

Second Quarter 2012

Texas Business Today

Tom Pauken
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS
* * * * *

New legislation impacts UI provisions for employers

- Finding balance: employee privacy • The cost of unpaid interns •
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Greater emphasis on skills training is needed

Texas continues to lead the nation in private-sector job creation, with an addition of nearly 226,000 jobs during the past 12 months. Over the past decade, Texas has had an increase of over one million in private-sector employment during a time when national job growth in the private sector was virtually zero.

While Texas should justifiably take pride in our job growth, we have to be concerned about a growing problem in our state and across the nation: a real shortage of skilled workers.

Do you know that the average age of a master plumber in the state of Texas is 56? Or, that the average age for a masonry craftsman is 69? We have a graying workforce

Commissioner's Corner

in the skilled trades and, unfortunately, we have failed to develop a pipeline of younger, skilled workers. A major

reason for that is that we have neglected the importance of vocational and technical education, beginning at the secondary school level.

I had been out of government and in the private sector since heading a federal agency in the Reagan Administration when Governor Rick Perry asked me to chair the Texas Workforce Commission in 2008. What shocked me in coming back to government four years ago was how different the attitude towards vocational and technical education among the education policymakers was from when I got back from Vietnam in 1969 and became a civilian again. I was asked to serve on the National Advisory Council on Vocational Education and did so from 1970 to 1975. Back then, the United States had the strongest manufacturing sector in the world, and there was a general recognition throughout American society of the value of technical education and the skilled trades. There was a strong emphasis—beginning at the secondary school level and continuing at post-secondary schools—on providing opportunities for young people with the aptitude and the interest to get skills training at an early age.

So much has changed—and it has not all been “positive change.”

What happened to our pipeline of skilled workers? Somehow, over the last two decades, certain political elites decided that everyone should be prepared to go to a four-year university. I call it a “one size fits all” approach. So, we got trapped into this “teaching to the test” mindset, which was going to make all of our elementary and secondary students “college ready.” First, there was the TAKS test. Now, there are the STAAR tests. So much



TWC Commissioner Tom Pauken signs a Skills Development Fund grant check for \$616,865 for a partnership between a maritime consortium and San Jacinto College. *Photo courtesy San Jacinto College*

of our educational system is driven these days by this teaching to the test mentality from the third grade through high school.

To borrow a phrase from Will Rogers, “if stupidity got us into this mess, then why can’t it get us out?” The answer to this critical shortage of skilled workers is simple, but not easy. There are powerful interests arrayed to protect the existing system of education financing and performance measurements. The problem is that the system is broken, and the average Texan gets it, even if some of the policymakers don’t. The time is ripe for major reform of our educational system so that we place greater emphasis on vocational and technical education at the secondary and post-secondary school levels.

Let’s replace the one size fits all TAKS and STAAR tests that we use to evaluate all our students with two different tests—one that measures college readiness for those who plan to pursue that route such as the ACT or SAT and one that measures career readiness.

We all learn differently. Some students don’t enjoy or do well in an abstract classroom setting—I have a son

like that—but would excel by working with their hands in a skilled trade. That’s why a hands-on approach to skills training is so important in preparing a student to be job-ready.

Let’s give our high school students the facts about the employment market. Young people who have completed an industry-certified skills training program have a better opportunity to get a good-paying job than many graduates of four-year universities. We have accepted for too long this misguided notion that everyone should go to a four-year university. That flies in the face of reality and human nature. We have different talents and different abilities.

Young adults with a skilled trade can get hired at entry-level positions with starting pay that is higher than that garnered by many university graduates. I’ll give you a few examples from here in Texas. A high school student at the Craft Training Center in Corpus Christi got his industry certification in welding. After graduating from high school, he is now making \$1,700 a week as a welder. A Texas State Technical College graduate with an associate’s degree in instrumentation in the engineering-technology field has been hired in the petrochemical industry at a starting salary of \$68,000. A board member of the Associated Plumbing-Heating-Cooling Contractors of Texas informed me that a licensed Master Plumber can make \$75,000 annually with

just three years’ experience.

The sooner we act the better. The graying of the workforce is the price we pay for neglecting the importance of the skilled trades over the past few decades.

So let’s design a school finance and accountability system which recognizes our differences, prepares our students for life after the classroom, and re-establishes the importance of skills training to provide young Texans with terrific career opportunities. 

