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Texas Business Today

Tom Pauken
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS
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Online monitoring perceptions of HR managers explored

- OSHA's directive on investigating workplace violence • Calculating workers' final pay •
- TWC Commissioner Pauken: Help our schools improve the workforce pipeline •

Help our schools improve the workforce pipeline

As many in industry understand, we have a serious problem nationwide with the supply of workers entering the skilled trades. There are several reasons for this problem, but I am particularly concerned that we need to encourage more vocational education programs in our high schools and stop pushing all students to go to college.

A recent survey by the consulting firm Deloitte found that “83 percent of manufacturers reported a moderate or severe shortage of skilled production workers for hire.”

Commissioner's Corner

The results are similar here in Texas. Just to cite a few examples: the average age of a welder is 55, a plumber 56, and a stone masonry craftsman 69.

This is where business can come in. I encourage industry to reach out both to community colleges and independent school districts. Establish two-way communication between educators and industry.

Our principals and superintendents care about the future success of their students. But the skills and knowledge required by today's employees differs from that required a generation ago. They can't meet the needs of employers unless they understand them.

Fortunately, businesses statewide are doing exactly that and our workforce is improving as a result. A few weeks ago, I was proud to honor one such company—Champion Cooler Corp. of Denison—as the Texas Workforce Solutions 2012 Employer of the Year. Champion Cooler is the largest domestic manufacturer of evaporative coolers.

The company worked with Denison High School to identify interested students and helped them to complete the Industrial Maintenance Technician Program at Grayson College.

After seeing initial success in its efforts, the company then worked with the Denison Development Alliance, Workforce Solutions Texoma, and other firms in the region to create the Industry Intern (I²) program. This industry coalition has created 10 scholarships for students to enter this program. Students work as paid interns for local employers. Successful completion of the training program leads to full-time employment. The program worked so well that Champion Cooler consolidated its operations in Texas, bringing new jobs to our state.

This story is one of many examples where Texas businesses work with public schools and community colleges to create new pipelines of qualified workers into skilled trade careers. When schools and businesses work

together, it creates a win-win situation for our state. Our employers get the trained workers they need to prosper and expand, and our young people get the opportunity for a fulfilling career.

At the state level, I am working to change a one-size-fits-all approach handed down from Austin that tries to push every high school student into college.

Yes, college is a good choice for some students. The state should continue its efforts to encourage first-generation and low-income college students. But state government needs to stop sending the message that college is the only path to an honorable or fulfilling career. Many in the skilled trades make more money and have a better work-life balance than the average college graduate.

We need more pipefitters, auto mechanics, air conditioning repair specialists, plumbers, welders, factory workers, nurses, and others in the skilled trades. These are honorable careers for honorable people.

State government should not pressure students into a college preparatory curriculum, but rather should encourage schools to work with both higher education and business to create multiple pathways to a successful, meaningful high school diploma. Then let students and parents choose what path their career should take.

I encourage Texas industry leaders to establish good two-way communication with education leaders and help school leaders achieve success, in both academic and vocational programs.

Texas is the number one state for business, and with farsighted policies we can help America reclaim its role as the world's greatest manufacturing nation. But our continued leadership in private sector job creation requires a pipeline of skilled workers. And the best way for that to happen is for business and education to work together for the good of our children. 🇺🇸

Sincerely,

Tom Pauken
Texas Workforce Commission (TWC)
Commissioner Representing Employers



Left: TWC Commissioner Pauken speaks at the 16th Annual Texas Workforce Conference, *The Challenge of Change—Gearing Up for 2013 and Beyond*, held in November in Grapevine. **Above:** TWC Commissioner Pauken presents a \$415,126 Skills Development Fund grant check to representatives from Tranter, P&WC Component Repairs, and Vernon College at a Skills grant presentation event held at Vernon College in November.



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Online monitoring perceptions of North Texas HR managers

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With businesses losing billions to computer crime and employees wasting considerable time on their computers looking at sports updates, the latest fashion trends, and even less appropriate websites, businesses are cracking down by monitoring their employees. The efforts are to ultimately reduce scams, identify theft, computer crimes, fraud, sexual abuse, piracy, and threats. As a result, many businesses have resorted to online monitoring of their workplace computers.

