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Texas Workforce Commission

An Update on the Texas Workforce Network

What is it and How Can it Meet the Needs of Texas Employers?

What Do Texas Employers Tell Us That They Need?

- Qualified workers
- Labor Market Information
- Skills Development and Self-Sufficiency Grant Information/Customized Training to Current Workers
- Tax Credit/Tax Avoidance Information
- E-tax Evolution: Online Initiatives to Make Tax reporting Less Taxing
- General Employment Law Information
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What is the Texas Workforce Network and how can it help meet those employer needs?

The Texas Workforce Network is a public/private partnership comprised of the Texas Workforce Commission (TWC) and its local partners at 28 workforce boards, 142 Texas Workforce Centers and their private service providers across the state. It was created in 1995 to revitalize and restructure the state's formerly fragmented job training and workforce system and consolidate services into a single entity. In this employer-driven workforce system, employers such as yourselves are the primary customer. And, our core services are always free.

Today, service delivery and strategic planning are provided by the local workforce boards which are composed of representatives from local businesses, labor and the community. At least 51% of the boards' representatives must be employers, and an employer must be the board's chair. The boards also include members of the education, vocational rehabilitation, labor, and childcare communities, among others.



These boards hire contractors to manage a system of workforce centers, at which both employers and workers receive assistance according to the level of their needs. The local control this structure provides makes the system more attuned to the needs of local employers. For information about the local workforce development board in your area, please check out the directory at www.texasworkforce.org.

Although more and more services are being provided at local workforce centers, the state TWC office in Austin continues to provide guidance, funding and a wide variety of technical assistance and support services ranging from Skills Development and Self-Sufficiency grants to labor market information and employer tax credits. And, if you haven't visited our website lately, take a moment to look at its greatly improved content and user-friendly design.

**Dear Texas Employers,**

Texas ended the last decade with an estimated 9.9 million jobs, adding 2.3 million jobs in the 90's alone – more than any other state. Because of your hard work, we now have four Texas jobs for every three jobs that existed in the state when the 1990s began. The economic strength of the 1990s also brought about a 15% decline in the total number of unemployed Texans; and, not only have unemployment rates dropped, the welfare rolls are shrinking as well. As a result, the majority of workers who will hold down paying jobs in the immediate future are already in today's workforce.

Recruiting, training and retaining qualified workers is becoming increasingly difficult for businesses of all sizes. In many industries and areas of the state, employers are engaged in a fierce battle for talent. At the same time, traditional methods of doing business are experiencing significant challenges often accelerated by the speed of technological change. Whether your firm's chips are computers or corn, the skills your employees need today are more sophisticated than ever before.

More and more occupations are demanding higher skill levels; demands for skill mixes are also changing. Almost every job now entails some contact with a computer. The low-skilled occupations that many working Texans have relied upon to provide a subsistence income are dropping off the bottom of the wage scale. Many of these jobs are moving overseas.

"Retooling" our workforce through continual worker training and retraining is becoming increasingly critical to honing our global competitive edge. Expanding the future supply of human capital now depends strategically on lifelong learning and skills upgrading for workers currently in the workforce. However, large or small, Texas employers find money and time to be the major barriers to investing in additional education or training for their workers; many are also largely unaware of the variety of resources available to assist with enhancing employees' work skills.

That's where the Texas Workforce Network may be able to help by providing comprehensive, professional staffing solutions ranging from basic recruiting to training and skills upgrades to retention and outplacement assistance – and these core services are always free. Funding and resources may be available to help train your current workers in new technologies and processes. If you need to fill jobs that require a special expertise, grants are available to pay for development and delivery of training courses through local community colleges and technical schools.

And, there are tax incentives available if you choose to hire from selected groups of harder to place workers. Among the groups targeted are veterans, welfare recipients, ex-offenders and high-risk youth. Many of these workers have valuable skills that will prove to be a strong asset for employers willing to make the effort and spend the necessary time to do on-the-job training. In order to offset the additional attention or accommodations necessary to fully realize the potential of these employees, Texas employers may qualify for federal and state tax credits of up to \$12,900 per employee. In fact, in recent years, the Texas Workforce Commission has approved credits worth more than \$61 million to Texas employers. This year, the credits will exceed \$100 million.

As the Commissioner Representing Employers and your advocate at the Texas Workforce Commission, I encourage you to familiarize yourself with the services of the Workforce Network and see if together we can solve some of the challenges you face running your business in the 21st Century.

Sincerely,

Ron Lehman
Commissioner Representing Employers



Update on Texas Workforce Network *continued*

(www.texasworkforce.org). There is an entire section devoted to employers and businesses containing a wealth of useful information and links to other helpful sites. Not only can you obtain valuable insight into labor trends in your area by looking at the labor market information portion, you can even post a job opening or see who's looking for a job on "Hire Texas" – the agency's free online job-matching service.

Finding qualified workers

After speaking with thousands of employers from all over the state and from all professions and walks of life, it is clear that the single most pressing concern they all share is their difficulty finding qualified employees. Good employees are your best asset, and recruiting, training and retaining them are all critical to the well being and growth of your business. The Network may be able to help you in several important ways in this search.