Sincerely,



Tom Pauken
Texas Workforce Commission
Commissioner Representing Employers



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Cover image: Chisos Basin. *iStockphoto/Thinkstock*

New feature allows parties to register phone number online for hearings

The Texas Workforce Commission (TWC) has added a new feature that allows parties to a scheduled unemployment hearing to register their phone number online rather than call in to a receptionist to participate in the hearing.

Online registration for your hearing is now available. If you want to register online rather than call in for your hearing, visit <https://tx.c2tinc.com/register> on the day of your hearing and follow the instructions on the website to register for your hearing.

You will need the case number for the hearing. When registering for your hearing, be sure to:

- Check the case hearing details to make sure you are registering for the right hearing.
- Enter a valid telephone number, including the area code and any extension number, where you can be reached at the time of the hearing.
- Enter on whose behalf you are appearing, usually claimant or employer.
- Check the information you entered to make sure it is correct before you submit your registration.
- Write down the confirmation number you will receive when you submit your registration.
- Click finish to complete your registration.

To change any information before the time of the hearing, go back to <https://tx.c2tinc.com/register> and follow the instructions to update.

To participate in your hearing, you must either register online or call in within 30 minutes before the time your hearing is scheduled. If you have any problems registering online for your hearing, call 800-252-3749 and speak with a receptionist within the 30 minutes before your hearing is scheduled to begin.



FREQUENTLY ASKED QUESTIONS

Q: What is the time period that the parties can register online? When does registration end?

A: The parties can register online from the time the hearing is entered into the telephone hearing system until the end of the day of the hearing. (Important note: Even though the system will allow a late registration to be entered online, it will do an employer or claimant no good to register after the starting time for the hearing. That is the same as calling in late. If a party misses the hearing due to calling or registering late, s/he will have to show good cause for missing the hearing.)

Hearings are entered in the telephone hearing system shortly before the date of the hearing, so it is recommended to wait until the date of the hearing to register online. If they register at a time after the start time of the hearing, they see a message on the screen informing them that it is a late registration. After the date of the hearing, if someone tries to register, they will get a message that no hearing is scheduled.

Q: Will TWC be able to track call-in history? For example, if a claimant enters a phone number and then enters a different one, will TWC staff be able to see all of that activity, or will the last entry overwrite the first one?

A: When an update is made to a registration, either by the party using the update function in the registration website, or by a receptionist/hearing officer through the hearing system screens, the original information is overwritten.

Q: Will a time stamp appear on the registration information?

A: Yes, TWC staff can see the time stamp in the hearing system screens or digital log, which will enable a party to prove the time at which the party signed in. 🇹🇽

Source: TWC Appeals Department, June 2012

**Call 800-252-3749 to speak with a representative
30 minutes before your hearing is scheduled
if you have problems registering online.**

Online registration for unemployment hearings is now available. This new feature allows parties to a scheduled unemployment hearing to register their phone number online rather than call in to a receptionist to participate in the hearing. *Jupiterimages/Comstock/Thinkstock*

The cost of unpaid interns

Know the facts to comply with the law

Summer is here, which may mean that your company has hired an unpaid intern for a summer term. Likewise, some companies bring interns on for fall or winter semesters in conjunction with their college studies. Unpaid interns are an area of confusion for Texas employers. Employers who call our employer hotline often ask, “How do you know when an individual you hired should be considered an intern and not an employee?” Unpaid interns are becoming a more attractive alternative for employers who may be looking for ways to stretch their budgets.

In April 2010, the U.S. Department of Labor (DOL) stated that it would be investigating and fining employers that were taking advantage of young people. Nancy J. Leppink, DOL’s Deputy Wage and Hour Administrator, told the New York Times in April 2010, “If you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.” Then, in January 2012, DOL announced President Obama’s initiative called Summer Jobs+. This program was designed to connect young people with summer job opportunities. The program released “A Toolkit for Employers: Connecting Youth & Business” (<http://www.dol.gov/summerjobs/pdf/Toolkit.pdf>). The toolkit assists employers in creating job opportunities for youth, including unpaid internships.

