

**Ron Lehman**  
Commissioner Representing Employers  
Texas Workforce Commission

## 10 Ways to Keep Good Employees in a Hot Job Market

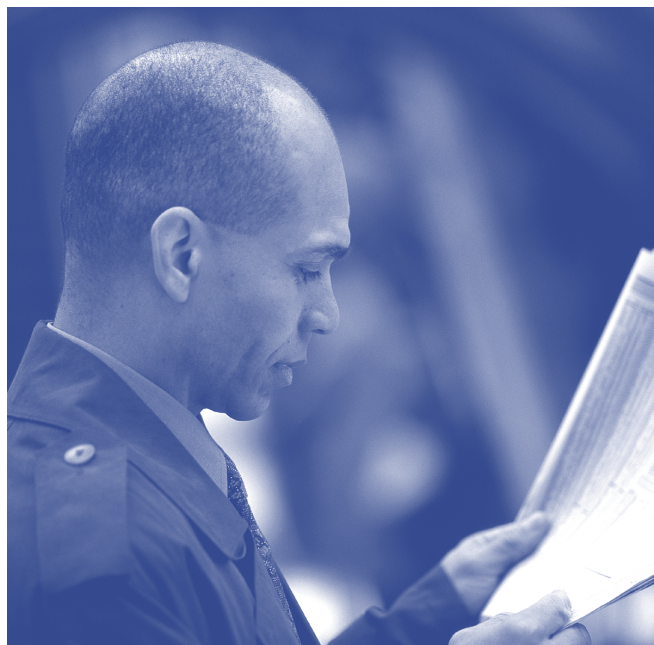
Record-breaking low unemployment has made retention of good employees a pivotal issue for employers nationwide. While it is obvious that the best retention strategy is to hire the right person in the first place, that's only the beginning of the story.

The simple truth is that your employees are your company's most valuable asset: it's impossible to run a successful business of any sort in the 21<sup>st</sup> Century without a staff of high quality performers who solve – not create – problems. Good employees can give you the competitive edge.

For example, retail sales are booming: depending on the region of the country, retail sales rose between 8.9% and 12% from the spring of 1999 through the spring of 2000 according to the National Retail Federation. However, an employer cannot take advantage of this healthy sales climate without enough skilled employees to get the work done. A company simply can't afford for employee turnover to get any higher at the same time business is soaring. For that reason, many retailers are instituting retention policies. According to retail giant Macy's West CEO Jim Zimmerman, "Sales and profit are our number one objective, but retention is our number one priority."

It's also important to remember that your employees have many more options and choices today than ever before. The Internet is filled with a bewildering array of "job boards" of varying quality listing thousands of jobs worldwide. Some types of employees are so scarce that employers are raiding their competitors for workers. If your employees don't feel challenged, appreciated or adequately rewarded, nothing can force them to stay with your company; they may very well find someone else who does value their skills. And, while a fair salary and financial stability are certainly important, they really don't tell the whole story. It seems that many workers are looking for personal fulfillment – in other words, meaning over money.

So, what does a "retention-driven" employer look like and how do you hang on to your star employees? According to several



studies investigating why employees stay in their jobs, the solution seems to lie in a combination of factors including challenging assignments, opportunities for career growth, development and personal fulfillment, employer flexibility, a family-friendly atmosphere, and the chance to work with good people. In short, most employees really would like to excel; it seems human beings really do want to improve themselves and "be all they can be." While you can't force or threaten an employee into improving their performance, as an employer or supervisor, you can play a huge role in moving them in the direction of success – yours and theirs.

If you're still not convinced, think about retaining your employees in very pragmatic, dollars and cents terms. Several years ago, the Coca-Cola Retailing Research Council commissioned a study on employee turnover in the supermarket industry. According to that research, employee turnover costs the average American supermarket an astonishing \$198,977 each year. The

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study's author, Blake Frank, a professor in the Graduate School of Management at the University of Dallas, points out that this translates to a staggering \$5.8 billion annually for the industry.

Blake estimates that "the annual cost of employee turnover in the supermarket industry exceeds the entire industry's annual profit by more than 40%." He calculates turnover as direct costs (training, advertising, testing, interviewing, new employee orientation) and "opportunity costs," including "change-making errors, paperwork mistakes, damaging products, inventory shrinkage, and improper use of equipment." The Coca-Cola study revealed that the median tenure for top supermarket companies was 148 days. The worst tenure was 86 days.

The study also revealed that managerial and hourly employees have different "retention drivers" and different needs. Store managers' top three desires were a clear sense of organizational direction, high-quality training, and the chance to advance. Hourly employees' top three desires were good direction, appropriate and sufficient equipment and supplies, and good immediate supervision.

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According to Ken Sekella, who for eight years was the senior vice president for human resources at Vons, a large regional supermarket chain based in California, there was a 72% difference between the worst retention rates and the median tenure on the basis of just the top three retention drivers. From that, Sekella concludes that an employee's experience during the first week on the job is an absolutely vital factor in retention. "It's so critical that you need to consciously manage it. If the orientation is too traumatic, they're likely to say, 'I really don't need this.' You need to let them know what the company's values are. And it's measurable. Store managers need to be held accountable for retention. It needs to be built into their compensation as a component of their bonus."

Sekella calls Seattle-based Nordstrom's an employer that does an especially fine job of "getting round pegs into round holes" by hiring and orienting their new employees carefully and thoroughly. Sounding more experienced in the ways of the world than sarcastic, Sekella suggests that a creatively designed compensation plan can motivate workers to "actually acknowledge customers." (Wow! That sounds promising.)

While every employer's approach to successful retention will reflect its own culture, here are 10 ways to help you keep good people around.