Not only can you contact your local Workforce Center to place job orders for trained workers, through the statewide public/private partnerships that make up the Network and the innovative use of Internet technology, we work to provide a comprehensive scope of professional staffing solutions. These solutions range from basic recruiting to training and skills upgrades, retention and outplacement assistance. A unique combination of value-added services makes the Texas Workforce Network one resource you should definitely check out. It's as easy as logging on to www.texasworkforce.org. A click on the Business and Employers block and you're on a page designed specifically with you in mind. You can:

- Post a job online with Hire Texas
- Access information on tax credits
- Check your tax accounts
- Gather data about your local job market
- Review important labor laws
- Locate your local Texas Workforce Center
- Learn about customized training programs

HIRE TEXAS for Employers

Our database of more than 1.4 million job applicants is available to you 24 hours a day, seven days a week, 365 days a year. There you will find jobseekers of all kinds, ranging from professors to pipefitters. Some are already living in your own backyard, while others are across the state or around the globe; however,

they all share a common desire to work here in Texas. With so many options, we'll take it one step further and do the first cut for you by matching your requirements to the skills of applicants in the database. And, unlike other job banks and matching systems, this one is FREE.

There's no complex paperwork to fill out. You don't even need to make a phone call. Just log on to www.texasworkforce.org and click on the Business and Employers block. Then click on "post a job" and follow the directions for new users. You will need to obtain a log-on ID and password to keep your information secure.

Labor Market Information

Planning for the future growth of your business or looking at the factors driving your success today requires not only your business savvy, but having economic data available at your fingertips. For example, where can you find information on the average weekly wage paid in your market, the growth projections and staffing patterns for your industry or property values by county? Without wanting to be repetitive, you probably guessed it – www.texasworkforce.org. By following the featured link to labor market information you can quickly find:

- Population and income figures
- Industrial and occupational wage statistics and projections
- Annual and monthly employment and unemployment figures
- Commuting patterns]
- Educational and training information
- Employer data

You can display and analyze demographic, economic and labor market information for your area in a user-friendly format. If you need more, you can search our databases to find that key piece of information that might just keep you ahead of the competition.

And, your local workforce center also has this information and a lot more just for the asking. You can also call 1-866-938-4444 toll free for additional information.

**find out more about our services at
www.texasworkforce.org**

Update on Texas Workforce Network *continued*

What other Network programs can benefit employers?

Skills Development Fund

The Skills Development Fund links businesses, community and technical colleges or unions by financing customized job training for new or existing jobs in local businesses. The Fund successfully merges business needs and local job training opportunities into a winning formula for putting real people to work in real jobs. For example, in 1999 alone, TWC awarded 55 grants totaling over \$13 million. To date, more than 1,000 Texas employers and 50,000 employees have reaped the benefits of the Fund. Currently, more than 15,000 workers are in training for jobs in their communities using Skills Development Funds. These grants serve as a strong investment in Texas businesses, colleges and workers.

Applicants should have a training plan and jobs which pay the occupational wage. After successfully completing the application process, the Fund provides training for specific skills for workers who will be hired by the businesses. The Skills Development Fund is currently funded at budgeted \$12.5 million per year.

For additional information on this program, please contact your local workforce development board, call TWC at (512) 463-8844, or visit the website at www.texasworkforce.org.

Self-Sufficiency Fund

The Self-Sufficiency Fund teams the business community and community-based organizations with local educational institutions to fund customized job training for individuals that receive Temporary Assistance for Needy Families (TANF) or are at risk of dependence on public assistance. The win/win philosophy behind the fund is to provide the employers of this state with trained workers while helping participants obtain jobs and attain self-sufficiency. To achieve these objectives, the Fund makes grants to eligible community colleges or to eligible nonprofit organizations so that these entities can provide customized job training for specific employers.

The funded training must prepare trainees for specific jobs with specific employers. The Fund also provides money for support services such as transpor-

tation and childcare that are needed to enable participants to take part in training activities while making the transition from welfare to work. This program is funded for \$12.4 million for each year of the current biennium.

In order to receive funding under the Self-Sufficiency program, two or more entities must file a joint application with the TWC. One of those entities must be a public community college, a public technical college, a private, non-profit organization that meets the requirements set forth by the TWC, or be the Texas A&M Extension Service. At least one of the other joint applicants must be a private employer. Applications may be submitted at any time, and are reviewed on a rolling basis. The review process typically takes about one month.

For additional information, please contact your local workforce board, call TWC at (512) 463-8844, or visit the agency's website at www.texasworkforce.org.

Other Special Training Funds

Texas workplaces, just like workplaces all over the nation, are undergoing profound changes that not only require workers to upgrade their existing skills but to acquire new skills to stay competitive. To meet the needs of both businesses and working Texans, TWC has set aside \$5.5 million to train current workers locally. This \$5.5 million will be awarded in the form of competitive grants to local workforce boards for use in their areas.

Called APEX (Achieving Performance Excellence) grants, the intent is to create effective, locally administered training to meet the needs of businesses and working Texans alike. Both need a single, widely recognized local source of information and expertise about skills upgrade resources – what's available, how to get access, and how to make it work.

In addition, TWC is working on an initiative that will focus on training adults and youth for careers in the high-technology sector. These industries include software development, telecommunications services, biotechnology and bioengineering services, medical and scientific instruments manufacturing, engineering and scientific services, and aircraft and defense-related manufacturing. Specifics will be announced in the coming months.

Update on Texas Workforce Network *continued*

For additional information, please contact your local workforce board or visit the website at www.workforce.org.

Tax Incentives for Businesses and Employers - Texas Employers Save \$100 million in Taxes

Here's some great news: during the past 12 months, 1,522 Texas employers have saved a total of \$108,980,000 in taxes by taking advantage of several federal tax credits. Let's take a closer look at how you may be able to do the same.

Work Opportunity Tax Credit (WOTC)

Would you like to save money on your federal taxes? Who wouldn't! The Work Opportunity Tax Credit Program (WOTC) might just be right for you. The WOTC is a federal tax credit used to reduce the federal tax liability of private-for-profit employers who hire workers in eight targeted groups, many of whom you're probably already hiring. This is a financial incentive that encourages and rewards businesses that employ welfare clients. The federal Work Opportunity Tax Credit establishes an income tax credit of as much as \$2,400 for a qualified new worker, or \$1,200 per qualified summer youth, for employers who hire from the targeted groups of disadvantaged persons.