Nevertheless, Texas does not have any intern laws for employers to follow. Instead, private, for-profit-sector employers in Texas need to comply with the federal laws under the Fair Labor Standards Act (FLSA)

when classifying interns at the workplace. In order for a private-sector employer to have an unpaid intern work at their business legally, the internship has to meet the six factors below:

1. The internship is similar in nature to training that would occur in an educational environment;
2. The experience is for the benefit of the intern;
3. The intern does not displace regular employees;
4. The employer derives no immediate advantage from the internship;
5. The intern is not necessarily entitled to a job at the end of the internship; and
6. The employer and intern both understand that the work is unpaid.

If the factors seem a little archaic, it’s because they are. The factors are based on a 1947 U.S. Supreme Court decision that evaluated whether the FLSA applied to prospective trainyard brakemen, which does not fit the standard profile of most interns today.

An employer may ask, “How can you possibly have an intern that does not provide an advantage to your business *at all*?” In 2002, DOL’s Wage and Hour Division issued a letter of advice to an employer suggesting that the interpretation is not as strict as it may sound (http://www.dol.gov/WHD/opinion/FLSA/2002/2002_09_05_8_FLSA.htm). The definition of “no immediate advantage” in factor #4, depends on whether “productive work performed by the mentees would be offset by the burden to the employers [local businesses] from the training and West Texas landscape supervision provided.” Therefore, an employer should ask itself, “Is your



Unpaid interns are becoming a more attractive alternative for employers looking for ways to stretch tight budgets. Texas employers must meet six factors to comply with federal laws regarding interns. *Jupiterimages/Photos.com/Thinkstock*

intern benefitting more from the work than you are?” If so, then you are in compliance with factor #4, but you still have to meet the other five factors.

Therefore, private-sector employers who hire unpaid interns need to keep in mind that misclassifying individuals as interns may not only cost a lot in minimum wage and overtime, but also may cost the employer money in state and federal taxes, insurance benefits, workers’ compensation, fines, and attorney fees.

For more information, please see the article about interns in our online book *Especially for Texas Employers* (www.texasworkforce.org/news/eft/advanced_flsa_issues.html#interns_trainees). 🗝️

Marissa Marquez
Deputy Senior Legal Counsel to
Commissioner Tom Pauken

Legal briefs: what you need to know

Transgender status, outside sales reps, NLRB posters, veterans

Correction to Q & A on page 9 of the First Quarter 2012 issue

The answer to the question on application of compensatory time to Family Medical Leave Act (FMLA) leave quotes an old U.S. Department of Labor (DOL) opinion letter from 1996 that has been superseded by a newer regulation released on November 17, 2008, namely 29 C.F.R. § 825.207(f). That

Legal Briefs

provision states that "... under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the Fair Labor Standards Act (FLSA), the time taken may be counted against the employee's FMLA leave entitlement." The text of the regulation may be seen at http://www.twc.state.tx.us/news/efte/wh_part825.html#825_207.

EEOC Holds That Transgender Status is Protected under Title VII

On April 20, 2012, the Equal Employment Opportunity Commission (EEOC) released a decision in the case of *Macy v. Eric Holder, Attorney General, Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives*, holding that a person undergoing a change in gender identity is protected from discrimination by Title VII of the Civil Rights Act of 1964. Specifically, the Commission found "that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing." In that case, the complainant had been told she had been hired pending the successful completion of a background check. After she informed the hiring contractor of her transgender status, the contractor notified her that the position was no longer available due to "federal budget restrictions," which turned out to be inaccurate since another candidate ended up being hired for the position in question. The complainant filed a charge with EEOC, which the agency initially dismissed because of a perceived lack of jurisdiction over claims involving "gender identity stereotyping." Noting the history of how discrimination related to gender identity stereotyping has come to be

recognized by courts as a valid claim under Title VII, the Commission concluded that "... intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."

Source: <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

Important Decision on Outside Sales Representatives

On June 18, 2012, in the case of *Christopher v. SmithKline Beecham Corp., dba GlaxoSmithKline*, the U.S. Supreme Court ruled that "pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs" qualify for the FLSA overtime exemption pertaining to "outside sales representatives." The Court's opinion flatly rejected DOL's attempted narrowing of the definition of outside sales representatives to those who actually consummate sales that result in a transfer of title to goods or other forms of property. Beginning in 2009, DOL took the position that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought." After the Supreme Court granted a review of the *SmithKline* case, the agency changed its interpretation of the term "sale" and held that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue."