In this context, we look at how human resources (HR) professionals see three aspects of online monitoring. First, how do they view the discipline managers provide

employees based on what they see about them on the Internet? Second, how do HR managers view employee handbook online monitoring policies? Should employees be permitted to freely use their computers, have certain constraints, or have all private use banned?

To find out this information, Malcolm Coco, one of our coauthors, surveyed attendees of the Society for Human Resource Management (SHRM) monthly meetings in North Texas. Two hundred sixteen respondents completed an organizational online ethics survey between February and May 2011.

Approximately 30 percent of attendees completed the survey. Questionnaires from Abilene, Dallas, Amarillo, Fort Worth, San Antonio, Grand Prairie, San Angelo, Lubbock, San Marcos, Wichita Falls, Stephenville, and Brownwood chapters in Texas were obtained. The majority of the sample was human resources managers from businesses that had 500 or fewer employees.

Abbreviations: “%” means percentage of respondents; “N” means number of respondents; “Mean” is the mathematical average of the rankings.

Results

As shown in Table 1, in 26 percent of respondent organizations, no one was affirmed to monitor online behavior. About 61 percent of respondent organizations had policies concerning online behavior. Of those policies, 37 percent banned social networking during work hours.

Results concerning human resource professional perceptions of the most ethical reasons to impose discipline on an employee among items are listed in Table 2. The statement “is shown with unauthorized company equipment at home” had a 3.92 rating. “Has his/her location monitored and is shown to be at a bar during work hours” was second with a 3.61 rating. In last place was “is seen romantically with your spouse or significant other outside of the company.”

Results concerning human resource professional perceptions of company monitoring rights in Table 3 show that the highest ethical monitoring policy is that employee monitoring will be done for business-related reasons only (3.98 rating on a 1-5 scale with 5 being considered most ethical). The least ethical item listed was “employee online monitoring will be done for any reason” with a 2.60 rating.

Discussion

Based on the survey results in Table 1, most organizations have policies governing the online behavior of employees. To enforce those policies, a wide variety of individuals such as human resources managers, information technology professionals, and corporate managers may monitor online activity.

Table 1: Online Monitoring Characteristics

Questions	%	N
<i>Who monitors online behavior in your organization?</i>		
Information technologists	45	98
No one	26	57
Human resources managers	25	55
Top managers	20	44
Don't know	13	28
Other	12	26
<i>Does your organization have any policy associated with online behavior?</i>		
Yes	61	133
No	39	85
<i>If “yes,” does your organization ban social networking during work hours?</i>		
Yes	37	49
No	63	84

Table 2: Perceptions of Managerial Discipline

Ethics Issues	Mean*	N
<i>A manager monitors the online characteristics of company employees. The manager imposes discipline based on the following information. The employee:</i>		
Is shown with unauthorized company equipment at home	3.92	215
Has his/her location monitored and is shown to be at a bar during working hours	3.61	215
Criticizes the company's managers	3.23	212
Shows explicit pictures of him/herself on the web	3.23	213
Has a police record of domestic violence against his/her spouse	2.97	214
Reveals he/she will leave the company and accept a job with a competitor in one month	2.88	213
Shows pictures of him/herself obviously drunk in a local bar	2.58	213
Reveals his/her pay, though there is no policy against doing that	2.53	212
Is seen romantically with your spouse or significant other outside of the company	2.26	211

*1 = very unethical, 2 = unethical, 3 = neutral, 4 = ethical, 5 = very ethical.

Table 2 shows the discipline implications of the web monitoring. If an employee is discovered to have unauthorized equipment at home, many respondents viewed discipline associated with that as relatively ethical.

There are many ethical implications from just this one example that need to be discussed. On the more ethical side, businesses need to protect their property and have a right to look at the Internet to see if their property has been stolen or improperly used. A photograph of an employee with the company's computer equipment at his or her home could be grounds for termination.