The eight targeted groups you may hire from to take advantage of this tax credit are: qualified veterans, vocational rehabilitation referrals, qualified summer youth, high risk youth, qualified ex-felons, qualified AFDC/TANF recipients, qualified food stamp recipients and qualified SSI recipients.

The WOTC credit is a two-tier credit. In tier one, an employee must work a minimum of 125 hours to earn

the employer any credit. Between 125 and 399 hours of work, the credit is calculated at 25% of all wages paid up to \$6,000. The second tier begins at 400 hours of work, and is calculated at 40% of all wages paid up to \$6,000.

For example, an employee hired at \$6.00 per hour who works 40 hours per week for six months would earn the employer the maximum credit of \$2,400 (40 hours X 26 weeks X \$6.00/hour = \$6,240 X 40% = \$2,496).

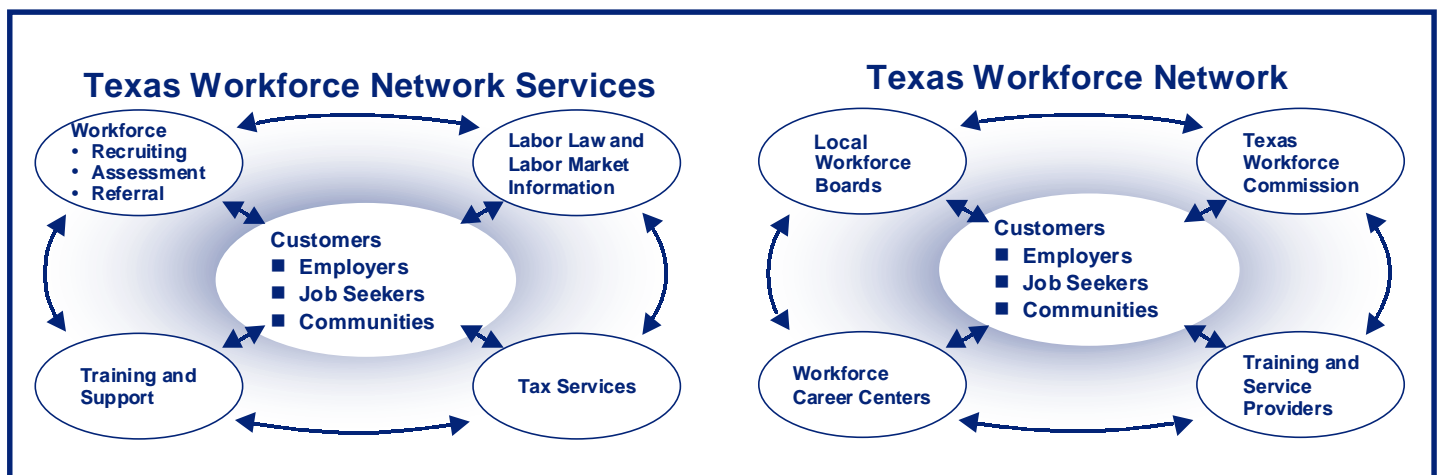
If that same employee works 40 hours per week for nine weeks and is paid \$6.00 per hour, the employer would earn a \$540 credit (40 hours X 9 weeks X \$6.00/hour = 360 hours X \$6.00 = \$2,160 X 25% = \$540 credit).

For additional information, please call the TWC's toll free number, 1-800-695-6879, or visit the website at www.texasworkforce.org.

Welfare-to-Work Tax Credit (WtW)

This Tax Credit provides tax savings of as much as \$3,500 in the first year of employment, and \$5,000 in the second, for employers who hire long-term welfare recipients.

There are also tax exclusions for employer-provided child and dependent care, with the value of the care excluded from the employer's gross income, thus reducing the employer's FICA and FUTA taxes, as well as the worker's income tax liability. And, there are federal tax credits for giving workers public transportation passes, with a value up to \$60 per month. Employers can deduct the value of the pass from their federal taxes.



Update on Texas Workforce Network *continued*

The WtW is a two-year credit. The first year is calculated at 35% of all wages paid up to \$10,000, with a retention period of 180 days or 400 hours of work required. The second year is calculated at 50% of all wages paid up to \$10,000, if the retention period has been met.

During the first year that an employer hires an eligible employee, the employer must choose which credit to claim, WOTC or WtW. During the second year, the employer may only claim the WtW credit.

Temporary Assistance for Needy Families (TANF) State Fund Program

In addition, at the state level, Texas offers incentives including a tax refund of up to 20% of \$10,000 of wages paid in the first year of work. The refund is available to any Texas employer who hires TANF clients and covers at least part of the cost of major medical insurance.

For additional information on any or all of these tax incentives for employers, please call this toll free number: 1-800-695-6879, or visit the website at www.texasworkforce.org.

E-tax Evolution – New Online Initiatives to make Tax Reporting Less Taxing

While paying taxes is never fun, hopefully, at least it will be more convenient for you in the future. In its ongoing efforts to create an employer-driven workforce system where the employer is truly the primary customer, TWC is unveiling some new online initiatives to make Unemployment Insurance tax reporting less taxing for you. New employee registration, wage record filing and bill payments are all going online – a move that eases the process for Texas employers, and is part of TWC's ongoing e-tax evolution.

The evolution began with the online presentation of general information about unemployment insurance taxes for employers. Next, employers were able to access password-protected information online. Then, quarterly returns and wage errors were made available to Texas businesses employing 25 or fewer people. Now, the near future holds the promise of full automation – registration, filing and payments at the touch of a button on your Internet-connected computers.