The Court found it significant that for 70 years, DOL had not challenged in any way the treatment by the industry of such sales representatives as exempt, that the industry's compensation practices for such employees is fully consistent with that given to other outside sales representatives, that DOL had changed its interpretation twice beginning in 2009, that the plaintiffs proposed using the new DOL position to impose liability for conduct occurring before the agency changed its interpretation, and that the agency position was in plain conflict with the agency's own regulation. The Court noted that to impose liability based upon the new DOL interpretation would constitute "unfair surprise" in violation of the general principle that regulated parties should not be held liable for conduct that was in good-faith reliance on prior agency



The Equal Employment Opportunity Commission issued additional guidance to wounded veterans and employers under the Americans with Disabilities Act Amendments Act of 2008 in February. The guidance comes as an additional sign that federal agencies are working to address the employment of disabled persons. Employers must be prepared to comply with laws applicable to veterans with physical and mental impairments that are considered disabilities, e.g. post-traumatic stress disorder. *Thinkstock Images/Comstock/Thinkstock*

pronouncements. Ultimately, the majority of the Court found that the work of pharmaceutical sales representatives (known in the industry as “detailers”) constituted “making sales” under FLSA, and that such employees are covered by the outside sales representative exemption. The dissenting opinion basically found that such employees are primarily engaged in non-exempt promotional work. Both the majority and dissenting opinions are well worth reading. The opinion is online at <http://www.supremecourt.gov/opinions/11pdf/11-204.pdf>.

NLRB-Required Poster on Hold

In our last *Texas Business Today* newsletter, we mentioned that the National Labor Relations Board (NLRB) would be requiring private employers to post a notice by April 30, 2012, which would inform employees of their union-related and other rights under the National Labor Relations Act. However, on April 13, 2012, a federal court in South Carolina ruled in favor of the U.S. and South Carolina Chambers of Commerce, holding that NLRB had exceeded its authority by requiring such a poster. Therefore, NLRB is prohibited from requiring such a notice until the Court resolves the legal issues. So for now, private employers are not required to post a notice regarding their employees’ union rights. The announcement regarding the postponement (see “Important Note”) can be found at <http://www.nlr.gov/poster>.

EEOC & Wounded Veterans

On February 28, 2012, EEOC issued additional guidance to wounded veterans and to employers under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Employers with 15 employees or more need to comply with ADAAA. The guidance is another sign that federal agencies are trying to address the employment of disabled persons. Disabled veterans are protected from employment discrimination under both the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Most employers are familiar with their obligations under ADA, but many are less familiar with USERRA, which applies to all employers regardless of how many workers the employer hires. ADAAA expanded the definition of disability in 2008 and while veterans are returning to the workforce, employers must be prepared to comply with laws applicable to veterans with physical and mental impairments that are considered disabilities, e.g., post-traumatic stress disorder. EEOC’s “Guide for Employers” provides an insight as to EEOC’s view of ADA’s effect on the hiring, recruiting, and accommodation of disabled veterans. The link to the guide is http://www.eeoc.gov/eeoc/publications/ada_veterans_employers.cfm. 

Employee privacy: getting the right balance

Technology makes it possible for employers to monitor workers

From time to time, Texas Business Today features guest articles contributed by experienced labor and employment law attorneys in Texas. This issue's featured article is from Sheila Gladstone of Lloyd Gosselink Rochelle & Townsend, P.C in Austin, Texas.

Employee privacy is a tricky balancing act. Employers want to make sure their employees are doing a good job, but employees don't want to feel like their every move is being watched. Technology makes it possible for employers to monitor many aspects of their employees' jobs. In deciding whether certain monitoring methods will violate employees' privacy, the main question is: did the employee have a reasonable expectation of privacy?

Computer and Email Monitoring

In general, because the employer owns the equipment and systems, it is free to monitor employees' electronic activities and communications, including any personal email communications accessed on a company computer. Despite this general rule, such monitoring would be a violation if the employee has a reasonable expectation of privacy on the computer or email system. This expectation could be created where the employer or a supervisor tells the employee that he or she can use the computer or email system for personal matters and that those devices will not be monitored.



Employers should include a stated policy in the employee manual that puts employees on notice of the fact that the company-provided computers, emails, and/or other electronic devices are subject to monitoring. Additionally, train supervisors to be careful not to make assurances that would contradict such a policy.