On the less ethical side, the reliability of the Internet information can be highly questionable. For example, that computer equipment shown in a photograph at employee's home may be identical to computer equipment at the company, but the employee purchased the computer equipment for his or her own use. Photographs on the Internet can be doctored to falsely place inappropriate objects in other people's

homes. People can make false statements about others in blogs or social networks accusing them of stealing the company's computer equipment. Non-work related matters such as romantic affairs outside of the company and drinking at a local bar seem to be inappropriate matters for discipline.

Concerning managerial policies, most HR professionals believed that the most ethical statement would be that online monitoring would be done for business-related reasons only. Such a statement not only corresponds to Equal Employment Opportunity Commission guidelines, but the international Organization for Economic Cooperation and Development guidelines concerning privacy in the workplace. There is little rationale to monitor the Internet for other than business-related reasons. Online monitoring, accordingly, for any reason, was deemed the least ethical in Table 3.

One statement, "The privacy of information provided on corporate social networks or blogs is not protected," was given a relatively high ethics rating of 3.48. On the more ethical side, companies are being honest by saying that whatever is put into their corporate social networks or blogs cannot be protected and might go out to third parties or many other places. On the less ethical side, there is a concern that the corporate social network might not be monitored sufficiently enough to protect those who enter

Table 3: Perceptions of Company Policies

Policies	Mean*	N
Employee online monitoring will be done for business-related reasons only	3.98	214
Employees who enter information into corporate social network or blogs must refrain from sharing negative statements about the company	3.64	215
The company has the right to edit any online statements made through corporate social networks or blogs	3.53	214
The privacy of information provided on corporate social networks or blogs is not protected	3.48	210
The company is not responsible for the content of statements made through its corporate social networks or blogs	2.81	214
Employees are subject to discipline for inappropriate behavior online off work hours (while off-duty)	2.67	216
Employee online monitoring will be done for any reason	2.60	215

*1= very unethical, 2 = unethical, 3 = neutral, 4 = ethical, 5 = very ethical

information to the network before it is leaked out to third parties and used inappropriately.

Conclusion

A majority of companies have some kind of online monitoring policies in the North Texas sample of Society of Human Resource Management members. With the policies, a wide variety of individuals such as human resources managers, information technology professionals, and other individuals do the monitoring. The most ethical discipline stemming from the monitoring appears to be associated with job-related discoveries about employees such as employees taking equipment from their companies. The most ethical online monitoring policy corresponds with ethical discipline in that employee monitoring will be done for business-related purposes only.

Special Thanks

Special thanks go to Abdalla Hagen, who granted permission to allow a revised version of the presentation from the International Academy of Business and Public Administration Disciplines Conference in Dallas in 2012. An extended version is forthcoming in the International Journal of Business and Public Administration.

About the Authors

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Business Briefs

2013 Unemployment Tax Rates Set

The Texas Workforce Commission's Tax Department recently announced good news for Texas employers: the state unemployment tax rates for most employers will be decreasing for 2013. The new minimum tax rate will be 0.54 percent (compared with 0.61 percent for 2012), and the new maximum tax rate will be 7.35 percent (compared with 7.58 percent in 2012). The rate for new employers (employers that are still in their first six calendar quarters of operation) remains at 2.70 percent.

IRS Announcements

- Beginning January 1, 2013, the standard mileage rates will be 56.5 per mile for business mileage: <http://www.irs.gov/uac/2013-Standard-Mileage-Rates-Up-1-Cent-per-Mile-for-Business,-Medical-and-Moving>.
- Answers to thorny questions about the Form W-4: <http://www.irs.gov/Individuals/Withholding-Compliance-Questions-&-Answers>.