The agency has been coordinating with the state comptroller to make sure that TWC and the Comptroller's Office can share the online tax information. Agency personnel have also been busy addressing the security of transmitting information and money online, as well as the Web pages where employers will either access or send their information.

The online reporting system has already gotten off the ground. For example, in October 2000, 3,400 businesses with 25 or fewer employees used it. Employers can file their returns online, but they still must print a remittance page and attach it to a mailed-in check. However, the agency's Tax Department anticipates that employers will be able to handle all transactions online shortly.

The Tax Department also foresees online employee registration later this year. This system will be tailored to each employer's needs rather than making all businesses of all sizes wade through the same questions. This feature is geared to tax practitioners such as accountants, tax preparers and bookkeepers who file returns on behalf of employers. Stay tuned for further developments.

General Employment Law Information – the Employer Commissioner's Office

Where can you go to learn what you need to do to lower your tax rates, how the unemployment insurance system works in Texas or what general employment law information you must have to run your business? While some circumstances may be so serious that you will need to hire an attorney to represent you, for nuts and bolts employment law information, you can use the resources provided by the Employer Commissioner's office.

Commissioner Representing Employers Ron Lehman is the advocate for Texas employers at the TWC. His office continues to take steps to improve the agency's outreach and the quality of service provided to all employers. Among the services his office provides:

- A toll free Employer Hotline (1-800-832-9394) which receives thousands of calls from employers each month. Staff attorneys are available to provide general information on a wide variety of topics ranging from Unemployment Insurance

Update on Texas Workforce Network continued

hearings to bills pending before the Legislature to Payday Law claims. Please feel free to contact this office at any time with your questions, comments, or suggestions.

- ***Especially for Texas Employers*** Handbooks (cover general employment laws such as wage and hour, Texas Payday, sexual harassment, hiring and firing, etc.)
- ***Texas Business Today*** Newsletters (which are published quarterly and update employers on new court decisions, changes in employment laws and agency rulings of interest)
- A greatly enhanced Web Site prominently featuring information of interest to Texas employers (www.texasworkforce.org)
- Texas Business Conferences (15 - 20 full day business seminars each year attended by thousands of employers; these are held all over the state to address many of the most frequently asked questions business owners and HR professionals must address daily.)
- Seminars specifically tailored to meet the needs of particular industries or trade associations
- To subscribe to the newsletter or receive the employer handbooks, simply fax your request to

1-512-463-3196. Both publications are free of charge

Businesses and Employers are A Primary Customer!

The Workforce Network is committed to meeting the workforce needs of its primary customers, the employers of Texas. Certainly nobody is pretending to have the answers to 100% of the employment challenges you face on a daily basis. However, we do offer some very useful and significant services, and best of all, they're always free of charge.

Texas employers need to get involved with the Network: provide input to your local workforce boards and use the services of the local workforce centers. Access the improved website. We have gathered valuable information from many sources to help you as an employer; some of the information could actually help reduce your cost of doing business. Take advantage of the tax incentives that are available, and see if either a Skills Development or Self-sufficiency Grant could help meet your workforce needs. See if WOTC tax credits could help you lower your federal taxes. Call the Employer Commissioner's office with your questions or suggestions. Working together, the employers of this state and the Texas Workforce Network will create a world-class workforce system for the 21st Century.

Seminar Tape Seminar Tapes Seminar Tapes

If you would like to receive an informative five-videotape set of the 2000 Texas Business Conference sessions, please make your \$30 check payable and mail to:

Controller - TBC Videos
Texas Workforce Commission, Room 0218
101 E. 15th Street
Austin, Texas 78778-0001

The tapes cover Federal and Texas Wage and Hour Law, Unemployment Compensation, Taxes and Tax Credits, Firing and Employment Policies. Please allow up to six weeks for delivery.

Texas Legislative Update

The 77th Session of the Texas Legislature is now well under way and many employment-related bills have been filed. This article will highlight a few of the bills. Since the Session ends on May 31, now is the time to concentrate on how these bills will affect your business if they become laws.

House Bill 76 proposes that Texas adopt a state version of the federal Family Medical Leave Act (FMLA). The FMLA requires that employers with 50 or more employees provide up to 12 weeks of unpaid leave to eligible employees for the birth or adoption of a child, serious medical condition of the employee or the serious medical condition of the employee's close family member.

House Bill 215 proposes an exception to the Texas at-will employment doctrine. The bill would prevent an employer from discharging an employee who has at least ten years of service with the employer unless the discharge was for cause. Employers violating this proposed law would be required to reinstate the terminated employee and compensate them for lost wages, etc. The Texas Workforce Commission (TWC) would be charged with adopting rules to implement this proposal. This particular piece of legislation has been filed, but not passed into law, in prior legislative sessions.

House Bill 240 proposes that employees who take leave or leave employment due to the birth or adoption of a child would be qualified to receive unemployment benefits. Employees qualifying for unemployment under this provision would be exempt from the normal eligibility requirements of searching for work and being able and available for work, etc. Individual employer tax accounts would not be charged with the benefits paid out under this bill. Instead, the cost of this bill would likely be spread across all employers in the system so that the Texas Unemployment Insurance Trust Fund would remain solvent. Last year, for the first time, the United States Department of Labor (DOL) authorized states to use their unemployment insurance funds for this purpose. However, states have to adopt legislation before unemployment funds can be used for maternity leave. To date, no state has passed legislation allowing their unemployment funds to be used for this purpose.

House Bill 243 would amend the Texas Labor Code by making it an unlawful employment practice for an employer to require employees to speak only the English language in the workplace. The bill would allow an employer to require employees to speak only English at certain times if the employer could demonstrate that the requirement was justified by business necessity. If an employer desired to limit employees to speaking English at certain times, it would be required to give employees notice to that effect and advise employees of the consequences of violating the limited English only rule.

