
- An employer may change both the method and the rate of an employee's pay, but only prospectively, never retroactively (to avoid the risk of violating wage payment law or breach of contract claims.)
- Always state the rate of pay in increments of the smallest amount of time as possible. If it's an hourly employee, quote their wage by the hour; if it's a salaried exempt employee, state their salary on a weekly, not annual, basis. (That way, the former employee will not be able to argue they are owed the entire quoted annual salary if the employment relationship ends before the year is up.)

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Sample written wage agreement for hourly wage earners:

"Your hourly wage is $15.00 per hour until further notice."

_____ _____
Employee Acknowledgment Date
Signature

Sample written wage agreement for salaried, exempt employees:

"Your weekly salary is $600.00 per week until further notice."

_____ _____
Employee Acknowledgment Date
Signature

Note: while not an actual policy, such wage agreements are very important documents that can protect you in the case of a wage claim filed with the Texas Workforce Commission or an audit by the U.S. Department of Labor. If an employee alleges that their wage was more than the wages paid to them, you'll be able to prove the actual wage with the acknowledged, signed wage agreement.

Jonathan Babiak, Attorney at Law
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Dear Texas Employers,

While Texas has long had the reputation of being a good place to do business, efforts to maintain and even improve the existing business climate demand our constant attention.

The 2003 Texas Legislature is considering a number of issues of critical importance to you. I know how busy you are and that time is one of your most valuable assets. Nonetheless, I strongly encourage you to familiarize yourselves with at least some of the measures that are before the Legislature this year that could have an impact on the day to day operation of your business. Whether it is health care, tort reform, workers' compensation, economic development, education, workforce development, transportation, or discrimination, please take the time to learn the issues and let your representatives know what you think and where you stand.

Here is a partial list of bills introduced that would impact Texas businesses:

- HB 50 – would provide mandatory leave for employees to attend school conferences and provides penalties against retaliation for exercising that right.
- HB 181 – would allow an individual who receives deferred adjudication to legally deny the arrest and prosecution, except for a subsequent criminal prosecution.
- HB 328 – would allow employers the opportunity to obtain information from job applicants about prior workers' comp claims and injuries.
- HB 570 – would cap liability at $250,000 for workplace injuries to employees of non-subscribers to workers' compensation.
- HB 705 – would provide a defense against a claim of negligent hiring for employers whose employees enter another's home for purposes of making repairs or delivery of goods. The defense would only be available if the employer obtained a criminal record from the DPS.
- HB 804 – would amend Texas minimum wage law to pre-empt any city ordinance establishing a minimum wage. It does not apply to government contracts or tax abatement agreements.
- HB 810 – would prohibit discrimination by state agencies on the basis of sexual orientation or gender identity.
- HB 812 – would provide that 75% of any punitive damage award would go to the Permanent University Fund. The plaintiff would receive 15% and the plaintiff's attorney 10% of the award, notwithstanding any other contractual agreement.
- HB 826 – would require employers to turn over any abandoned wage payments to the State Comptroller.

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- SB 819 – would amend the workers' compensation statute so that an insurance carrier could challenge the compensability even if it misses the seven-day deadline for beginning benefits or contesting the injury.

To monitor these and other pending bills, or to contact your legislators, visit http://www.capitol.state.tx.us.

Tax Credits: A Win/Win for Employers and Their Employees

In these challenging economic times, it's always nice to discover programs that benefit both employers and their employees alike. I'd like to bring several such programs to your attention.

Work Opportunity Tax Credit (WOTC)

Would you like to save money on your federal taxes? If so, the WOTC program may be right for you! The WOTC is a federal tax credit that reduces the federal tax liability of private-for-profit businesses that hire individuals from eight target groups, many of whom you're probably already hiring. This financial incentive rewards businesses that hire individuals who are veterans, long-term welfare recipients, food stamp recipients, ex-felons, high-risk youth, qualified summer youth, vocational rehabilitation referrals or Supplemental Security Income recipients.

The WOTC program provides employers with an income tax credit of as much as $2,400 for hiring a qualified new worker, or $1,200 per summer youth hired. Here's some great news: in 2002, Texas employers that hired workers from these targeted categories received over $118 million in potential WOTC tax credits! For additional information on WOTC, please call TWC's toll free number, 1-800-695-6879, or visit the agency's website, http://www.texasworkforce.org.