Desk, Locker, and Office Searches

Office, desk, and locker searches are generally permitted because they also are company property. But again, the relevant issue is whether the employee had a reasonable expectation of privacy. Consider whether the employee locks the desk, locker, or office, and whether that lock is accessible to the employer. If the employer would need a locksmith or crowbar to get in, then the employee could likely claim a reasonable expectation of privacy.

Purse, Backpack, Briefcase, and Pocket Searches

There is a higher standard of privacy for personal items. Searches can be legitimate provided there is a well-publicized written policy that personal property is subject to search. Additionally, pat-downs should be left to the police and not conducted by the employer at work. If absolutely necessary, the employer should have the employee show what is in his pockets.

Drug and Alcohol Testing

Private-sector employers in Texas may do random drug and alcohol testing as a condition of employment, as long as such testing requirements are consistently applied and tests are done in a way that is not embarrassing or overly intrusive. Employees in positions covered by the federal Department of Transportation Drug and Alcohol Testing Program are subject to additional testing requirements. Public-sector employees have a constitutional protection against unreasonable search and seizure by a governmental employer, so only those in designated safety-sensitive positions may be subject to random testing.

Employers are free to monitor employees' electronic activities and communications, including personal email communications accessed on company computers. However, reasonable expectations of privacy should be laid out in advance, so potential privacy violations do not occur.
Creatas Images/Creatas/Thinkstock



Telephone Monitoring

Employers may monitor company phones for business purposes, but should give advance notice to employees that such monitoring may take place. Then, when monitoring phone calls, the employer must stop listening when it is apparent that the conversation is personal and does not concern business matters.

Workplace Audio Recording and Video Surveillance

Recording a conversation, whether it be in person or on the telephone, is legal in Texas as long as one party to the conversation knows of the recording. Accordingly, a manager can record a conversation he has with an employee, but may not secretly record a conversation between two other employees if the manager is not present.

Video surveillance is legal as long as it is in an area an employee would expect to be observed, such as a lobby or hallway. Because an employee would not expect to be observed in the restroom or a private office, video surveillance is not permitted there. If the video surveillance also records audio, then notice is required.

While employers can monitor company phones for business purposes, the employer must stop listening when it becomes apparent that the conversation is personal and no longer concerns business matters. Employers should give employees advance notice that phone monitoring may be taking place. *Getty Images/Digital Vision/Thinkstock*

Medical Information

Employee records containing medical information, such as detailed doctors' notes, drug test results, health plan enrollment information, workers' compensation information, and illness/injury information, must be kept in a separate, secure file. Release of such records requires a court order or employee written consent.

Identity Theft Prevention

Federal Trade Commission regulations require that all consumer reports must be "burned, pulverized, or shredded" once they are no longer needed. These include criminal background checks and credit reports. Furthermore, employers must similarly dispose of documents showing employees' social security numbers and other identification, and train employees on the disposal policy.

Monitoring Off-Duty Behavior

When investigating employees' off-duty conduct, such as workers' compensation fraud, be aware that you may only observe and record an employee who is in plain view from a public area. Therefore, videotaping an employee from the public road while he does construction work on his home is legal, while climbing into a tree to observe an employee in a fenced backyard is not.

Bottom Line

Privacy issues are a balancing test, which requires that the employer's need for information outweigh the employee's right to privacy. As employees have no claim of violation where they have no reasonable expectation of privacy, employers and supervisors should be careful not to give assurances of privacy, and should clearly post any policies regarding monitoring, searching, or testing. 🇺🇸

Sheila Gladstone chairs the Employment Law Practice Group at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin, Texas. Direct line: 512.322.5863; email: sgladstone@lglawfirm.com.

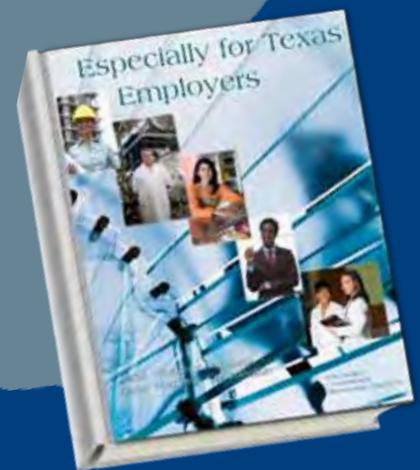
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www.texasworkforce.org/news/efte/tocmain.html