House Bill 295 would amend the Texas Labor Code by making it an unlawful employment practice for an employer to require an applicant for employment to disclose in an application form his or her sexual orientation or to ask an applicant during an interview to disclose their sexual orientation. The bill would also make it an unlawful employment practice for an employer to ask a third party, such as a former employer, to speculate on an applicant's genuine or perceived sexual orientation. Certain religious organizations would be excluded from the bill's requirements.

House Bill 300 would prohibit private sector employers with 5 or more employees from suspending, demoting, terminating or otherwise discriminating against an employee for reporting workplace activities that constitute a violation of law. Before the provisions of this bill would apply the employees reporting such violations would be required to do so in good faith and to make the report either to an appropriate law enforcement authority or to a workplace supervisor. Employees who were wrongfully terminated, etc. would be entitled to sue for injunctive relief, actual damages, court costs and reasonable attorney's fees. In addition, employees could seek reinstatement and compensation for lost wages and benefits. The bill would require employees to exhaust any employer grievance procedures before suing. Finally, the bill has a mandatory posting requirement and TWC is designated as the state agency to prescribe the design and content of the poster.

House Bill 303 would raise the state minimum wage of \$3.35 per hour. The proposal would raise it to the higher of the federal minimum wage (which is cur-

Texas Legislative Update *continued*

rently \$5.15 per hour) or the hourly wage computed by dividing the fair market rent for a one-bedroom apartment by .3 for the fair market rent area in which the employer is located. For example, if the fair market rent in Austin for a one-bedroom apartment were \$526 per month, an employer would divide that figure by .3 to come up with a figure of \$1753.33. That number would be divided by the number of weeks in a month, or 4.3, to produce a weekly wage of \$407.75 per week. That number would then be divided by 40, the number of normal work hours in a week, thus producing a minimum wage in Austin of \$10.19 per hour.

House Bill 463 proposes to amend the Texas Labor Code by requiring public and private employers to obtain workers' compensation insurance coverage. Currently Texas is one of the few remaining states that have an optional workers' compensation program. The proposed bill would still allow employers with fewer than 25 employees to elect not to obtain comp insurance.

House Bill 566 proposes to change certain provisions of the Texas Labor Code pertaining to unemployment compensation benefits. Specifically, the bill would delete sections that limit a person's ability to collect unemployment benefits during the first week after they file their initial claim for unemployment. Currently, an unemployed worker does not collect benefits for their first week of unemployment until they have been unemployed for four weeks. The proposed bill would do away with the so-called "waiting week" and instead allow workers to collect unemployment in the first week they become unemployed.

House Bill 668 would protect employees against employment discrimination based on their sexual orientation or gender identity. Gender identity is defined in the bill as "the actual or perceived gender of an individual". The bill covers both private and governmental employers, but religious organizations are exempted. Private employers are covered if they have 15 or more employees. Employers would be prohibited from adopting quotas or giving preferential treatment to individuals based on their sexual orientation or gender identity.

House Bill 989 would give an employee the right to inspect his personnel records at least twice per year

after making a written request to his employer. Employees would be given the right to request that an employer remove items from their personnel files. If the employer refused to remove a document(s) from the personnel file after receiving a request, an employee would also have the right to attach a statement of disagreement to any document(s). The refusal of an employer to comply with this law would constitute an unlawful employment practice.

House Bill 1397 and **Senate Bill 444** would require the Texas Workforce Commission to conduct a study to determine the number and amount of fraudulent unemployment insurance claims filed and paid each year. The TWC would then use the information to establish an effective fraud detection system.

House Bill 1695 would gradually raise each employer's taxable wage base from the current \$9000 per year per employee to \$15,000 per year per employee.

House Bill 1931 would require unemployed workers to make at least five work searches per week in order to qualify for unemployment benefits. TWC would be required to issue rules that determine what type of activities would constitute a valid search for work.

Senate Joint Resolution 9 would let voters decide if they wanted to amend the Texas Constitution to allow court judgments to be garnished from employee wages. Currently the Texas Constitution only allows employee wages to be garnished for court-ordered child support or spousal maintenance.

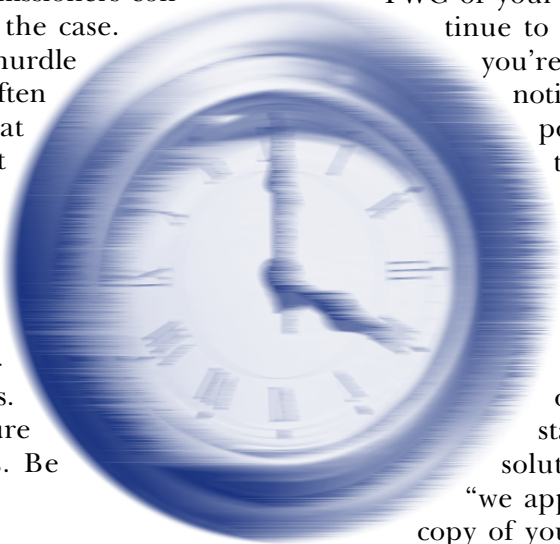
*Aaron Haecker
Attorney at Law*

Late Appeals and Protests:

A Guide for Employers

Any employer experienced with unemployment insurance appeals understands the critical importance of filing appeals before the deadline. Late appeals are simply dismissed, and you never get a chance to have a hearing officer or the Commissioners consider the underlying facts of the case.