1. **Hire the right people for company fit.** Get it right from the start by investing in the hiring process. Employers must be clearly aware of their goals up front and the kinds of skills, people, behaviors and competencies needed to meet those goals. Don't make a bad hire assuming you're going to "fix" it later. Even in the 21<sup>st</sup> Century, you still can't make a silk purse out of a sow's ear. Once you've defined your goals, finding the right person to hire may require you to interview job candidates longer and more often, asking more targeted questions about job skills and attitudes and then listening carefully to their answers. Don't dominate the interview: spend 80% of your time listening, 20% speaking. And, pay as much attention to non-verbal signals such as body language and eye contact as to what's actually being said. Before making a final decision, you may also want to ask other managers to interview the top candidates as well. You're looking for people with the skills you need; this includes both such hard skills as math, literacy and problem solving, as well as "soft" skills such as motivation and attitudes.
2. **Intensively manage an employee's first week of work with the company.** From day one, do everything possible to make new employees feel welcome. Set the tone early by letting employees know what the company's values are right away, and provide meaningful orientation and training sessions. The more you can teach your employees, the more you empower them. Before beginning a new employee's on the job training, meet with supervisors and other key employees to decide exactly what the new employee will be doing. Write these functions down and go over them carefully in clear, straightforward language with the employee on their first day with the company. New employees need to know exactly what is going to be expected of them; not only does it help to focus them, it also gives them tangible goals.
3. **Introduce your company's policies to your new workers in writing as soon as possible.** Have them sign a statement acknowledging that they have received and understood those policies, and then live with them, every time, with every worker. Clearly explain what the company expects of its employees in the simplest and most straightforward language possible. There is no federal or state law requiring a private sector employer to translate job descriptions, policies or instructions into a language

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other than English. However, if you realistically expect to have enforceable policies or meaningful job descriptions, it is extremely helpful to make sure that your expectations are explained to all new workers in a language that they understand and comprehend.

4. **Be patient with your employees.** Just because you know how something needs to be done doesn't mean your workers do, no matter what their resumes say they did for another company. Try to deal calmly with what you consider to be dumb mistakes; losing patience tells your employees that you think they're stupid and destroys their self-confidence. You want to create an atmosphere that encourages people to grow and stretch as employees, not an atmosphere of fear and mistrust. If at all possible, assign an experienced employee to work with your new hires during their training period. This veteran employee should explain every facet of the job and continue to monitor the individual's command of the work until it is completely satisfactory.
5. **Let your employees know that they have the opportunity to grow by staying with the company.** While salary levels are certainly an important part of staying competitive, also consider side-line benefits which not only attract employees initially, but entice them to stay. You want employees to feel fortunate to work for the company. Many companies have started providing such perks as fully stocked kitchens, free lunches, health club memberships, and concierge services. The question to consider here is what work benefits do you offer that an employee could not find elsewhere that help employees meet their long-range goals and/or make their everyday lives a little easier. By the same token, don't make promises you can't keep. Don't promise to reward extra effort with a promotion or raise if you can't deliver. Don't promise to provide insurance, vacation and sick leave benefits or year-end bonuses if it isn't going to happen.
6. **Talk to your employees often and really listen to their answers.** This will put you in a much better position to observe employees who are ready to handle more responsibility or to detect morale problems quickly. Give your employees meaningful feedback. When they do a good job, let them know it; feeling appreciated will go a long way toward encouraging employee loyalty and distinguishing your business from others in a positive way. Praising employees for the good work they do can encourage them to adopt a more positive attitude towards improving the areas where they may be deficient. When your workers make mistakes, give them prompt corrective feedback in as positive a manner as possible. Remember: while it isn't always possible to achieve, the ultimate goal is to encourage an employee's success and to improve performance deficiencies.
7. **Address performance problems as soon as they arise.** Performance problems aren't going to go away by themselves. The biggest counseling mistake is to avoid dealing with the problem. Don't let little problems grow into big ones, or sit by helplessly, waiting for disaster to strike. Counseling your problem performers may take 10% of your time if you handle a situation when it first arises and is still manageable. While that's certainly a large investment of time, you ignore these problems at your peril. If you allow your employees bad habits to become chronic, you may suddenly find yourself spending half or more of your day trying to undo the damage. And, don't think for a moment that these problems go unnoticed by others in the workplace, especially your top performers who end up shouldering more of the workload.
8. **Be specific, not general, when giving constructive feedback.** You can't fix a problem without first discussing its nature; an employee can't correct their behavior unless they first acknowledge there's a performance deficiency. Describe performance problems by using objective, meaningful terms that relate directly to job-related behaviors. Instead of focusing on an employee's poor attitude or calling them lazy, you might say, "You've been seen making personal phone calls, smoking, and reading the newspaper when co-workers needed your help to meet a critical deadline. On June 5, 8 and 11, Cindy asked you to help out with secretarial overflow work and you refused on all three occasions. This is unacceptable and could lead to further discipline if it happens again." This calls attention to behavior that is completely within the employee's ability to control and change. Follow your company's progressive discipline policy and document all encounters with problem employees in writing. Remember: the "fuzzier" the reason for discharge or discipline, the more ammunition an employee has for alleging that the stated reason wasn't the real reason for the action taken.
9. **Firing an employee is your last resort, but there are some situations that warrant termination.** No matter how low the unemployment rate falls, there will still be occasions when an employee simply cannot or will not do what needs to be done in the workplace on a consistent, reliable basis, even after intensive training, repeated warnings and coaching. Further, you should not tolerate threatening, harassing, violent words or actions from

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anyone. Keeping poor performers after you've taken all promised disciplinary steps not only creates management headaches for you, it lowers the productivity and morale of others and affects the company's bottom line. Remember: always have documentation to support your actions and final decision to fire the employee.