**Request a printed copy from the Table of Contents page of the online version.*

Newest legislation impacts unemployment insurance provisions for employers

During the most recent general session of the Texas Legislature, several bills passed and were signed into law by the Governor. The following are the bills that changed certain aspects of the unemployment insurance (UI) provisions of the Texas Unemployment Compensation Act:

- **HB 14** amended Section 207.049 of the Texas Labor Code to provide a new disqualification for a claimant who has received severance pay, as defined in Section 207.049(b). Under the new provision, severance pay disqualifies a claimant for UI benefits for the period covered by the severance pay amount. Amounts paid by an employer for releases of claims, waiver-of-liability agreements, settlement agreements, mutually negotiated employment contracts, or under collective bargaining agreements do not constitute severance pay. Severance pay promised in a job offer letter or provided pursuant to an employer policy could constitute severance pay under this new section of the law, depending upon the circumstances of the specific payment.
- **HB 2579** created a new section in the Texas Unemployment Compensation Act, Section 213.011, providing a partial safe harbor from tax penalties, interest, and other sanctions resulting from misclassification of workers, as long as the misclassification was in reliance upon a prior TWC determination or a ruling of a Texas court, pertaining to the type of workers involved and providing that the workers in question were not in employment.
- **SB 439** created a new category of chargeback protection for employers that find they have to let a temporary replacement go in order to reinstate a returning veteran who has reemployment rights in accordance with the federal law known as USERRA. In such a case, pursuant to the new Section 204.022(a)(15), the employer will not be charged back with the benefits received by the temporary employee who was replaced by the returning veteran.
- **SB 458** amended Section 208.002(a) of the Act to provide that the “person for whom the claimant last worked,” i.e., the last employing unit, is an employer for which or for whom the claimant worked at least 30 hours in a week, or else is an employer covered by the unemployment law of Texas or any other state. This helps address an issue noticed by many in the past involving claimants who were discharged

for misconduct from a longtime employer and then worked a short time for a non-covered individual before filing a UI claim. In such cases, the notice of claim went to the non-covered individual, who usually had little incentive to respond to the notice, and payment of benefits was generally easier for the claimant, who did not have to be concerned with explaining the circumstances of the separation from the primary employer. Now, the claimant’s last work must be more substantial, either an employer that is already liable under the UI system, or anyone else for whom the claimant worked at least 30 hours in a week before filing the claim.

- **SB 638** brought a welcome measure of even-handedness to the law in business acquisition situations. Prior to the new Section 204.0861 becoming law, a company that acquired another company would not be entitled to a surplus credit earned by the company it acquired, even though the acquisition brought liability for a tax debt owed by the predecessor. With the change in law, successor entities have access to surplus credits earned, but not yet used, by their predecessors.

The 2011 legislative session brought about other interesting changes in Texas labor laws. Employers are welcome to call 800-832-9394 for information about any law that affects their employees or their status as employers. 🇹🇽

*William T. Simmons
Senior Legal Counsel to Commissioner Tom Pauken*



Under new provisions of the Texas Labor Code, severance pay disqualifies a claimant for UI benefits for the period covered by the severance pay amount. *iStockphoto/Thinkstock*

Business briefs: keeping you in the know

Available tax credits, NLRB notice, non-agricultural employment, child labor announcement, and new technology consortium

From the IRS: Small Business Health Care Tax Credit for Small Employers

Small employer? Get the credit you deserve.

If you are a small employer. . .

- With fewer than 25 full-time equivalent employees;
- That pays an average wage of less than \$50,000 a year;
- And pays at least half of employee health insurance premiums

. . . then there is a tax credit that may put money in your pocket.

What You Need to Know about the Small Business Health Care Tax Credit

How will the credit make a difference for you?

For tax years 2010 through 2013, the maximum credit is 35 percent for small business employers and 25 percent for small tax-exempt employers such as charities. An enhanced version of the credit will be effective beginning Jan. 1, 2014. Additional information about the enhanced version will be added to IRS.gov as it becomes available. In general, on Jan. 1, 2014, the rate will increase to 50 percent and 35 percent, respectively.

Here's what this means for you. If you pay \$50,000 a year toward workers' health care premiums, and if you qualify for a 15 percent credit, you save \$7,500. If you save \$7,500 a year from tax year 2010 through 2013, that's a

total savings of \$30,000. If, in 2014, you qualify for a slightly larger credit, say 20 percent, your savings go from

\$7,500 a year to \$12,000 a year.