The Earned Income Tax Credit (EITC)

Helping your eligible employees take full advantage of individual tax credit programs can be a win/win proposition for those of you who employ low-wage workers. You win by cutting turnover costs (interviewing, hiring and retraining), and you retain better workers. Higher quality workers and lower turnover are always a competitive advantage for your business. Your workers win with a direct increase in take home pay. Helping hard working Texans claim tax credits for which they are eligible helps you keep good workers, encourages spending in your community, and reduces the burdens on public assistance. And, employees with reliable transportation and stable living arrangements are far more likely to show up at work on time, ready to do a good job for their employer.

How the EITC Works

The EITC was designed mainly to help working parents (and their children) and to encourage work rather than welfare. Many entry-level, low wage Texans work 40 or more hours a week, but still don't earn enough to move out of poverty. They are also largely uninformed regarding their eligibility to receive individual federal tax credits. (And, while the EITC was designed as a safety net for low-wage workers, it could also be a lifeline for a small-business owner experiencing a bad year during lean economic times.)

More individuals will qualify to claim the EITC this year, which is worth as much as $4,140 for a family of four. Because the qualifying income range rose $1,000, a family of four can earn up to $14,520 and still get the maximum credit. They can get a partial credit if they earn up to $34,000. Working parents (or grandparents) who cared for one child and who earned $17,000 in 2002, for example, might expect a check for about $2,000. If they cared for two children or more, around $3,500. While the credit decreases as income rises, anyone who earned less than $34,000 in 2002 (or in any of the three preceding years) while caring for dependent children should check this out. Individuals who do not have children may still qualify for up to $376 if they are at least age 25 but not over age 64, and earned less than $12,000. (Workers who learn they qualify for the EITC can often get a check retroactively by filing what's called a Form 1040X – an amended tax return – for up to three prior years.)

"Regular" EITC Payments

The EITC reduces the amount of federal income tax a worker owes; when the EITC exceeds the amount of taxes owed, it results in a tax refund to those who claim and qualify for the credit. Income and family size determine the amount of the EITC.

In order to claim, those who qualify for the EITC **must file** a federal tax return by completing forms 1040, 1040A or 1040 EZ and attaching schedule EIC *even if they do not owe any tax*. They will then get additional cash back for some or all of the federal income tax that was taken out of their pay during the year, if the credit exceeds their tax liability.

EITC Advance Payments

Workers with children can be paid a portion of their anticipated EITC in their monthly paychecks throughout the year. This is called the Advance Payment Option. Upon hire, each eligible worker must complete an IRS Form W5 (this form is retained in the employer's files, but it is not sent to the IRS). The employer can then advance up to $125 per month (or $1,503 per year) to the employee; a minimum wage

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worker would see their take home pay increase by over $100 each month! The best news is that the program is *not an additional cost to the employer:* these advance payments are made to the employee from the amounts the employer would normally be required to send to the IRS for federal employment taxes. The amount is paid to the employee with no income tax withheld. Then, the employer claims the amounts as a timely payment on their quarterly employment tax form (Form 941). There is no time limit: this credit is available as long as the employee's income remains below the qualifying limits.

To learn more, obtain IRS publication 596, "Earned Income Credit" at http://www.irs.ustreas.gov, or call 1-800-829-1040, or 1-800-829-3676. You may also want to encourage eligible employees to get tax preparation help from a Volunteer Income Tax Assistance (VITA) program. VITA recruits volunteers from the community to help individuals prepare their tax returns. More information is also available at the IRS website and the phone numbers listed above.

By taking advantage of and providing information about tax credits, encouraging your eligible employees to fill out their income tax returns, and completing the necessary forms to claim the Earned Income Tax Credit, you can help your employees supplement their income while they add value to your company and move toward self-sufficiency.

As always, it is a privilege to serve as your advocate at the Texas Workforce Commission.

Sincerely,

Ron Lehman
Commissioner Representing Employers

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Texas Employers Benefit Through New Hire Reporting

Submitting information about your newly hired employees to the New Hire Reporting System creates benefits for both your business and the children in your community. Some of the benefits of New Hire Reporting include:

- Keeping state Unemployment Insurance (UI) taxes as low as possible by returning UI overpayments recovered by the Texas Workforce Commission to the UI Trust Fund;
- Reducing government spending on public assistance;
- Helping state agencies, such as the Texas Workforce Commission and the Texas Workers' Compensation Commission, detect fraudulent claims and prevent overpayments;
- Helping child support workers find parents who avoid their child support responsibilities;
- Helping children receive the support to which they are entitled.