**10. Respect the work/life balance-juggling act that your employees face daily.** Many employers are so preoccupied with intricate compensation arrangements and initial public offerings that they forget to address lifestyle benefits for their employees. However, it's often the little things that make your office a more satisfying and enjoyable place to spend the day; it's also the little things that can make a huge difference in whether a prized employee stays with you or goes elsewhere. Millions of American workers find themselves in the so-called sandwich generation – caring for young children and aging parents simultaneously. For many of these employees, instituting family-friendly policies and programs can make your workplace too good to pass up. According to a recent study done by the Work and Family Institute, 37% of the companies that offer child care services report lower turnover rates as a result; other benefits include higher morale

(reported by 62% of respondents), reduced absenteeism (54% of respondents) and increased productivity (52%). Family-friendly covers a wide range of programs including non-traditional schedules, such as flextime, job-sharing, compressed work weeks and telecommuting. If you need help deciding whether such supportive policies would work for your organization, contact TWC's Work and Family Clearinghouse at (512) 936-3226 for assistance.

If you still think that providing certain benefits to your employees is too expensive or time consuming, take a moment to compare the costs of implementing such programs against the expense of hiring new employees again and again (if you can find them) while simultaneously fighting unemployment claims filed by former workers. You may also want to evaluate your approach if competitors are constantly stealing your most talented employees away.

From a strictly business standpoint, it just makes good sense to be a retention-driven employer. Let's face it: disloyal employees are very unlikely to help you develop customers who are loyal to your company. A content, happy workforce of productive, long-term employees is truly your best asset and can give you an invaluable competitive advantage.

Renée M. Miller  
Attorney at Law

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

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matters as the Texas Payday Law, the Unemployment Insurance Hearing Process, Workers' Compensation, Hiring, Firing, Sexual Harassment and Policy Handbooks. To keep costs down, lunch will be on your own. The registration fee is \$60 and is non-refundable. Seating is limited, so please make your reservations immediately if you plan to attend. We hope to see you this Winter!

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# TWC ADOPTS NEW UNEMPLOYMENT INSURANCE RULES

On October 4, 2000, the Commissioners of the Texas Workforce Commission (TWC) voted to adopt new rules that govern the Unemployment Insurance (UI) program in Texas.

While part of the review process resulted in mere technical corrections, such as dropping antiquated gender references, some of the changes were substantive in nature. Some of the changes will be very helpful to employers. However, the TWC also missed some opportunities by failing to adopt provisions that are in line with the changes occurring in our economy. Details of both the helpful changes and the missed opportunities are outlined below.

The new UI rules became effective on November 6, 2000. The rules can be found at **Title 40 Texas Administrative Code Part 20, Chapter 815.**

## TELEPHONE PROTESTS

The most positive news concerns TWC's adoption of a business-sponsored provision that allows employers to contest or "protest" by telephone applications for unemployment benefits. For several years workers have been able to file unemployment claims by telephone. Now employers will have the same convenience. A written Notice of Application for Unemployment will still be mailed to employers each time an unemployment claim is filed. However, employers will have the option to protest verbally over the phone or by sending in a written response by fax or mail. The TWC also approved language that will allow employers to protest by email or Internet *at some point in the future* when the Agency has the electronic systems and staff resources to permit more e-commerce activities.

Commissioner Lehman's Office is optimistic that the addition of the easy telephone protest option will encourage more employers to take time out of their busy schedules to contest any claims they view as undeserving. Telephone protests should become a reality by January 2001.

Employers should not confuse the new availability to protest claims for unemployment with the ability to file appeals by telephone. Telephone appeals are not allowed for either workers or employers under the new rules.

There are two ways that an employer may protest by

telephone. An employer may call the phone number provided on the Notice of Application for Unemployment Benefits form and lodge their oral protest. TWC staff should provide the employer with a confirmation number at the completion of this process. **If for any reason TWC staff should fail to provide you with a confirmation number, be sure to request a confirmation number. Always write down the confirmation number given to you.**

**Employers will also have a second way to protest by telephone. Many times TWC staff will call an employer half way through the statutory response period in order to conduct a fact-finding investigation. At the end of this conversation employers will be told they have the right to file a protest by fax, mail or by telephone. Staff will not ask the employer if they want the TWC-initiated telephone call to constitute a telephone protest. However, an employer can affirmatively tell the examiner that it wants the call to constitute a protest to the claim. Be sure to ask for and receive a confirmation number if you want the TWC - initiated phone call to constitute your oral protest. You will not have appeal rights if you don't make this request and receive a confirmation number, unless you file a timely protest by mail or fax.**

The Employer Commissioner's Office fought to require agency examiners making these calls to explain to



## NEW UNEMPLOYMENT INSURANCE RULES *continued*

employers their rights and to clearly offer them the right to have the call constitute a protest. We lost on that issue, so be sure to follow the above information printed in bold when dealing with TWC initiated phone calls. We will continue to challenge this bureaucratic mentality on all future issues that arise.

### EXISTING POLICIES THAT BECAME RULES

TWC has internal policies that have been in effect for many years. Many of these policies became part of the new UI rules. Since published rules are more readily available to the public, employers and workers should benefit from the codification of these policies.

- Section 815.16(3)C: Codified TWC's practice of holding telephone hearings in almost every circumstance. Telephone appeals hearings save money for employers because they cost less than the travel expenses associated with holding in-person hearings. In-person hearings will usually be restricted to only those situations in which a party or witness suffers from a hearing impediment that cannot be accommodated with the telephone hearing process.
- Section 815.16(4)(B): Codified TWC's policy of granting postponements for the **appellant** (party appealing) due to illness, death in the immediate family or a pending criminal prosecution. A postponement may be granted for either the **appellant or the appellee** (appellee is the non-appealing party) when there is a need for an interpreter, religious observance, jury duty, court appearance, active military duty, or other reasons approved by the Supervisor of Appeals.
- Section 815.16(5)(C): Codified TWC's definition of an "appearance". Parties who appear may not request another hearing. An appearance includes giving testimony, examining witnesses, or presenting oral argument.
- Section 815.16(1)(A): Codified TWC's practice of allowing faxed appeals or "other methods approved by the Commission in writing". This broader language will allow flexibility in the future for e-mail or Internet based appeals. E-mail or Internet appeals are not currently allowed and are not yet allowed under the new rules.
- Section 815.32(E)(5): Codified TWC's policy of dating faxed appeals by the day and time that they are *received by TWC*.
- Section 815.32(C)(7): Clarifies that if the TWC *improperly* addresses a document, the time frame to appeal starts with the date the document is received by the party, even if it was received by the party within the statutory appeal time frame. If TWC *properly* addresses a document, the time frame to appeal begins with the date the document was mailed to the party.
- Section 815.18: Clarifies that subpoenas will be granted to the extent that the records or witnesses sought are **relevant** to the issues on appeal.
- Section 815.113: Points out that although Rule 13 tax coverage hearings have been renumbered to section 815.113, they will retain their old "Rule 13" name.