Be Wary of Online Background Information

Showing how prudent it is to take online information with a grain of salt, businesses doing their own background checks using online searches need to be aware that several businesses have sprung up in the past few years that specialize in posting mug shots of people who have been arrested, then offering to take the pictures down for payment of what is often a sizable fee. In what is probably a case of regulatory action waiting to happen, some related sites posting the same pictures share the same owner and even phone number, but each site charges a separate fee for taking an individual person's photo offline. For more details, see the original story in *The Daily*: <http://www.thedaily.com/article/2012/11/19/111212-news-mugshot-shakedown/>. Since arrests do not equal convictions, employers would be well-advised to seek legal counsel before undertaking any adverse action against applicants or employees whose photos may appear on such sites. This is particularly important in light of the Equal Employment Opportunity Commission's new emphasis on ensuring the job-relatedness of any criminal history-related actions against employees or applicants. 🇹🇽

Calculating final pay in Texas

We often receive calls from employers asking for help calculating an employee's final pay. The method in which you calculate the final pay owed to an employee depends on their classification and any wage agreements between the employer and the employee. Let's look at some specific examples.

Non-exempt employees

You are only required to pay non-exempt employees for the hours they actually work. Therefore, calculating final pay for these employees would be done as normal, by multiplying the hours worked in the final pay period by the employee's hourly rate of pay. You must still pay the employee overtime (1.5 times the normal hourly rate) for each hour of work over 40 per work week.

If the departing employee is a non-exempt employee who happens to be paid a salary, the employer can pro-rate the final pay period's salary based on the percentage of time worked.

Non-exempt employees who are paid by other methods (piece rate, day rate, and so on) should be paid in accordance with the wage agreement for the work they performed. For employees who are paid a commission, see below.

Exempt employees

An exempt employee is an employee who is exempt from overtime pay under the Fair Labor Standards Act (FLSA). Many employers normally refer to these employees as salaried employees. While pay is not normally prorated for exempt employees, FLSA does allow for the final week of pay to be prorated. You do not have to pay the exempt employee for the entire week of work if the employee does not work the full work week (see 29 C.F.R. §541.602(b)(6)).

To calculate the final pay, divide the employee's normal weekly salary by the number of days he or she normally works in a work week. Then, multiply the result by the number of days the employee actually worked during his or her final week.

For example, if an employee earns \$600 per week and normally works six days per week, his daily pay comes out to \$100 per day ($\$600 \div 6 = \100). If that same employee only works four days during the final week of work, then you would pay him \$400 on his final

paycheck ($\$100 \times 4$ days worked).

Keep in mind that partial-day deductions are not allowed for exempt employees, unless the deduction relates to unpaid Family Medical Leave Act (FMLA) leave or is for violating a "safety rule of major significance."

Commission employees

Final pay for an employee who is paid commissions on sales is governed by the terms of the wage agreement between the parties. The wage agreement is enforceable whether oral or in writing. Since the wage agreement is what controls commission employees, it is important that you draft a wage agreement that details what happens when an employee separates from your employment. The agreement should state such things as how the commissions are earned, when they will be paid, and how any draws against the commission will be deducted. The commission agreement should also include clear and precise terms detailing whether any commissions will be paid after the employee has left the company, and when the employee can expect such a payment.

Other things to remember

Finally, remember that Section 61.014 of the Texas Labor Code covers the timing of the final paycheck. If the employee is involuntarily separated through a discharge or layoff, the final pay is due within six *calendar* days of discharge. If the employee voluntarily leaves your employment, then you do not have to provide the employee with his or her final paycheck until the next regularly scheduled pay day following the effective date of separation. Thus, if an employee quits, you would issue the final pay as you would normally do, and there is no requirement to issue a special paycheck. The final paycheck should include payouts for accrued leave, if required by a written policy. Final bonuses and commissions should also be paid at the same time, unless a different deadline is included in a policy or wage agreement.

For more information regarding final pay, including information on what deductions you can make from the final paycheck, please see the final pay topic in *Especially for Texas Employers*, located online at http://www.twc.state.tx.us/news/eft/final_pay.html. 

Sonia J. Luster
Legal Counsel to Commissioner Tom Pauken

Written warnings provide employers with solid documentation of interactions

Not all disciplinary warnings are created equal. During an unemployment claim, in trying to determine whether a claimant was discharged for misconduct connected with the work, employers will inevitably be asked whether the claimant was previously warned about his job. Most employers will respond with, “Yes, we gave the claimant many verbal warnings.” As you may imagine, employers like to give verbal warnings because they are easy. By the same token, they are also easy for claimants to refute. For that reason, written warnings are better.