Information reported to the State Directory is automatically transmitted to the National Directory of New Hires. And, the Texas Workforce Commission, the Texas Workers' Compensation Commission, and the Texas Department of Human Services use New Hire information to detect and prevent fraud in the unemployment insurance, workers' compensation, Medicaid, and food stamp programs.

What Do Employers Report?

Employers are required to report six items within 20 days of hiring an employee if they provide hard copy reports, or at least twice monthly if they report electronically. The information that must be provided includes:

- Company name
- Payroll mailing address
- Company Federal Employer Identification Number
- Employee name
- Employee address
- Employee Social Security Number.

How Do Employers Report?

There are a number of ways to report New Hire information – choose the method that is easiest for you. You may file by using:

- The Internet, including online submission and file uploads;
- A File Transfer Protocol (FTP);
- A shareware software program that generates a file for submission;
- An electronic file mailed via diskette or tape. Please review media and file layout specifications at the New Hire website, www.newhire.org/tx.

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- A hard copy report (W-4, printed list, or state form);
- Telephone – 1-888-TEX-HIRE (1-888-839-4473);
- FAX – 1-800-732-5015;
- E-mail: tx@mail.newhire.org
- Mail: Texas New Hire Reporting
  Operations Center
  P.O. Box 149224
  Austin, Texas 78714-9224

Attention Employers: Existing and New Requirements for Reporting Occupational Injuries and Illness to the Texas Workers' Compensation Commission (Even if You Don't Carry Workers' Comp Insurance)

Existing Requirements

Most Texas employers are required by law to report occupational injuries, illnesses and fatalities to the Texas Workers' Compensation Commission (TWCC). Injuries and illnesses that occur at businesses that carry workers' compensation insurance (subscribers) are typically reported electronically to TWCC on the TWCC Form 1 by the company's workers' compensation insurance carrier. On the other hand, employers with five or more employees that do not carry workers' comp insurance (non-subscribers) are required to report injury and illness information on the TWCC Form 7. (Texas Labor Code 411.0 01(2), 411.032 and Title 28 of the Texas Administrative Code, Rule 160.2).

Injuries that must be reported include:

- any on-the-job injury that results in the employee's absence from work for more than one day; and
- occupational diseases of which the employer has knowledge.

New Requirements

Since August 2000, the Texas Workforce Commission (TWC) has been issuing North American Industrial Classification System (NAICS) codes to all Texas employers. The NAICS codes will replace the Standard Industrial Classification (SIC) system, which has been used to classify businesses by industry for 60 years. The NAICS system recognizes hundreds of new businesses in our economy and reorganizes the classification of businesses based on production processes. ***Beginning on July 1, 2003, all employers that are required to report injuries and illnesses to TWCC (as described above) must do so using their NAICS codes instead of SIC codes.***

Why Should Employers Report Injuries and Illnesses to TWCC?

Reporting occupational injuries to TWCC serves multiple beneficial purposes, for employers and workers alike:

- Employers benefit because analyzing injury and illness data, which is available on TWCC's web site, can help them better understand the risks involved in their industries. Data analysts can illustrate comparisons of a particular worksite's injury history to an industry average;
- TWCC's accident prevention services, including free health and safety consultations, training, publications and safety video loans are available to all Texas employers. It is important to collect injury and illness information from both subscribers and non-subscribers to ensure that the TWCC can provide relevant and effective educational and preventive resources to businesses and their workers.
- Complete and accurate data concerning injuries, illnesses and fatalities that occur in Texas workplaces helps TWCC analyze trends, such as types and causes of injuries, and industries in which injuries are occurring. This enables TWCC to better target the accident prevention resources of its Workers' Health and Safety Division to employers and industries that need the most attention;
- The information provided on the reporting forms becomes necessary when TWCC must become involved in disputed workers' compensation cases; and
- The information is necessary to analyze the costs associated with occupational injuries in our state.

For More Information:

- Contact TWCC with questions about reporting requirements at 512-804-4695;
- Access TWCC Forms 1 and 7 online – www.twcc.state.tx.us, under "Forms"
- Access TWCC claims data for analysis – www.twcc.state.tx.us, "Research & Analysis" link under "Information"; for information not found on the website, contact injury.analysis@twcc.state.tx.us or call 512-804-4651;
- Contact TWC with inquiries regarding the assignment of NAICS codes at 512-491-4865.

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GENERAL RECORDKEEPING REQUIREMENTS FOR TEXAS EMPLOYERS

Most Texas and federal laws contain recordkeeping requirements for employers. The requirements center around three main duties:

1. The basic duty to keep certain kinds of records;
2. The duty to keep records in a certain form and readily available for inspection; and
3. The duty to keep the records for a specified period of time.