### WORK SEARCH

Probably the biggest missed opportunity was the TWC's failure to pass meaningful work search requirements. While TWC has always required claimants to look for work, TWC's existing *policy* is outdated and inadequate because it merely states that one work search per week is not enough. While individuals are receiving unemployment benefits, they should be looking for work on a full-time basis. Not only is this policy unclear on how many searches per week is enough, it fails to recognize some of the fundamental changes that have occurred in the Texas economy over the last decade.

Texas no longer relies on the oil and gas industry to carry the economy. Although the traditional mainstays of oil and agriculture have remained strong, other sectors like technology, manufacturing and services have added much needed diversification and strength to the State's economy. This new economy relies on a ready, available and trained labor pool to sustain growth and progress. Unfortunately, the demand for workers has outstripped the supply. If this trend continues, the health of the Texas economic boom could be threatened.

TWC has been working on many fronts to help resolve this problem. For example, moving training resources and employment decisions to employer-led local

## NEW UNEMPLOYMENT INSURANCE RULES *continued*

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workforce development boards recognizes that employers create jobs. However, we believe TWC can do more to assist the business community in solving the looming labor shortage.

In a state as large as Texas, you might not be surprised to learn that more than 750,000 UI claims are filed each year. In fact, Texas has the dubious distinction of leading the country with a 55% exhaustion rate, meaning that 55% of unemployed workers collect every dollar of their available benefits before finding a new job. This seems almost incredible in most parts of the state where "help wanted" signs dominate the landscape.

The TWC should be more aggressive in helping unemployed workers quickly find new jobs. One solution is to give workers a push toward finding new work. Such a push would entail requiring more work searches and providing additional technical search assistance for each unemployed worker.

Putting unemployed workers back into the workforce quickly would certainly help to alleviate labor shortages. Equally important would be the effect such a move would have on the Texas Unemployment Insurance Trust Fund. This Fund is made up of employer-paid unemployment insurance taxes. If workers move more rapidly back into the workforce, the Fund grows. Also, as the Fund grows, employer taxes can be reduced. When taxes are reduced, business has more money available to expand and to hire new employees.

Thus, it is clear that requiring a greater work search effort and providing more technical assistance to unemployed workers has a positive rippling effect on the Texas economy. For this reason, the Employer Commissioner's Office was disappointed that the other Commissioners did not support our efforts to modernize the work search requirements in Texas.

### CONCLUSION

Commissioner Lehman's Office worked hard to suggest proposals that the business community wanted to see in the new UI rules. While we were able to gain some ground, such as the addition of telephone protests, there are still other issues to be addressed. Despite this fact, our office, with your help, will continue to press Agency staff and the other Commissioners to change from the old ways of doing business at the TWC.

Aaron Haecker  
Attorney at Law

# DEDUCTIONS FROM SALARIES FOR ABSENCES

## The Good, the Bad and the Complicated

You've seen it time and time again. An employee is placed on salary as a measure of the employer's trust, respect and confidence. The relationship goes well for awhile, but then, for whatever reason, the employee becomes dissatisfied. He begins to miss work regularly, each time for illness or some other personal reason, but never for anything more serious than an upset stomach, a sore throat, headaches, a 24-hour bug, etc. The employee exhausts his sick and vacation leave, but still takes unscheduled time off and expects you to pay his full salary.



This problem of leave abuse has become pervasive throughout the United States. A recent survey by CCH Inc. revealed that less than half of unscheduled absences are actually due to personal illness, and fourteen percent of these absences are caused by those who feel the employer "owes" them additional time off. While some workers humorously refer to these as Mental Health days, they certainly do nothing to improve the employer's state of mind.

It's tempting to address this problem by docking the pay of the problem employee. After all, by continuing to pay the full salary, employers are actually rewarding bad behavior. However, these deductions are tricky at best, and in some cases, forbidden by Texas or federal law.

Before considering the details of these types of deduction, employers should be forewarned: it is far safer to discipline salaried employees for excessive absences through warnings and write-ups than it is to take pay deductions. Questionable deductions can lead to wage claims through TWC and audits by the U.S. Department of Labor (DOL). If your company takes deductions inappropriately, DOL can remove the exempt status of some employees, and both TWC and DOL can impose penalties. If you decide to take this path, please tread carefully. This article will only address how these laws are applied to private sector employers.

### DEDUCTIONS UNDER THE FAIR LABOR STANDARDS ACT

The first step in evaluating the feasibility of docking a salaried worker's pay is determining whether the employee is exempt from the overtime provisions of the

federal Fair Labor Standards Act (FLSA). A salary alone does not make an employee exempt, and many salaried employees must be paid overtime when they work more than forty hours in a workweek. For example, many secretaries, clerical workers and lead production workers are paid on a salary basis, but the FLSA still requires employers to pay these employees overtime. Exempt employees are generally white collar professionals, executives and top-level administrators. For a list of the tests DOL uses to determine whether an employee is exempt or not, please see the related article on page 15 of

this edition of *Texas Business Today*.