Written warnings have many benefits. When submitted to TWC during an unemployment claim, they can support the employer’s position that the employee was discharged for misconduct connected with the work. They provide documentation of how often an employee was warned during a certain period of time, what areas of performance or policy violations were the most problematic, and whether an employee may have made any admissions or any rebuttal statements about the incident that led to the warning. Most importantly, when they are signed by the employee, they provide proof that an employee has been talked to, or counseled, about his job performance, and that the employee should have known his job was in jeopardy.

Employers often call and ask whether we have a sample written warning they can use. There is no single warning form that is required of employers, nor is there a specific form that is considered better than any other. Written warnings come in many shapes and sizes and are known by different names. They are often called reprimands, disciplinary

forms, counseling forms, actions plans, or just plain written warnings. Regardless of what you choose to call them, it’s important for warnings to include the following: **1)** the behavior, rule infraction, or policy violation that the employer would like to change or correct—in other words, what the employee did wrong; **2)** the employer’s rule or policy that you would like the employee to follow; **3)** the employer’s expectations of future behavior; **4)** the consequences for future violations or for failure to meet the employer’s expectations; and **5)** the signatures of the parties involved.

Let’s take an example and look at the different parts of a warning one at a time. An employee is scheduled to come in to work at 8:00 a.m. every day. However, he has been coming in late pretty regularly and, although verbally warned about tardiness last week, he came in late again today.

Part 1: Start by setting out the behavior you, as the employer, want to change. You might write, “You were 20 minutes late to work today. You were late three times in the last week on these dates: (specify dates). I previously spoke to you about your tardiness on (specify date of prior verbal warning or counseling session).”

Part 2: Next, include your company rule, policy, or procedure. For example, “Our work rules require employees to get to work at the time they are scheduled and to work their entire scheduled shifts. You are scheduled to come in at 8:00 a.m.” Even if this rule is set out in the employee handbook, and you have an acknowledgment form indicating that the employer received a copy of the handbook, by including the rule or policy in the warning there can be no

question that from this moment forth, the employee is fully aware of the rules he is expected to follow. In other words, it would be difficult for him to credibly claim that he was not aware of the specific rule or policy.

Part 3: Clearly set out the employer’s expectations. Be specific about what you want the employee to do or not do in the future. Writing your expectations in broad general terms makes it hard for both parties to know whether the employee is complying with the employer’s wishes. For example, a warning might contain, “I expect your attendance to improve in the future.” What does that really mean? Does that mean that as long as the employee is tardy fewer times next week than he was last week that it’s okay? After all, that could be considered an improvement in his behavior. However, that’s probably not what the employer intended with the warning. It helps if the employer’s expectations are phrased in a way that can be easily measured. For example, “Starting tomorrow, you will get to work, and be ready to work, no later than 8:00 a.m. on every scheduled work day. You are expected to work your entire shift as it is scheduled.” As you can see, by being specific about the day and time that the employee is expected to be at work, it is a lot easier to determine if the employee is in compliance.

Part 4: Set out the consequences the employee will face if the employee repeats the behavior. For example, “If you are tardy again within the next 30 days, or if you violate any other work rule, you will be subject to (include the appropriate consequence here).” It is up to each employer to choose what the consequences for further violations will be. These could

include another written warning, probation, a disciplinary suspension, a reduction in pay, a final warning, termination, etc. There is no specific number of warnings that an employer is required to give an employee before proceeding to termination. That is up to each employer to decide based on its specific needs and on the severity of the infraction. Of course, if an employer has a progressive disciplinary policy which sets out specific steps that an employer must follow prior to termination of employment, the employer should follow the progressive steps of the disciplinary policy when issuing written warnings. Keep in mind that nothing prevents an employer from discharging an employee immediately in case of serious offenses, such as theft from the company or violence in the workplace.