This brief article will focus on the third set of requirements, i.e., how long employers should maintain records under various laws.

Statutory Requirements

- Wage and hour laws (the Fair Labor Standards Act – FLSA) - while some payroll records need to be kept for only two years, most must be kept for at least three years. To be safe, keep all employee payroll records for at least three years after the date of the last payroll check.
- Unemployment compensation - keep all records relating to employees' wages and other compensation, as well as all unemployment tax records, for at least three years.
- Family and Medical Leave (FMLA) - keep all payroll, benefit, and leave-related documentation for at least three years after the leave event.
- I-9 records - keep all I-9 records for at least three years following the date of hire, or for one year following the employee's date of last work, whichever point is reached last.
- New Hire Reporting - report all new hire information to the Office of the Attorney General (see specifics in "Business Briefs") within 20 days of hire.
- Hiring documentation - under Equal Employment Opportunity Commission (EEOC) rules, all records relating to the hiring process must be kept for at least one year following the date the employee was hired for the position in question; if a claim or lawsuit is filed, the records must be kept while the action is pending.
- Disability-related records (Americans with Disability Act – the ADA) - keep all ADA-related accommodation documentation for at least one year following the date the document was created or the personnel action was taken, whichever comes last.
- Benefit-related information (ERISA and HIPAA) - generally, keep ERISA and HIPAA-related documents for at least six years following the creation of the documents.
- Age-discrimination documentation (Age Discrimination in Employment Act - ADEA) - keep payroll records for at least three years, and any other documents relating to personnel actions for at least one year, or during the pendency of a claim or lawsuit.
- OSHA records - keep OSHA-related records for at least five years.
- Hazardous materials records - keep these for at least 30 years following the date of an employee's separation from employment, due to the long latency period for some types of illnesses caused by exposure to hazardous materials.
- State discrimination laws - keep all personnel records for at least one year following an employee's last day of work.
- IRS payroll tax-related records - keep these records for at least four years following the period covered by the records.

Common Law Requirements

There are no common law requirements as such regarding how long employers should keep certain kinds of records. However, there is a practical aspect to the issue: each common law cause of action is subject to a specific statute of limitations, meaning that there is a time limit within which such a cause of action must be brought, or else it is "time-barred". The most common causes of action in the category of common law include defamation, intentional infliction of emotional distress, breach of contract, fraud, tortious interference with an employment relationship, and invasion of privacy. The statutes of limitation vary widely and range from one to four years under Texas law.

How to Deal With So Many Time Limits

Clearly, there are many different recordkeeping requirements for different situations. Employers can rightly wonder whether they can be in good shape under one requirement, but out of compliance under another law. For that reason, many employment law attorneys advise their employer clients to keep all employment-related records for

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at least seven years following the date of an employee's work separation. Doing that will exhaust all possible statutes of limitation for various common law causes of action in Texas, and will keep an employer safe under federal and Texas statutes as well. The only exception is fairly easy to remember: if any employees are exposed to hazardous materials, keep the documentation relating to the exposure for at least 30 years following the employee's work separation.

Conclusion

While some employers view the recordkeeping requirements as a bothersome hassle, the fact is that for an employer that complies with the laws, the records can be the company's best friend in an unemployment claim, discrimination charge, or employment-related lawsuit. Properly maintained records increase an employer's credibility and help the employer prove that it complied with state and federal laws with respect to its employees.

HELPFUL EMPLOYMENT LAW-RELATED WEB SITES

Federal Laws

General U.S. government Web site – FedWorld - http://www.fedworld.gov/

General legal information site – U.S. and state laws - http://www.law.cornell.edu/

FERPA – general information & links - http://clhe.org/issues/studentpri.htm

U.S. Department of Labor (DOL) – Home Page: http://www.dol.gov

DOL – Laws and Regulations – Main Page - http://www.dol.gov/dol/public/regs/main.htm

DOL – Required Posters - http://www.dol.gov/dol/osbp/public/sbrefa/poster/main.htm

DOL – Small Business Handbook - http://www.dol.gov/dol/asp/public/programs/handbook/main.htm

DOL – Code of Federal Regulations - http://www.dol.gov/dol/allcfr/Title_29/toc.htm

DOL – Wage and Hour Regulations - http://www.dol.gov/dol/allcfr/Title_29/Chapter_V.htm