Even if you are a small business employer who did not owe tax during the year, you can carry the credit back or forward to other tax years. Also, since the amount of the health insurance premium payments is more than the total credit, eligible small businesses can still claim a business expense deduction for the premiums in excess of the credit. That's both a credit and a deduction for employee premium payments.

There is good news for small tax-exempt employers, too. The credit is refundable, so even if you have no taxable income, you may be eligible to receive the credit as a refund so long as it does not exceed your income tax withholding and Medicare tax liability.

Finally, if you can benefit from the credit this year, but forgot to claim it on your tax return, there's still time to file

an amended return.

Visit www.irs.gov/pub/irs-utl/small_business_health_care_tax_credit_scenarios.pdf more examples of how the credit applies in different circumstances.

Can you claim the credit?

Now that you know how the credit can make a difference for your business, let's determine if you can claim it.

To be eligible, you must cover at least 50 percent of the cost of single (not family) health care coverage for each of your employees. You also must have fewer than 25 full-time equivalent employees (FTEs). Those employees must have average wages of less than \$50,000 a year.

A full-time equivalent employee is two half-time workers, or simply put, 20 half-time employees are equivalent to 10 full-time workers. That makes the number of FTEs 10, not 20.

Now let's talk about average wages. Say you pay total wages of \$200,000 and have 10 FTEs. To figure average wages, you divide \$200,000 by 10 (the number of FTEs) and the result is your average wage. The average wage would be \$20,000.

Also, the amount of the credit you receive works on a sliding scale. The smaller the business or charity, the bigger the credit. So if you have more than 10 FTEs or if the average wage is more than \$25,000, the amount of the credit you receive will be less.

How do you claim the credit?

To claim the credit, you must use Form 8941, Credit for Small Employer Health Insurance Premiums.

If you are a small business, include the amount as part of the general business credit on your income tax return.

If you are a tax-exempt organization, include the amount on line 44f of Form 990-T, Exempt Organization Business Income Tax Return. You must file Form 990-T in order to claim the credit, even if you don't ordinarily do so.

Don't forget, if you are a small business employer, you may be able to carry the credit back or forward. And if you are a tax-exempt employer, you may be eligible for a refundable credit.

Source: <http://www.irs.gov/newsroom/article/0,,id=223666,00.html>.

Expanded Work Opportunity Tax Credit Available for Hiring Qualified Veterans

The VOW to Hire Heroes Act of 2011 made changes to the Work Opportunity Tax Credit (WOTC). The Act added two new categories to the existing qualified veteran targeted group and made WOTC available to certain tax-exempt employers as a credit against the employer's share of Social Security tax. The Act allows employers to claim WOTC for veterans certified as qualified veterans and who begin work before January 1, 2013.

The credit can be as high as \$9,600 per qualified veteran for for-profit employers or up to \$6,240 for qualified tax-exempt organizations, but the amount of the credit also will depend on a number of factors, including the length of the veteran's unemployment before hire, the number of hours the veteran works, and the veteran's first-year wages. The amount of the credit for qualified tax-exempt organizations may not exceed the organization's employer Social Security tax for the period for which the credit is claimed.

Source: <http://www.irs.gov/businesses/small/article/0,,id=253949,00.html>.



Small business owners may be eligible for a health care tax credit, depending on whether qualifications like having fewer than 25 full-time equivalent employees and an average annual wage of less than \$50,000 may qualify. *Stockbyte/Thinkstock*

New Notice from NLRB

In the First Quarter 2012 issue of *Texas Business Today*, we mentioned how several federal agencies, including the National Labor Relations Board (NLRB), have stepped up their enforcement activities against employers suspected of violating various labor laws. NLRB also has increased its effort to get the word out about its agency and the laws it enforces, primarily the National Labor Relations Act (NLRA). On June 18, 2012, NLRB issued a press release describing its new website relating to the right of employees to engage in "concerted activity." The press release gave several examples of cases involving such rights: "A construction crew fired after refusing to work in the rain near exposed electrical wires; a customer service representative who lost her job after discussing her wages with a coworker; an engineer at a vegetable packing plant fired after reporting safety concerns affecting other employees; a paramedic fired after posting work-related grievances on Facebook; and poultry workers fired after discussing their grievances with a newspaper reporter."