Part 5: Include a space for the employee's signature, as well as for the signature of the supervisor or company representative who is issuing the warning to the employee. This can be tricky. Employees often refuse to sign warnings because of fear that their signature will be interpreted as an admission of guilt or of some wrongdoing. Many employers ask what to do when an employee refuses to sign a warning. There are a couple of strategies that an employer may try. First, make it clear that the employee's signature means that the employee simply received the warning. You may want to use this, "I understand that my signature on this form does not necessarily mean that I agree that I did anything wrong, but rather only that I have seen this warning and have had it explained to me." (This sample is found in Section II of *Especially for Texas Employers*, or online at <http://www.twc.state.tx.us/news/efte/discipline.html>.) Next, provide two signature lines for the employee—one that says, "I agree with this warning" and one that says, "I disagree with this warning." Adding the signature

line that allows employees to disagree with the warning may take away the fear that their signature implies an admission of wrongful conduct. It may also help to include a space for the employee to be able to write comments about the incident that led to the warning. If an employee still refuses to sign a warning, an employer might have to resort to using another staff member as a witness that the employer presented the employee with the warning and that the employee refused to sign. This way, if an employee in an unemployment claim alleges that he was never presented with the warning and has never seen it before, the employer can rebut that allegation. There is no requirement that employers give copies of the written warnings to its employees. However, we recommend that regardless of whether employees sign the warning, employees should get a copy of the document after it has been explained to them, and a copy should go into the personnel file.

Regardless of how many written warnings employers choose to give before proceeding to termination, it is a good idea for employers to issue a final warning prior to discharging an employee. This lets employees know that they have one last and final chance to correct their behavior, performance, attendance, etc., before the employer resorts to termination of employment. It's important to let the employee know that his job is in jeopardy. To that end, you might want to include the words, "Your job is in jeopardy" or, "This is your last chance to correct this problem" in the final warning. However, do not issue a final warning unless you, the employer, are ready to discharge the employee the next time he repeats the offending behavior. (For an example of a final warning and for more information about employee discipline, please see Section II of *Especially for Texas Employers*.)

As previously noted, written warnings have multiple benefits.



Some employees may be reluctant to sign written warnings because of the fear that their signature will be interpreted as an admission of guilt or wrongdoing. Employers can make it clear to employees that their signature represents simply that they received the warning. Employers can also leave space for the employee to leave comments. *iStockphoto/Thinkstock*

However, the primary purpose of the warning is to change certain employee behavior. If the employee heeds the warning and changes his behavior, then I consider that to be a win/win situation. The employee gets to keep his job, and the employer has someone who is following the rules and working to the employer's expectations. However, if the employee repeats the behavior or violates any other policy, and the employer ultimately discharges the employee, by having a written record of the warnings, the employer who is defending against an unemployment claim will have a better chance of being able to prove that the employee was discharged for misconduct connected with the work. Remember, verbal warnings may be easy, but written warnings are better. 🇺🇸

Elsa G. Ramos
Legal Counsel to Commissioner
Tom Pauken

How bad can employment claims get, anyway? Steps to help you prepare

As any employer who has been through the wringer with a state or federal agency can tell you, things can get bad. Sometimes, they can get very bad. On rare occasions, they can shut a business down. This is an account of how what might seem like minor situations, or things that many do not think present problems at all, can go off the deep end.

Let's start with TWC

An unemployment claim? A subcontractor complains that you didn't pay her everything you promised? What's the worst that can happen? Consider the case of a small electronics repair shop whose owner felt he could not afford to hire employees, so he hired two "subcontractors" to help him service his customers.

Things started off all right with an agreement to pay both of them with flag (billable) hours. Work was slow for a while, and the workers complained that they were not bringing in enough income, so they asked for weekly guarantees of \$325 up to a certain number of hours, and if their flag hours earned more than that, then they would just get the income from such hours. One worker got a nice set of tools from the owner, promising in a "gentleman's agreement" that he would pay the owner for the more than \$1,000 cost of the tools a little at a time out of his pay.