DOL – OSHA - http://www.osha.gov/

Equal Employment Opportunity Commission - http://www.eeoc.gov/

INS and I-9 information - http://www.immigration.gov

I-9 Form - http://www.immigration.gov/graphics/formsfee/forms/i-9.htm

INS Employer Info - http://www.immigration.gov/graphics/lawsregs/handbook/hand_emp.pdf

Federal Trade Commission – Fair Credit Reporting Act information – http://www.ftc.gov

Social Security Administration – verification of SSNs – http://www.ssa.gov

IRS Home Page - http://www.irs.gov

National Labor Relations Board - http://www.nlrb.gov/

Texas Laws

Texas – Home Page – http://www.state.tx.us/

Texas – State Laws - http://www.capitol.state.tx.us/statutes/statutes.html

Texas – State Regulations - http://lamb.sos.state.tx.us/tac/index.html

State of Texas New Hire Program - http://www.newhire.org/tx

Texas Workforce Commission (TWC) - http://www.texasworkforce.org/

TWC Employer Page - http://www.texasworkforce.org/customers/bemp/bemp.html

TWC Labor Law Page - http://www.texasworkforce.org/ui/lablaw/lablaw.html

Important Employer Contact Information

Commissioner Representing Employers
http://www.texasworkforce.org 1(800) 832-9394

Work Opportunity Tax Credit 1(800) 695-6879

Unemployment Insurance Fraud Hotline 1(800) 252-3642

Labor Law (Payday & FLSA Questions) 1(800) 832-9243

TWC Program Numbers
Tax Department — Austin, Texas 1(800) 832-9394 (OPTION 2)
TWC Posters (512) 463-2747
Quarterly Report Forms (512) 463-2749
Tax Rate Information (512) 463-2756
New Employers (512) 463-2731

Workforce Division
Alien Labor Certification (512) 463-2332
Proprietary Schools (512) 936-3100

Labor Market Information 1(866) 938-4444
BLS-790 Reports 1(800) 252-3485
Industry Verification Reports 1(800) 227-7816
OES Wage Survey 1(800) 252-3616

Career Development Resources 1(800) 822-7526

Workforce Development Boards
http://www.texasworkforce.org/boards/board.html
To post job openings, please contact the Workforce Development Board in your area.

Other Agencies
Office of the Attorney General – New Hire Reporting 1(888) 839-4473
http://www.newhire.org/tx

Equal Employment Opportunity Commission
http://www.eeoc.gov
Dallas (214) 655-3355
Houston (713) 653-3320
San Antonio (210) 281-7600

Internal Revenue Service
http://www.irs.gov 1(800) 829-1040

United States Department of Labor — *Wage and Hour Division*
http://www.dol.gov
Dallas (817) 861-2150
Houston (713) 339-5500
San Antonio (210) 308-4515

United States Department of Labor - Pension, *Welfare and Benefits Admin.* (214) 767-6831

United States Immigration and Naturalization *Service (INS)* 1(800) 375-5283

Texas Commission on Human Rights
http://www.tchr.state.tx.us 1(888) 452-4778

Tx Comptroller of Public Accounts
http://www.cpa.state.tx.us 1(800) 252-5555

Tx Department of Insurance
http://www.tdi.state.tx.us 1(800) 578-4677

Tx Department of Licensing and Regulation
http://www.license.state.tx.us 1(800) 803-9202

Tx Department of Public Safety
http://www.txdps.state.tx.us
Austin Headquarters (512) 424-2000
Driver License Customer Service (512) 424-2600

Tx Workers Compensation Comm.
http://www.twcc.state.tx.us 1(800) 252-7031
(512) 804-4000

Required Employer Posters

US DEPARTMENT OF LABOR —
EMPLOYMENT STANDARDS ADMINISTRATION,
WAGE & HOUR DIVISION
Federal Law requires:
Fair Labor Standards Act
Employee Polygraph Protection Act
Family & Medical Leave Act of 1993
(all 3 are available on the World Wide Web at http://www.dol.gov/elaws/posters.htm)

US DEPARTMENT OF LABOR —
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA)
Federal Law requires:
Job Safety & Health Protection (available online at http://www.osha.gov)

OSHA area offices in Texas:
Austin, Corpus Christi, Dallas, El Paso, Fort Worth and Houston

U.S. EMPLOYMENT OPPORTUNITY COMMISSION
Discrimination Act and Civil Rights Act requires:
Equal Employment Opportunity is the Law
American with Disabilities Act of 1990
(available online at http://www.eeoc.gov/publications.html)

TEXAS WORKERS COMPENSATION COMMISSION
State Law requires:
Do or Do not Carry Worker's Comp Insurance
How Employees can Report Workplace Safety Violations
(available online at http://www.twcc.state.tx.us)