Employers who have faced the hurdle of a late appeal at hearings often come away perplexed at what may seem like inconsistent procedures and rules. In fact, the rules underlying late appeals are the real source of the various standards used for adjudication, and hearing officers do a consistently excellent job of applying those rules. This article explains the structure of the rules for late appeals. Be prepared! Learn the rules!



The general rules for protest and appeal periods are found in the Texas Unemployment Compensation Act: 14 calendar days for claim notice protests and appeals, and 30 calendar days for chargeback notice protests. But TWC rules, found in the Texas Administrative Code, and TWC precedent cases provide the structure of distinguishing one late appeal from another.

Generally, there are four “exceptions” to the timeliness rules, and one extremely important rule of “no good cause.” I’ll describe each exception separately and the evidence you’ll need to establish that your late appeal qualifies for an exception. I’ll also give you some helpful hints. Finally, please read carefully the important warning at the end of the article on the “no good cause” rule.

Nondelivery and delayed delivery

This exception involves TWC claim notices, claim determinations, and chargeback notices that are not delivered, or notices and determinations that are delivered after the protest or appeal period has lapsed. To establish the exception, you must present “credible and persuasive evidence,” which can start with your testimony: “We didn’t receive the determination in the mail.” It doesn’t end there: you’ll also have to

establish that you were checking your mail regularly after TWC mailed the determination to you and that your address on record at TWC and used to mail the notice was current. If you move without notifying

TWC of your new address, TWC mail will continue to be sent to your old address, and you’re responsible for not receiving the notice. An address change filed with the post office is not enough! This situation does not fall within the “nondelivery/delayed delivery” exception.

Helpful hint: if you receive a notice or determination at 5:00 PM on the last day for a timely protest or appeal, this does not meet the standard for “delayed delivery.” The solution? Photocopy the notice, write “we appeal” on the copy, make a photocopy of your appeal, and place it in a USPS receptacle immediately. Do not leave your appeal letter “up front” for a postal carrier to pick up! More importantly, it is imperative that you check your mail daily, or have a responsible person do it for you. “Our appeal was late because we didn’t open the mail while we were on vacation” is covered by the “no good cause” rule, and that’s a place you don’t want to go. Finally, be very careful to provide TWC with an accurate address at all appeal stages, because nondelivery that results from you providing an incorrect address isn’t “nondelivery” under the rules; it’s just a late appeal.

Appeal filed before the postmark date, the postal meter date, or the date on the appeal itself

You file a timely appeal on the “thirteenth day,” but your appeal is dismissed when TWC says it was filed on the “fifteenth day.” You appeal the dismissal. When the hearing notice reaches you, you see that the post office postmarked your letter two days after you placed it in the mail. To establish the exception in a case like this, you must present “sworn testimony,” which should be the person who mailed the appeal saying, in effect, “I mailed the appeal on the thirteenth day.”

If you file a late appeal that bears your postal meter

Late Appeals and Protests *continued*

imprint, you must present “extremely credible evidence.” The same standard applies to an appeal letter that bears a date that falls beyond the appeal period. “Yes ma’am, I wrote the wrong date on my appeal letter, and I have no idea how my own postage meter put the wrong date on the envelope, but I filed that appeal on time.” Extremely credible? Not hardly. Employers and claimants alike almost never satisfy the evidentiary standard in these cases, and for good reason.

Important: Your postal meter only meters postage; only the United States Postal Service establishes the postmark!

Helpful hint: Mail all your appeals and protests by placing them in a USPS mail receptacle, preferably inside a post office. If you leave an appeal letter “up front” at your office for pickup by a USPS letter carrier, you can’t really testify that you mailed the letter. Play it safe. Take appeals and protests to the post office, and do it on time!

Appeal or protest never received by TWC

You file an appeal and wait patiently. When you write again to learn the status of your earlier appeal, your follow-up letter is dismissed as a late appeal, because TWC never received your original appeal! Relax; it’s not nearly as bad as you think, thanks to a 1995 precedent case. The rules require you to present “credible and persuasive testimony of timely filing corroborated by testimony of a disinterested party and/or physical evidence specifically linked to the appeal in question.”

Start with the “credible and persuasive testimony,” which again is simply the person who filed the appeal saying, (you guessed it): “I mailed the appeal letter.” Next, you’ll almost never have a “disinterested party” who has any knowledge of the appeal, so you’re left to presenting the “physical evidence.” Before 1995, many believed that the rule required you to show a receipt from a certified letter, which almost never existed. Very few parties send every appeal letter by certified mail on the chance that TWC will lose the appeal letter! Along came Appeal No. 95-014321-50-102495, where the Commissioners ruled that your file copy of the protest or appeal satisfies the “physical evidence” requirement of the rules! So after you say, “I mailed the appeal letter,” you’ll just add, “And this copy from our files is a true and accurate copy of what I sent.”

Helpful hint: always keep a photocopy or “e-copy” on your computer of any protest or appeal you mail. What about faxed appeals? Excellent question! In Appeal No. 98-005480-10-052098 (1998), the Commission ruled that the “physical evidence” required for a fax protest or appeal that is not received by TWC is a copy of the protest or appeal and a copy of a transmission log or confirmation report. So read the manual for your fax machine, and print out a confirmation for any fax appeal to keep in your files. Bonus hint! Fax appeals are filed upon receipt at TWC. If your representative in California faxes an appeal at 11:00 PM California time on the fourteenth day, it will arrive at 1:00 AM in Texas on the fifteenth day (late!) simply because of the two-hour time difference. Don’t wait until the eleventh hour!