### Salaried Exempt Employees

If you determine that the employee is exempt, the FLSA severely restricts your ability to make deductions for absenteeism. The general rule under the FLSA is that salaried exempt workers may not have their pay reduced because of variations in the quantity or quality of the work performed. These employees must be paid their full salary for any week in which they perform any work, regardless of the number of hours actually worked, but need not be paid for any workweek in which they perform no work at all.

The federal regulations also set out a number of exceptions to the general rule. First, the general rule does not apply in the initial and terminal weeks of employment. In these cases, the employer may prorate the salary in full day increments to pay only for the days actually worked.

Second, there is an exception when the employer has a bona fide plan, policy or practice of providing paid sick and disability leave to its employees, but the worker either has not worked long enough to qualify for the leave or has exhausted the leave available to him. In this case, the regulations allow the employer to take a deduction when the absence is for a day or more. The worker must be paid in full for any partial days he works. For any days in which he has enough sick leave to cover part of the day, the employer may utilize that sick leave, but must also pay for the remainder of that day. To further complicate the situation, the Family and Medical Leave Act (FMLA) creates an exception to



the exception just described. Employers may make partial day deductions without endangering a worker's exempt status when the leave is under an FMLA intermittent or reduced leave schedule.

A third exception to the general rule is that an employee need not be paid for days when he is absent due to personal reasons unrelated to sickness or accident. Once again, the worker must be paid in full for any partial days he works, but in this case, the law does not require the employer to have a paid leave plan in place before making the deduction. For example, if company policy does provide vacation leave but requires prior management approval for its use, the employer can dock the employee's pay for a whole day's absence even when sufficient vacation pay is available to cover that day.

The FLSA specifically prohibits deductions from the pay of salaried exempt workers for absences caused by jury duty, witness duty or temporary military leave. However, employers may offset against the salary any jury fees, witness fees, or military pay received by the worker. In addition, the general rule still applies: if an employee performs no services at all for the entire workweek, the employer does not owe the salary for that week.

### **Salaried Non-Exempt Employees**

Salaried non-exempts generally fall into two categories: those who work a set number of hours for a weekly salary, and those who receive a set salary regardless of how few or how many hours they work. In both cases, the employees must be paid an overtime premium when they work more than forty hours in a week.

Those who receive a set salary for a predetermined number of hours must receive time and a half for overtime hours. The workers are treated very much the same as hourly workers and federal law does not prohibit employers from making deductions when the worker does not work the full number of hours agreed to.

Those who receive a fixed salary for a fluctuating workweek are effectively paid only a half time premium for overtime hours, and deductions for working fewer hours would be, by definition, prohibited. No deductions for time missed from work may be made from these workers' salaries.

### **DEDUCTIONS UNDER THE TEXAS PAY DAY ACT**

The Texas Pay Day Act prohibits employers from making any deductions from an employee's wages unless it is ordered by a court, authorized by state or federal

law, or authorized by the employee in writing. Commission rules clearly explain that the term "federal law" includes regulations promulgated by a federal agency, and the federal regulations do refer to certain deductions employers may make from the salaries of exempt employees. Therefore, from a literal reading of the law, it would appear that Texas employers do not need the written permission of the employee to make those deductions. However, some argue that the federal regulations do not, in fact, authorize employers to make those deductions, but merely describe the deductions employers may make without jeopardizing the exempt status of those employees.

In addition, federal law does not specifically authorize deductions from the wages of salaried non-exempt workers. In fact, the federal regulations are generally silent on the issue, and neither prohibit nor authorize them. Therefore, it is open to interpretation as to whether an employer must get this employee's written authorization to deduct, and it may depend upon each particular salary agreement. Some argue that the term "salary" implies that the employer is guaranteeing a certain wage per week, and therefore the employee must authorize any deductions. Others contend that an agreement calling for a particular salary for a set number of hours implies that the worker will have his pay prorated when he works fewer than those hours.

Prudent employers will ask all salaried employees to authorize the appropriate deductions as a standard part of the hiring process. The authorization form does not have to be complicated, but it must give the employee a reasonable expectation of how much will be withheld, it must clearly state that the employee authorizes the employer to deduct the amount from his wages, it must describe the purpose of the deduction, and it must be signed by the employee.

Of course, it would not be advisable to take deductions from the pay of a non-exempt worker employed on a "fluctuating hours for a fixed salary" basis. To do so would run the risk that the worker would file a wage claim asserting that he is really an hourly worker and is therefore entitled to full time-and-a-half for overtime hours, as opposed to the smaller payments called for under his hiring agreement.

In conclusion, it is possible to make deductions from the wages of many salaried workers. However, this should not be the first course of action for most employers. Discipline through counseling and written warnings is far safer in most situations. If the employee fails to improve, termination, rather than pay deductions, may be the appropriate solution.

Mark Fenner  
Attorney at Law

# Observations from the Dais

## **Congratulations to the Eureka Company, Winner of the Texas Workforce Employer of the Year 2000 Award!**

During the past year, many employers from all over the state have given significant amounts of time, talent, resources and expertise to further the development of the workforce system here in Texas. The Texas Workforce Network created the Employer of the Year Award to recognize the employer that has best advanced support for and use of this system. This support was measured by several factors including the employer's engagement in providing input that helped to shape workforce services in their region and the extent to which the employer was actually a customer of those services.

All 28 local workforce development boards around the state were invited to submit their employer candidates for this honor and a number of first-rate nominees were entered. After careful consideration by a panel of seven independent judges, The Eureka Company of El Paso was selected to receive this honor. The award was presented at the fourth annual Texas Workforce Conference held at Houston's Westin Galleria in September.

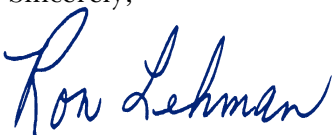
The Eureka Company is located in El Paso and takes its commitment to the community very seriously. The post-NAFTA era has certainly presented a number of unique challenges to this border region. Not only has Eureka contributed to the redesign of the local workforce system, they have also participated in developing an economic infrastructure for training and re-training job seekers, and helped to lay the groundwork for future economic development activities in the city of El Paso.