TEXAS WORKFORCE COMMISSION
State Law requires:
Texas Unemployment Compensation
Texas Payday Law
(available online at http://www.twc.state.tx.us)

New business only: "Employer Information Packet"
1 (800) 832-9394 or (512) 463-2731

PUTTING THE BRAKES ON WORKERS' COMPENSATION COSTS

The vast majority of employers in Texas are "small employers." More than 90% of these employers have fewer than 100 employees, and over 70% have fewer than 25 employees. Small companies are much less likely to have specialized managers such as Safety Directors, Risk Managers, Occupational Health Directors, in-house Legal Counsel or even a Human Resources Manager. Instead, management appoints one or more owners or managers to assume these important duties as part of their job functions on an "as-needed" basis. This means that such managers are, to a large degree, expected to learn by experience, utilizing whatever network of contacts and resources they can find to learn their new administrative roles.

When an employer has workers' compensation (WC) insurance coverage, they have a built-in resource to help them manage their WC cases: their insurance adjuster. Much of the cost of your insurance premium goes to the training and support services of the adjuster in the insurance company's claims department. If you are not already using your adjuster as a teacher and consultant, start today.

The Texas Workers' Compensation Act is a "no-fault" statute. The statute protects employers of a worker who is injured on the job from lawsuits based upon ordinary negligence. It does not protect the employer from a gross negligence claim by survivors in the event of a fatal injury of an employee. This is where good written safety policies and procedures, consistent enforcement of them and safe tools and equipment for every employee's job functions become important. If a worker ignores a safety policy or misuses equipment in a way that causes his injury, he will still receive workers' compensation benefits (the "no-fault" provision), but he may be subject to disciplinary action, including termination, for violation of the safety policy.

Adverse employment action against an employee because of an injury or because the employee filed a WC claim is strictly forbidden by the WC Act. This does not mean adverse action cannot be taken against the worker for violation of company policy. However, the employer should obtain legal advice before termination of an injured worker so that the actual reason for the adverse action is supported in the event of an allegation of illegal WC retaliation by a worker.

Many employers simply "dump" a new WC claim on their insurance company and do not take an active role in the claim investigation or claim management. This is a costly mistake. Prompt, early fact investigation by the employer is

critical to preserving certain statutory defenses and exemptions the Act provides. For example, your insurance company needs to know if the worker was a temporary employee actually employed by another company with its own WC insurance coverage. It needs to know exactly how the injury occurred so that the adjuster can help identify possible legal exceptions (e.g. "horseplay") to liability in time to controvert the claim for you.

The adjuster has only seven days to controvert under a number of exceptions to liability or compensability. If you fail to provide the adjuster with the facts, you may "buy" a claim you didn't have to, thus increasing your "risk rating" and, ultimately, your premium.

This article will focus on the employer's own investigation of a WC claim. The employee who is assigned to be the acting "Risk Manager" does have several sources from which to learn more about the WC law and how to be a good investigator. The adjuster is the most important source for early assistance on a claim. However, you will ask more informed questions of your adjuster if you know a bit about the law first.

PUTTING THE BRAKES ON ... cont.

The law is administered by the Texas Workers' Compensation Commission (TWCC), with its central office in Austin and several field offices in major cities. TWCC maintains some useful tools and information on its website, www.twcc.state.tx.us. Go there to get an overview of the WC benefits and to read the statute and the rules (especially Chapters 126, 129, and 130) and the dispute resolution rules in Chapters 140-143 and 145 if you become involved in a disputed issue. You can see the required forms and official notices for use by employers, insurance companies and claimants, and learn about upcoming TWCC seminars and publications. The site also has links to TWCC's Health & Safety Division, which offers useful free safety consulting services for all industry sectors and sizes of employers. The law requires insurers of large companies to provide certain safety training and consultations. Call 1-800-687-7080 for more information, as your adjuster may not know if it applies to your company.

In addition, the TWCC has ombudsmen at both your local field office and the state agency office who can answer general employer questions about how the law and procedure work. Use the TWCC state Ombudsman if you already have a WC benefit dispute case pending at the local office involving a claimant who does not have an attorney, because the field office ombudsman is required to assist such claimants. Also, depending upon your company's industry, there may be legal or other expertise available to you through your trade association, or just through your own business network. Finally, the Employer Commissioner's office at the Texas Workforce Commission can guide you in some WC matters, including investigation ideas. Just call our hotline, 1-800-832-9394.