Late appeal resulting from misleading information on appeal rights from a Commission representative

“Yes sir, take all the time you need to write your appeal letter. Just send it in whenever you’ve got it finished, and you’ll have a hearing.” We hope that no TWC employee ever says this, but it’s simply impossible to guarantee that all information provided by TWC representatives is absolutely accurate. We’re all human, inadvertent errors occur, even here at TWC in the twenty-first century! If you happen to receive misleading information and end up filing a late appeal, the rules require you to establish (1) how you were misled, (2) what you were told that was misleading, and (3) the name of the TWC representative who provided the misleading information. Are you going to remember the name of every TWC representative you talk to? Not likely. Are you really going to ask a TWC worker to explain “fourteen days”? Definitely not. File the appeal on time and avoid the whole problem. **Helpful hint:** fourteen days means just that: fourteen calendar days, not “business” days. Get your appeals filed on time.

Now you know the four primary exceptions to the timeliness rules. Other less common exceptions include:

- (1) If TWC improperly addresses a document mailed to you, the appeal period starts when you receive the document.
- (2) Your address change filed with TWC during the appeal period constitutes a timely appeal.
- (3) A determination that omits a required chargeback ruling can be appealed by the employer at any time.

Late Appeals and Protests *continued*

Call us if you have any questions!

DANGER! DANGER! PLEASE READ CAREFULLY!

TWC rules provide: "There is no good cause exception to the timeliness rules." Consider the following hypothetical facts: "I received the determination in our post office box. I opened it, read it, and had it with me in the car. Driving to the office, I was hit by a truck. My car and the TWC determination were completely destroyed, and I was in the hospital for four months. That's why my appeal was late." Good cause? Clearly. Outcome? Appeal dismissed. The rule means what it says: no exception for good cause. Don't confuse good cause to reopen a hearing, which is allowed under the rules, with good cause for a late protest or appeal.

Summary

File your appeals and protests on time! If your appeal is late, your late appeal must fall within one of the "exceptions" under TWC rules or it will be dismissed. Simple "good cause" is never an "exception."

*Jonathan Babiak
Attorney at Law*

NEWS FLASH

Ergonomics Rule Halted By Congress

On March 6, 2001, the U.S. Senate, followed a day later by the U.S. House, invoked the Congressional Review Act of 1996 and passed a Joint Resolution of Disapproval of the Occupational Safety and Health Administration's (OSHA) new ergonomics rule. Unless President Bush vetoes the resolution, the rule will die upon the President's signing the bill, or he could wait and allow the resolution to become final without his signature.

Industry associations and businesses across the country can breathe a sigh of relief. The rule (see "A Pain in the Back", *Texas Business Today*, Summer 2000 issue) would have imposed several burdensome requirements on employers. First, employers would have had to disseminate information about musculoskeletal disorders (MSDs) and the new ergonomics standard to their employees by October 14, 2001. Second, if an employee reported an MSD or MSD sign or symptom, the employer would have had to determine whether the symptom met the standard's "Action Trigger" and then decide what steps to take to comply with the law. While some injuries could be addressed with a "quick-fix" option, others would require development of an extensive ergonomics program. Third, and most onerous to many employ-



ers, the rule would have required that employers subsidize injured workers' wages for 90 days, including supplementing workers' compensation payments.

Although Congress' action strikes down this particular rule, OSHA still regulates workplace safety, and some in Congress are already calling

for the agency to adopt a new rule addressing ergonomics concerns. Employers should remain tuned for further developments.

Note: Back issues of *Texas Business Today* are posted on the Internet at <http://www.twc.state.tx.us/news/curpubs.html>.

BUSINESS BRIEFS Spring 2001

America's Workers Want Supportive Employers, Not Just Money

Many businesses spend countless hours designing intricate compensation arrangements and initial public offerings but totally overlook other benefits affecting the quality of life of their employees; apparently, this could be a serious oversight. A recent survey of more than 1,000 working Americans indicates that nearly 75% of the employees who rated their employers as being supportive pointed to reasons other than salary and bonuses in reaching their conclusions.

Bellevue, Washington based Xylo Inc., a corporation that provides Web-based work/life solutions, had Wirthline Worldwide conduct the job satisfaction survey in September 2000.

The encouraging news for employers is that slightly over 80% of the workers surveyed expressed satisfaction with their jobs. One third of the workers said they are "somewhat satisfied" while nearly half – 48% - said they are "very satisfied." While 9% of those surveyed said they were "somewhat dissatisfied," only 4% felt "very dissatisfied" with their jobs. However, in spite of those responses, only 39% of the respondents said that their employers supported the concept that "what is good for the employees is good for the company."

Of the group that rated their companies as supportive, only one quarter of them attributed that to pay and bonuses. Other satisfaction factors that scored as highly as compensation were benefits, perks and employee discounts (29%), a "fun" work environment (23%), and respect for and recognition of good work performance (22%).

According to Xylo's president and CEO, Norman Behar, "It is not surprising that U.S. workers place greater value on additional benefits and an enjoyable work environment when those factors can have a tremendous impact on an employee's overall quality of life." For more details about the survey, see www.xylo.com/xyloreport/xr_0009.htm.

Maquiladora Employment Grows 13.4% During First Three Quarters of 2000

While talks are beginning in Washington to revisit the issue of legal immigration, the employment picture in Mexico, Texas' most important trading partner, is also improving. According to a report released in early January 2001 by Lucinda Vargas, senior economist with the El Paso Branch of the Federal Reserve Bank of

Dallas, Maquiladora plants in Mexico grew to 1.3 million workers during the first nine months of 2000. This is a 13.4% increase over the same period in 1999.

The electric and electronics sector had the largest gains in employment, followed by textiles and apparel, and transportation equipment. Since the same time period in 1999, the number of workers employed at plants along the Mexican border with the U.S. grew by 11.5% while the number of workers employed at plants in Mexico's interior states jumped by 16.7%.