As an employer, Eureka has experienced the effects of having a large but unskilled labor pool. However, rather than shying away from the challenge, Eureka decided to take an active role in helping to develop a skilled workforce.

In response to its 1500 workers' needs, Eureka established an academic program that provides free on-site GED classes and encourages workers to upgrade their skills by requiring them to attend a minimum of two on-site workshops. Employees who want to move up the career ladder are given a list of mandatory workshops to qualify for the position on their career path. Eureka also helped to pilot a system to profile its various positions to identify the skills a successful job candidate must have. The company also helped produce a motivational video aimed at eliminating the concerns and fears of dislocated workers who are just re-entering the workforce. Additionally, Eureka served on several task forces that were charged with resolving the difficulties that affected this population. Ultimately, they also hired many of the workers that this new system identified as qualified candidates.

Special thanks to all of the boards that entered candidates and to the judges for their hard work in making a very difficult decision. Congratulations to the Eureka Company and to all of the outstanding nominees and employers who are helping to create a world-class workforce here in Texas. As Employer Commissioner, I would like to commend everyone who participated. Keep up the great work!

Sincerely,



Ron Lehman  
Commissioner Representing Employers

## Health Costs Top List of Problems Facing Small Businesses

The National Federation of Independent Business (NFIB), the nation's largest small-business advocacy group with over 600,000 members, recently released a comprehensive study which reveals that health insurance costs, federal taxes on business income, and finding qualified workers are the three toughest problems facing America's small-business owners. The study by the NFIB's Education Foundation, *Small Business Problems and Priorities*, analyzed responses from 4,044 small-business owners nationwide. As in past years, the 2000 survey listed 75 potential problem areas and asked owners to assess how much impact each actually had on their operations.

"Cost of health insurance" retained its number one ranking, a slot it has occupied since 1986. Almost half (47%) of all respondents rated this as a "critical" problem for their firms – the most severe evaluation possible. Another 23% awarded it the second-most severe assessment possible. "No other single problem can touch health costs in terms of either the unanimity or intensity of concern it generates among small-business owners," according to the study's author, William J. Dennis, Foundation Senior Research Fellow. "Complaints about high health insurance costs are as common among those providing coverage as those who can't begin to afford it," he says.

Survey respondents ranked "federal taxes on business income" as their second-most compelling problem, with 29% deeming it a "critical" concern. According to author Dennis, "These taxes are only one part of the tax behemoth besetting small business owners. They are compounded by numerous other taxes of various types imposed from all levels of government." Indeed, three of the six top-ranked problems relate to taxes. Social Security taxes ranked fifth, while state taxes on business income ranked sixth. Dennis noted, "If you sort the individual problems into broad categories, 'taxes' emerges as the category of greatest overall concern. Employee-related issues constitute the next most serious area of concern, while 'costs' ranked third.

The gravest employee-related problem facing small firms is basic: finding qualified employees in this era of record-breaking low unemployment. Three of every 10 respondents (31%) cited this as a "critical" problem. Interestingly, just four years ago, small business

owners gave this issue an 11<sup>th</sup> place ranking; in 1991, it ranked only 20<sup>th</sup> in importance. The separate issue of "keeping skilled employees" – retention – also soared to 18<sup>th</sup> position in this year's rankings, up 11 notches since the 1996 survey.

This latest *Small Business Problems & Priorities* report is based on responses to a mail survey circulated during the first three months of 2000. Respondents rated each of 75 possible business problems on a scale of 1 to 7, with 1 indicating a "critical" problem and 7 indicating that the issue was "not a problem." More information on the study is available at [www.nfibonline.com](http://www.nfibonline.com).

## New, Improved and Helpful Websites

Please take a moment to visit the Texas Workforce Commission's redesigned Internet home page, [www.twc.state.tx.us](http://www.twc.state.tx.us). Not only does the site sport a sharp new look, it also uses a new form of navigation. The site was recently redesigned to be more customer friendly than ever before. The ultimate goal is that it will take no more than three clicks on links from the main home page for customers to find what they're looking for, and no more than two from the customer group home page to find what they need. For instance, if an employer has a question about an Unemployment Insurance chargeback, from the main page, he or she would select the "Businesses and Employers" home page. Next the employer would choose the relevant topic, then select a final link within the UI topic. Commissioner Representing Employers Ron Lehman is the project's executive sponsor.

Several other useful new websites include the Texas Insurance Commissioner's site for small business, [www.tdi.state.tx.us/commish/smbiz.html](http://www.tdi.state.tx.us/commish/smbiz.html), and an online directory of Texas state agencies for small businesses at [www.tsbac.com](http://www.tsbac.com). A link to the directory is located directly under *Small Business Links and Contacts* on the Home page. The Texas Government Online Portal is also up and running at [www.texasonline.state.tx.us](http://www.texasonline.state.tx.us).

And, the federal Department of Labor (DOL) recently unveiled an interactive web site to help employers decide which posters they must display in the workplace. This new DOL poster adviser site is the latest addition to its Employment Laws Assistance for Workers and Small Businesses (e-laws) website. An added feature: employers can now print the posters directly from the

## continued BUSINESS BRIEFS fall 2000

web site. The poster adviser can be found at <http://www.gov/elaws/posters.htm>.

This new website joins a number of other interactive DOL adviser websites already covering a wide range of laws. They are intended to provide easy to understand and accessible compliance assistance information to small businesses about various labor laws and regulations. The goal of the e-law advisers is to mimic an employer's interaction with a DOL representative by asking the user a series of questions to help decide if a specific regulation or law covers a particular employee or a workplace.