Since that part of NLRA applies even in non-unionized workplaces, it is very important for employers to review their policies and practices to ensure that employees do not receive disciplinary actions or other kinds of adverse treatment when they act together in some way to discuss or complain about the terms and conditions of employment. Although that right is not unlimited, it is generally interpreted very broadly in favor of employees, so any employer faced with comparable situations would be well-advised to seek the advice of an employment law attorney who is experienced in working with NLRB.

The new website is at <http://www.nlr.gov/concerted-activity>.

Final Rule: Temporary Non-agricultural Employment of H-2B Aliens in the United States

On February 21, 2012, the U.S. Department of Labor's (DOL) Employment and Training Administration and its Wage and Hour Division issued a final rule on the H-2B program that amends its regulations governing the certification of the employment of nonimmigrant workers performing temporary or seasonal non-agricultural labor or services and the enforcement of the obligations applicable to employers under the H-2B program. This final rule revises the process by which employers obtain a temporary labor certification from DOL for use in petitioning the U.S. Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. The final rule also introduces new regulations that provide increased worker protections for both U.S. and foreign workers.

Major features of the final rule include the creation of a national electronic job registry for all H-2B job orders to improve U.S. worker access to these temporary jobs. The final rule also enhances recruitment of U.S. workers from across the country, increases the amount of time during which U.S. workers must be recruited and hired, and requires the rehiring of former employees when available.

The final rule is effective April 23, 2012. More information is available at <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm>.

Child Labor Announcement from DOL

From a U.S. Department of Labor (DOL) press release from April 26, 2012 regarding the agency's withdrawal of its proposed rule dealing with children who perform agricultural labor:

“The Obama administration is firmly committed to promoting family farmers and respecting the rural way of life, especially the role that parents and other family members play in passing those traditions down through the generations. The Obama administration is also deeply committed to listening and responding to what Americans across the country have to say about proposed rules and regulations.

“As a result, the Department of Labor is announcing today the withdrawal of the proposed rule dealing with children under the age of 16 who work in agricultural vocations.

“The decision to withdraw this rule—including provisions to define the ‘parental exemption’—was made in response to thousands of comments expressing concerns about the effect of the proposed rules on small family owned farms. To be clear, this regulation will not be pursued for the duration of the Obama administration.



“Instead, the Departments of Labor and Agriculture will work with rural stakeholders—such as the American Farm Bureau Federation, the National Farmers Union, the Future Farmers of America, and 4-H—to develop an educational program to reduce accidents to young workers and promote safer agricultural working practices.”

Source: <http://www.dol.gov/opa/media/press/whd/WHD20120826.htm>.

New Technology Consortium

The Bay Area Houston Advanced Technology Consortium, or BayTech, is a 501(c)(3) technology consortium developed by the Bay Area Houston Economic Partnership comprised of NASA Johnson Space Center, the State of Texas, and academia and industry members. BayTech’s goals are to:

- Create innovative partnerships that successfully acquire research and technology development funding, resulting in products and services that assure:
 - New jobs
 - Regional workforce and knowledge-based retention
 - New revenue streams
 - Future business opportunities for the greater Houston region and Texas
- Optimal usage of NASA Johnson Space Center laboratories, facilities, and capabilities through public-private agreements

Additionally, BayTech has partnered with the Texas Workforce Commission, the Houston Technology Center, and Workforce Solutions Gulf Coast to provide training scholarships and technology skills transfer services to individuals affected by the retirement of the NASA Space Shuttle program.

BayTech has access to industry and academic expertise across multiple engineering and scientific disciplines, including the top minds at NASA’s Johnson Space Center. A partnership with BayTech is the first step towards advanced technology solutions that benefit the Greater Houston region and Texas.

For more information about BayTech, visit www.baytechsolutions.org or contact Kim Morris, director at BayTech, at 832-536-3255 or kim@bayareahouston.org. 

In April, the U.S. Department of Labor issued a statement regarding the withdrawal of a proposed rule regarding children and agricultural labor. The proposed rule would have impacted children age 16 and under who perform agricultural work. Caution: OSHA rules require that anyone situated on or using agricultural machinery be safely secured. Children are subject to special safety rules. *Jupiterimages/Brand X Pictures/Thinkstock*

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

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