According to Vargas, there are now more than 787,700 border-area employees. This represents almost 62% of all maquiladora employment. The workforce of the interior's maquiladora plants grew to almost 483,550 workers, or 38% of all maquiladora employment.

Not only did the number of workers increase, the number of maquiladora plants also grew to 3,652 during the same time frame, a jump of 9.3%. And, these plants processed \$40.5 billion in raw materials between January and September of 2000, a 20% increase over the same period in 1999.

According to Vargas, increases in maquiladora employment are expected to grow in 2001 in spite of new tariffs of up to 5% on certain products and sectors. Copies of the report are available on the Web site of the Federal Reserve Bank of Dallas at: <http://www.dallasfed.org/htm/pubs/front.html>.

Heads Up: U.S. Supreme Court To Rule on Nine Employment-Related Cases By June 2001

The United States Supreme Court is expected to issue decisions in nine employment-related cases before its term ends in June 2001. A wide variety of legal issues will be addressed including, among others, front pay as a remedy for sex discrimination, the application of the Americans with Disabilities Act to state workers, individual employment arbitration provisions, the supervisory status of nurses, at what point the amount of employment taxes owed on a back-pay award should be calculated, and state enforcement of prevailing wage rules in public works contracts. The Court has already heard oral argument in four of the cases, while the remaining five cases should be argued by the end of April 2001. Stay tuned for further details; these decisions will have ramifications for employers in all 50 states.

*Renée Miller
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LEGAL BRIEFS

Good News From the 5th Circuit!

Hooray! Here's some very good news for Texas employers and the employment at-will doctrine: the 5th Circuit U.S. Court of Appeals recently ruled that in Texas, a written job offer does not amount to a binding contract of employment even if it quotes a specific yearly salary. *Hamilton v. Segue Software*, No. 00-10541 (11/20/00). The case reinforces the State's long-established tradition that employment is at will, meaning the employment relationship is for an indefinite period of time. It also makes clear that a Texas employer would have to take fairly dramatic (and risky) steps to rebut the presumption that employment can be terminated at any time, for a good reason, bad reason, or no reason at all, by either party, with or without notice.

The Facts

While Randall Hamilton was working at AutoTester, Inc., Segue Software recruited him and made him a written job offer to become their Director of Enterprise Resource Planning Initiatives. Segue's letter also indicated that Mr. Hamilton's base salary would be \$125,000 per year, and requested that he sign not only the letter, but an employment contract that should have been attached. However, the contract wasn't attached or included in the envelope. Had Mr. Hamilton actually seen the contract, he would have realized that it contained a disclaimer that his employment would be at will. Interestingly, the missing contract didn't seem to bother either Segue or Mr. Hamilton, and he went to work for them one month later. Pursuant to the terms of the offer letter, Mr. Hamilton was paid on a semi-monthly basis.

Approximately four months after going to work for Segue, Mr. Hamilton was moved to a new position on the company's business development team. Then, about six weeks later, Mr. Hamilton's employment abruptly ended for reasons the court did not discuss. However, the employer's decision was not well received by Mr. Hamilton: he sued Segue for breach of contract, alleging that their offer letter created a one year employment contract under Texas law.

What the Court Did

The court was disturbed by the fact that the offer letter did not have a contract attached. Had the contract been where it was supposed to be, the contract and the offer letter could have been read together, meaning the disclaimer language in the contract would have



been incorporated into the offer letter. Result? In that situation, Mr. Hamilton wouldn't have had a case. However, the missing contract made it harder for the court to determine if the offer letter alone amounted to a definite contract.

Part of the court's dilemma arose from the fact that a number of Texas cases have held that an offer to hire an employee at a specified wage per year, month or week is indeed a contract of employment for the period quoted. In direct conflict with those rulings is the State's longstanding and strong presumption that employment is always at will unless an employer clearly, and in a meaningful and special way, limits its ability to fire employees without cause, at will. The court's predicament was deciding which of these two conflicting theories should prevail.

After a careful review of recent rulings from various Texas courts, the 5th Circuit concluded that the "more modern" at-will presumption should apply. The court went on to rule that Segue's written offer of an annual base salary to Mr. Hamilton was not definite and specific enough to indicate that Segue intended to limit its prerogative to fire at will.

What This Case Means to Texas Employers

This case is welcome news for Texas employers. While the at-will doctrine is still alive here in Texas, it is

Legal Briefs continued

constantly under attack by both courts and the legislature. Even in Texas (as in this case), courts will carefully examine offer letters or employee policy handbooks to decide whether a fired employee had an employment contract for a specific period of time, meaning they could only be fired for cause. This decision says that a Texas employer has to take fairly substantial steps to rebut the strong presumption that employees can be fired at any time, for any reason. Only an unambiguous, specific statement that an employer intended to limit its prerogative would meet that test.

It is still critical that all employee offer letters, policy handbooks, memos or e-mails offering employment contain clear and unequivocal language that all employment with the company is at will, that the document does not create a contract for employment, and that the employer retains the right to unilaterally withdraw or amend the handbook at any time, with or without notice. All employees should be asked to sign a statement acknowledging receipt of the handbook.

Just to be on the safe side (and help a court decide in your favor should you be sued), always make offers of pay in the shortest increment of time possible. If you're hiring an hourly employee, quote an hourly rate of pay; if you're hiring a salaried employee, make the offer based on a monthly, not yearly, salary.

And, make sure that all necessary documentation is not only provided to your employees before they come on board, but that they have seen, signed and agreed to be bound by your policies or work agreements prior to their first day of work. In this case, if Mr. Hamilton had seen and signed the contract containing the disclaimer that all employment was at will, he wouldn't have had a case, saving everyone time and money.

*Renée Miller
Attorney at Law*

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Texas Business Conference

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

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