The addition of this new poster adviser website means that more than 20 DOL "advisers" are now available online. Other advisers include regulations promulgated by the Occupational Safety and Health Administration, the Pension and Welfare Benefits Administration, the Veterans' Employment and Training Service, the Mine Safety and Health Administration, and the Employment Standards Administration. All of the DOL advisers can be found at [www.dol.gov/elaws](http://www.dol.gov/elaws).

### A Little More on Employee Retention: Some Thoughts on Being Family Friendly

With the unemployment rate at one of its all-time lows, human resource directors everywhere are scrambling to find ways to reduce employee turnover. In addition to offering better salaries, many Texas employers are attempting to provide support for potential problem areas in employees' work and home lives. "There is a realization that if people feel supported in dealing with their personal life, as well as their business life, they feel more committed to their employer," according to Betty Purkey, work/life program manager for Texas Instruments, Inc. in Dallas. "We have data that bears this out. Intuitively, it makes sense. If people are worried about things at home, they're not going to be as productive at work."

Here is a list of 10 things some Texas companies are doing to make their workplaces more family-friendly (and help them hold on to good employees):

1. Assessing employee needs with surveys or focus groups;
2. Organizing a work and family committee or task force;
3. Training managers and supervisors to be sensi-

tive to work and family issues;

4. Implementing work time policies such as flextime, compressed work weeks, job-sharing or telecommuting;
5. Offering parental leave;
6. Distributing information on supportive family policies and programs;
7. Offering seminars on parenting, child care, aging and elder care;
8. Allowing telephone access for family calls home during business travel;
9. Implementing pre-tax salary reduction plans for dependent care;
10. Providing on-site or near-site childcare centers or vouchers for slots in outside child care centers.

Employers may also want to consider partnering with other employers or organizations in their community to address work/family options. Employer collaborations comprised of businesses interested in addressing work/family issues to meet employees needs have been established in a number of areas throughout the state. Here is a list of those groups and a telephone number for each one:

- Amarillo – *Children's Learning Center* – (806) 374-5223
- Austin – *Austin Area Employers' Collaborative* – (512) 834-0342
- Bryan/College Station – *Brazos Valley Quality Workforce Planning Committee* – (409) 775-4244
- Corpus Christi – *Coastal Bend Work and Family Coalition* – (512) 886-1318
- Dallas – *Work Friendly* – (214) 821-8388
- Fort Worth – *Corporate Champions of Tarrant County* – (817) 831-2111
- Houston – *Corporate HANDS* – (713) 365-0313
- Jacksonville – *HOPE, Inc.* – (903) 596-7781
- Lubbock – *South Plains Community Dependent Care Coalition* – (806) 744-3572
- San Antonio – *Smart Start* – (210) 226-3391
- Tyler – *Champions for Children* – (903) 592-1454

If you need more information on work/family issues, visit the Texas Workforce Commission's Work and Family Clearinghouse website at [www.twc.state.tx.us/svcs/workfamch/wfchp.html](http://www.twc.state.tx.us/svcs/workfamch/wfchp.html) or call (512) 936-3226.

Renée M. Miller  
Attorney at Law



# LEGAL BRIEFS Fall 2000

The United States Supreme Court recently decided a case clarifying the type of evidence that an employee must introduce to support a jury verdict in a discrimination lawsuit. This wasn't a win for employers; in fact, this decision has the unfortunate impact of expanding potential employer liability in these types of cases. It also highlights the importance of not only having a zero tolerance policy for illegal discrimination, but actually making sure that the policy is followed.

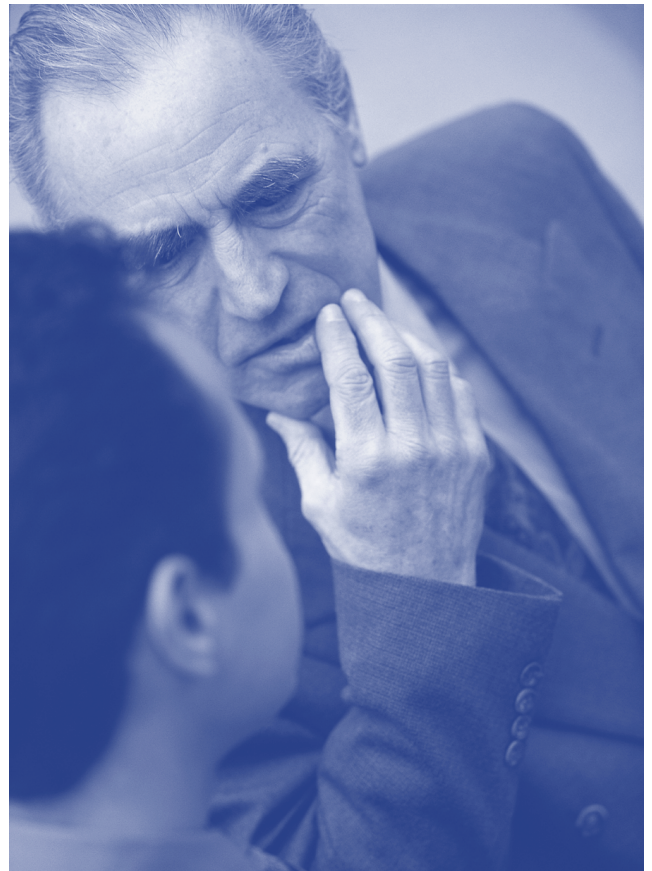
## The Facts

Roger Reeves worked for Sanderson Plumbing Products (SPP), a Mississippi manufacturer of toilet seats and covers. As a supervisor in the "hinge room," Mr. Reeves was responsible for recording the hours worked and keeping attendance records for the employees he supervised. In mid-1995, SPP received complaints that hinge room employees often left work early and arrived late. After an investigation uncovered "numerous timekeeping errors," both Mr. Reeves (who was 57 at the time) and his immediate supervisor were fired.