Employers should keep accurate and complete written documentation to help protect them in wage claims and other matters. Employers should have employees sign written wage agreements and keep thorough and reliable written time records. *Fuse/Thinkstock*

The agreements were oral, the earnings were paid in cash, and the owner kept no records of the time worked, wages paid, or deductions made. That worked for a while, but then the owner started noticing problems with their work, their attendance, and their attitudes. One worker had an accident and missed some work, then tried to come back on light duty, but the owner would not let him do his duties, so he just kind of waited around for simple things to do, and the owner let him do that. The other worker allegedly had excessive problems with alcohol and was fired, still owing quite a substantial amount on that nice set of tools. After the first worker found out that the owner had spoiled an alleged scheme to scam another motorist's insurance company, he filed a wage claim under the Texas Payday Law for the last couple of weeks of light-duty work that he claimed to have done. A second wage claim came from the other worker, who objected to the owner's plan to hold his final paycheck until the worker finished paying for the tool set.

The employer objected to both claims, stating that since they were subcontractors, they were not covered by the Texas Payday Law. The wage claim investigator then performed the usual analysis based on the Texas Workforce Commission's (TWC) twenty-factor test and determined that they were really employees. On the merits of the wage claims, both claimants were found to be entitled to the final wages, and because the employer had no written authorization to make a wage deduction for balances owed on loans, the ruling allowed no offset for the tools.

Then, the worker who had had the accident filed an unemployment claim, which was initially disallowed because the owner had reported no wages for him. The claimant appealed, and the issue was referred to TWC's Tax Department for an investigation. The account examiner found that the employer had misclassified the workers in question, awarded wage credits to the claimant, which allowed the claim to proceed, and assessed back taxes, interest, and penalties against the employer.

Meanwhile, back on the wage claim side, the employer had neglected to file a timely appeal from the wage claim determination in favor of the claimant who kept the nice tools that the employer had bought for him. TWC sent a demand letter for the wage judgment amount, which went unpaid. The agency then located and froze the employer's bank account and levied on it for the full amount. That left

the company in somewhat of a bind. The employer filed late appeals in both cases. How the appeals will ultimately turn out is unknown, but in general, late appeal cases are difficult to win. The employer spent some money consulting an attorney about the various cases, but is not currently represented.

Wrap-up

What the employer wanted was to avoid the expense of paying payroll taxes on employees, the trouble of keeping records, and having to pay wages to workers who he felt were not being honest with him. What the employer got was two wage claims, two wage claim judgments, a bank freeze and levy on substantial funds, an unemployment claim that he lost and had to appeal, a tax audit, an assessment for back taxes, interest and penalties, an appeal on the tax issue, and legal bills from his attorney.

How much of this trouble the employer could have avoided had he just called the employer hotline at 800-832-9394 and asked about treating the workers as non-employees, not keeping records, loaning money without getting a signed, written repayment/wage deduction agreement, and withholding pay, is hard to say.

However, a little accurate information at the right time would most likely have prevented most of those problems. If it were possible to go back in time and give that employer some advice, here is what would have helped.

- Call the employer hotline at 800-832-9394 and ask about potentially risky or troublesome employment matters before you proceed.
- Understand that workers you hire to help you in the primary work of your business, who do not own and operate their own businesses and have you as one of their customers, who use your tools and equipment, who have to meet your schedules and follow your instructions, and who do not have a potential for profit or loss because you have agreed to pay them for whatever work they do, are employees. Do not pretend they are anything else. It will not matter that they agree to be paid as a subcontractor or on a 1099 basis. TWC, Internal Revenue Service, the U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission, and other agencies that enforce labor laws will simply ignore that and make their rulings based upon what the work relationship really shows.
- Get everything in writing. Have employees sign written wage agreements; keep good, complete, accurate, and reliable written time records; obtain written authorization for any wage deduction that is not ordered by a court or required by a law; and do not ever give a loan or pay advance or buy something for an employee without obtaining a signed, written repayment agreement allowing you



Texas employers can call TWC's Employer Hotline at 800-832-9394 to ask about potentially risky or troublesome employment matters before taking action, which can potentially save the employer future hassle. *TongRo Images/Thinkstock*

to deduct the repayments from future paychecks.