Often, employers are surprised to find they have a WC claim, especially if there was no known "incident." Injured workers often do not clearly report a compensable injury initially for one of several reasons. They are afraid to file a claim; they minimize their injury until it has worsened or until they use up their insurance benefits or the company disallows a medical bill. They think the injury is not "new" until symptoms progress; they think they injured themselves some other way; or they don't want to jeopardize their department's upcoming safety or attendance bonuses. Sometimes, employees don't report an injury because they want to talk to their doctor first, don't want to go to the employer's doctor, or want to see a WC attorney first (especially if they have several prior WC claims and have "learned the system").

Most of the legal issues in a WC case are very "fact dependent," so early investigation at the first sign of a possible claim is critical to managing WC claim costs. The earlier your efforts, the more you can impact a WC claim! The WC Act requires that TWCC "liberally construe" its provisions in favor of the injured worker. Statutory terms like "injury," "compensable injury," and "course and scope of employment" are liberally interpreted. Even the clear requirement that an injured worker "report the injury to the employer within 30 days" is so liberally construed that the mere fact the worker's doctor's office calls you to verify your WC coverage has been construed as the worker's report to the employer. A family member who leaves a voice mail message that "Joe hurt his hand and can't work for a while" will usually suffice, even if there is no clue that Joe hurt his hand doing something related to work.

When you get "clues" about an injury, take them seriously, and begin your fact investigation. Your assigned Risk Manager should coordinate this. Talk to Joe directly and inquire about what you have heard. Ask Joe to fill out an Accident Report "if he was injured at work" and use that information for your further investigation. Find out who Joe's doctor is. If you have a company doctor, take Joe there if you can. If Joe took off work time for the injury, tell him you need a doctor's letter about his ability to continue work or any restrictions. Talk to Joe's managers and co-workers to see what they know about Joe's injury. Often a coworker has useful information, including background information. How long has Joe worked for you? Thirty percent of WC claims are filed by employees of less than three years. Did you do a pre-employment claims check? Look at it: is it the same type of injury? Did the injury "happen" close in time to a disciplinary action which Joe may have resented, or Joe's termination from your employment?

Did you know that a "flare-up" of an old, known injury is often found to be a "new injury"? Another problem is that some "injuries" are not accidental, and can be "sneaky." An injury may be an "occupational illness." A good example of this is carpal tunnel disease, often found in workers who primarily do keyboarding, distance driving, machinery operation, assembly work, or other repetitive tasks using the same body parts and motions over and over in their work. Onset of symptoms may be very subtle and slow, and the worker may not even think of it as related to his occupation until an astute doctor inquires about his work activities in the course of an evaluation. It really helps to have a safety consultation (it may be free, from TWCC!) if your industry or some of your job positions involve such repetitive motions, to identify how you can minimize the risks through simple measures, policies and ergonomic changes.

Occupational diseases can be difficult claims, because the "date of injury" isn't the date of the first symptom, but rather the date on which the worker "first knew or should have known" it could be caused by the work. In some cases, the employer may be able to show that this date was reached

PUTTING THE BRAKES ON ... cont.

during a prior employment, but not often. This is very fact-dependent. The date of injury must be determined because the time frame for income benefits and medical benefits depends upon and is related to that date.

Sometimes, especially among workers with multiple employers, there can even be an issue as to which employer gets to "bite the bullet." For example, a classic Texas case involved a dental assistant who simultaneously worked for six different dental offices! The Act assigns liability for the WC claim in an occupational disease to the employer with whom the worker was "last injuriously exposed" before he knew or should have known he had a work-related disease. In this particular case, the liable employer had employed the worker for only a month.

You can now see how important it is to immediately follow up on any clues about an injury that might turn into a WC claim. Assign a savvy staff member to be your Risk Manager, and alert your insurance adjuster. Discuss the facts of your investigation with the adjuster first. Many employers resist notifying their adjuster. They then deprive themselves of the help and assistance that can sometimes make a critical difference.

Identify the best fact witnesses for each possible claim. Ask the worker and his coworkers and managers some open-ended questions using the *"Five W's"*: Who? What? When? Where? Why (or How)? You want to know who SAW or HEARD anything that may affect the validity of the claim or the history of the injury. If A heard something from B, you must also interview B, until you reach the actual source of the information. That person is your best witness on that fact. A & B only have "hearsay" knowledge, and that will not support your case at a hearing before TWCC. And don't forget to document your investigation! Written statements of a witness should be signed and dated, and even notarized if possible. You can lose a good witness if he moves away or gets mad at you!