Mr. Reeves decided to sue his former employer under the Age Discrimination in Employment Act (ADEA) which applies to companies with 20 or more employees and prohibits workplace discrimination against workers who are 40 or older. Mr. Reeves asserted that he had in fact kept accurate records of the hours worked by the employees he supervised. He went on to contend that SPP's director of manufacturing once remarked that he "was so old (that he) must have come over on the Mayflower" and on another occasion told Reeves he was "too damn old to do (the) job." In other words, Mr. Reeves alleged that his age – not poor recordkeeping – was the real reason he was fired.

At trial, the jury bought this argument and found in Mr. Reeves' favor; SPP appealed. The Fifth Circuit Court of Appeals (which also hears cases arising in Texas) overturned the jury's finding, reasoning that Mr. Reeves failed to prove that age motivated the decision to end his employment with SPP.

When the case was appealed to the Supreme Court, the Justices ruled unanimously that a jury may infer that the employer discriminated based on the *prima facie* case presented (which literally means "at first view") and evidence that the employer's explanation for its actions is untrue. The Justices wrote, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a



discriminatory purpose." Therefore, further, independent evidence of discrimination is not necessary.

Thankfully, the Court went on to say that such a demonstration won't always be sufficient to sustain a jury's finding of liability. The Court concluded, "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff only created a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

The Court went on to rule that the jury's verdict in favor of Mr. Reeves should be reinstated because he had established a *prima facie* case and successfully challenged the veracity SPP's explanation for his termination. *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, U.S. Supreme Court (June 12, 2000).

## Bottom Line

After this ruling, employers that do not provide honest reasons for the adverse actions they take against their

**continued LEGAL BRIEFS Fall 2000**

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employees will have a very tough time getting a lawsuit dismissed without a jury trial. This can be very important to employers, who should generally try to avoid jury trials whenever possible. Why? Not only are juries generally composed of individuals who are employees themselves, they are far more likely to make a decision based on their perception of fairness, rather than what the law actually requires. Juries are less predictable than judges, heightening the uncertainty of the entire litigation process.

The only safe policy is one of zero tolerance for illegal discrimination. And, not only is it absolutely critical to have written policies prohibiting illegal discrimination in the workplace, it is vital to actually follow them. Stray remarks, sidebar comments and jokes are obviously going to be taken into consideration in determining whether illegal discrimination has occurred. Loose lips continue to sink ships.

Managerial training has never been more important. Be sure to set aside sufficient time for comprehensive and intensive training for all managers and supervisors, including giving detailed information on how to properly respond to and recognize unlawful harassment in the workplace. Hold supervisors accountable for enforcing your non-discrimination policies and for responding to complaints in their performance evalu-

ations, and in considering them for raises, promotions and bonuses.

In addition to a clearly written policy, a serious anti-harassment effort must also include taking a hard look at the image and the corporate culture of the company. Too often, employers spend thousands of dollars and many hours drafting a written policy while totally ignoring what's really happening in the workplace on a daily basis. It is critical to take a careful look at the entire organization to see if the actions and beliefs of staff members or (as in this case) management are undermining the company's written policy.

To prevent illegal harassment, all supervisors, managers and executives must be good role models, not a part of the problem. Further, all supervisors and managers must be aware of what is going on in their departments – and not be a huge part of the case against the employer, as in this situation. In short, the Supreme Court has reaffirmed that corporate culture and reality must mirror the organization's self-proclaimed dedication to eradicating all forms of harassment.

Renée M. Miller  
Attorney at Law

# THE DEPARTMENT OF LABOR'S TESTS

The DOL has adopted both long and short tests for determining whether a given position qualifies for an administrative, executive, or professional exemption. Employees who meet the criteria of either the long or short tests are exempt from receiving overtime pay under the white-collar exemptions.

## Executive

### *Long test*

- a. primarily manages an operation or subdivision
- b. routinely supervises two or more employees
- c. has hiring, firing, promoting authority
- d. routinely exercises discretion in the work
- e. spends at least 80 percent of the workday in above
- f. earns at least \$155/week on a salary basis not including board, lodging, or other facilities

### *Short test*

- a. primarily manages an operation or subdivision
- b. routinely supervises at least two other employees
- c. earns at least \$250/week on a salary basis

## Administrative

### *Long Test*

- a. routinely exercises discretion and independent judgment in performance of job duties
- b. duties consist mainly of office or nonmanual work related to management policies or general business operations or duties involve administrative work in a school which provides academic instruction; or
- c. duties involve the direct and routine assistance of an executive or administrative employee in the performance of specialized or technical work requiring special training, experience or knowledge
- d. performs duties under general supervision only
- e. spends 80 percent of work day in above listed activities
- f. earns at least \$155 per week on a salary basis

### *Short test*

- a. duties are described in the long test
- b. duties must include work requiring the exercise of discretion and independent judgment – a slightly lesser standard than the long test which requires routine exercise of discretion and independent judgment
- c. earns at least \$250 per week on a salary or fee basis

## Professional

### *Long Test*

- a. primary duties include:
  - 1. work requiring advanced knowledge normally acquired through a prolonged course of specialized intellectual study; this criterion is not met by a general academic education, routine training or apprenticeships; or
  - 2. original and creative work stemming primarily from invention, imagination, or talent or
  - 3. teaching, tutoring, lecturing, or instruction for an educational institution
- b. work must require the consistent exercise of discretion and independent judgment
- c. work must be intellectual and varied in character
- d. work does not lend itself to standardization by time, i.e., how much time any part of the overall task should take cannot be determined
- e. at least 80 percent of the employee's work day must be devoted to the type of work described above
- f. employee must earn at least \$170 per week on a salary basis

### *Short test*

- a. duties are described in the long test
- b. duties need only include work that requires use of discretion and independent judgment
- c. employee must earn at least \$250 per week on a salary or fee basis

Aaron Haecker  
Attorney at Law

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## TexasBusinessToday

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