You also want to know what persons were working with or around the worker, or supervising the worker, at the time of an accident (or at times prior to the report of an occupational disease), and interview them. Avoid disclosing the source of any information to someone you are interviewing, even if you use the information in the question. For example, you might say "if our current information is that (Worker) was involved in a fight with C, would that be consistent with what you saw/heard?" Then, follow up if it wasn't, with more questions. Sometimes you might have to go back and re-interview A, B or C based on new information.

If an accident involved tools or equipment, remove them from the site and photograph them. It's much easier to explain how an accident could not have happened the way the claimant said it did if you can show the picture and describe the features you relied upon. If equipment or tools actually malfunctioned, causing the injury, consult your own attorney to protect your rights and for instructions about handling the investigation and the evidence.

Be sure you notify your insurance company of every WC claim, even if the worker is able to continue his job while injured. These are "medical only" claims and will usually be handled by a different adjuster. Set up a medical or WC file for each injury but don't make it part of the personnel file (confidentiality and privacy laws can get you into trouble). Also, promptly report any change in the injured worker's pay, schedule or work status to your adjuster. She will then tell you what forms must be filed, and how the change affects your costs. You will avoid risks of overpayments, or of underpayment of benefits and extra charges of interest on them. Any time you learn of possible fraud, let your adjuster know right away so she can follow up. Cases have been won on benefit entitlement issues because the adjuster obtained good surveillance and investigation services showing the claimant working as a trapeze artist in the circus while supposedly "on bed rest" for her bad back!

You can also cut your costs by enabling an injured worker to return to work sooner, thereby reducing or ending WC benefit entitlement. Investigate other companies' "Return to Work" policies and practices for ideas. Remember that each of the four WC income benefit categories has different qualifications for entitlement. You should always know what kind of benefit your worker is receiving, and when or under what circumstances it will end. Part of your adjuster's job is to help you with this, so ask a lot of questions! If your adjuster recommends a service that is costly, it may still be worth it. For example, a medical case manager or a vocational placement service may actually reduce long-term costs if the injured worker sincerely wants to return to work but needs help doing it. It can, however, be a wasteful expense if he doesn't, because the claimant does not have to cooperate with such services.

Managing the medical costs of a WC claim is a big challenge. The worker is entitled to all "reasonable and necessary" health care. This can often be more and better health care than the worker could get under your health benefit plan! The worker is also free from day one to select his own treating doctor, and to change doctors once without TWCC approval and more often with approval (which is rarely denied). You can require by policy that the injured worker see your company doctor initially when an accidental injury occurs, and discipline an employee who does not do so. But in general, it's risky to terminate an employee for this because it could be construed as interfering with the right

PUTTING THE BRAKES ON ... cont.

of choice of doctor, even though you only require that one exam.

Twice a year, your carrier can require the injured worker to see an "independent medical examination" (IME) doctor the adjuster selects. Is he or she one that TWCC respects as being skilled and objective? You don't want your carrier to use a doctor who always says "return to full duty" when the worker really cannot safely do so. A persuasive IME exam is also an important "brake" on runaway "overtreatment" by the worker's treating doctor. If the reasonableness and necessity of medical treatment is disputed by the IME doctor, TWCC will appoint a third doctor to examine the claimant and give an opinion.

Your adjuster may also occasionally request a "peer review doctor" to review cumulative medical records and advise on appropriateness of treatment, inadequacy of diagnostic work-up, inappropriate rehabilitation or medications. IME exams and Peer Reviews are only rarely a waste of time and money, and can save you a bundle.

Talk to your adjuster about ways you can help her limit your exposure to the costs of each workers' compensation claim. Your WC insurance premium is based upon your industry category and your risk experience. Try to remain supportive of the worker during his recovery and therapy. Even if a limited duty job that does not pay at the worker's prior level can be offered, it is a way to decrease the amount of income benefits paid. An angry employee can sabotage your cost-containment efforts in a large variety of creative ways. If you must replace a valued worker to get the job done, try to plan a way that the worker can reapply for future positions in your company. Some positions may allow for you to assign work to an injured employee to do at home. And remember that a worker receiving certain types of workers' compensation benefits is not eligible to receive unemployment benefits at the same time. Call the Employer's Hotline at TWC if you learn this is happening.

In conclusion, take charge of your workers' compensation risk exposure by assigning a risk manager, using your insurance adjuster as a consultant, and fully investigating the facts of the injury as soon as you learn of it. Help put the brakes on workers' compensation costs!

Christine Delmas
Attorney at Law

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