- Do not let workers simply hang around unless they are able to do their jobs. Employees who hang around the shop, just waiting to be allowed to do light duties, have a frequent habit of later claiming wages for all the time spent hanging around. Employees whose medical limitations render them unable to do what you need do not have to be given make-work jobs. Give them written notice that they are on medical leave and instructions on your return-to-work process; but if they come to work and you let them hang around, occasionally letting them put someone else's tools up, or answer a phone, or talk with a coworker about a work-related matter, you are exposing yourself to the risk of a wage claim.
- Respond to claims and appeal adverse rulings promptly. Claims and adverse determinations do not go away by themselves, and no amount of fuming about how intrusive the law is will change that situation. Rulings that are not appealed on time become final, and then collection action starts.
- Respond quickly to a demand letter from TWC; the clock is ticking.

The preceding troubles are just from laws that TWC, a relatively small agency with relatively innocuous laws, enforces. In the next issue, we will cover what can happen with other laws enforced by more powerful agencies, such as EEOC, DOL, the National Labor Relations Board, the U.S. Immigration and Customs Enforcement and Customs and Immigration Services bureaus of the U.S. Department of Homeland Security, and the IRS. 

*William T. Simmons
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OSHA's directive on investigating workplace violence

By Sheila Gladstone and Elizabeth Hernandez
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Employers assessing workplace safety routinely consider how to prevent a nasty slip, a back injury, or a fall from a rafter. But what about homicide? Workplace violence has remained among the top four causes of death in the workplace for 15 years, and it is the most common cause of workplace death among women. It is also the cause of hundreds of thousands of nonfatal incidents, and the violence is sufficiently widespread that the Occupational Safety and Health Administration (OSHA) is taking notice. OSHA now plans to enforce safety standards to prevent workplace violence much in the way it has traditionally dealt with other workplace injury causes.

In September 2011, OSHA released a directive establishing uniform procedures its inspectors must follow when investigating, inspecting, and issuing citations in response to incidents of workplace violence. http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf. The directive marks the first time OSHA has defined enforcement procedures for investigators who identify violence as a workplace hazard or respond to an incidence of workplace violence. The directive provides additional detail for employers and inspectors in two industries particularly vulnerable to workplace violence: healthcare and social service workplaces, and late-night retail establishments.



In releasing the directive, OSHA used as an example a Maine psychiatric hospital where workers were assaulted on the job by patients more than 90 times between 2008 and 2010. OSHA issued violation citations to the hospital. “These incidents and others like them can be avoided or decreased if employers take appropriate precautions to protect their workers,” said Dr. David Michaels, assistant secretary of labor for OSHA.

OSHA has identified risk factors for workplace violence that include working with the public or with volatile, unstable people; working alone or in isolated areas; handling money; working where alcohol is served; working late at night; and working in high-crime areas. Employees in industries with these characteristics have the highest incidents of violence. From 2005 to 2009, 19 percent of victims of workplace violence worked in law enforcement, 13 percent worked in retail, and 10 percent worked in medical occupations, according to data from the U.S. Bureau of Justice Statistics (BLS).

On average, 590 workers died by homicide every year between 2000 and 2009, according to OSHA. Homicide remains the number one cause of workplace death among women. Even though workplace homicides overall decreased by seven percent in 2010, homicides among women increased by 13 percent. As with homicide, rates of non-fatal violent crimes in the workplace are decreasing, but still substantial. In 2009 alone, more than 572,000 incidents of nonfatal violent crimes were committed against people 16 and older while they were at work or on duty, according to data from BLS. By comparison, in 1993 there were 2.1 million such incidents. These workplace crimes include rape, robbery, and assault.

Steps employers can take to protect workers and themselves

OSHA states that every employer has a duty to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” Employers can be found in violation of this so-called “General Duty clause” if they fail to take steps to prevent and mitigate workplace violence. The directive instructs OSHA investigators to gather evidence on whether an employer—either individually or through its industry—recognized potential hazards, and on the ability of that employer to prevent or minimize the hazards.

OSHA has identified risk factors for workplace violence, including working with the public or with volatile, unstable people; working alone or in isolated areas; handling money; working where alcohol is served; working late at night; and working in high-crime areas. *iStockphoto/Thinkstock*

OSHA suggests that employers take several steps to prevent violence. First, implement a zero-tolerance policy against workplace violence that covers not only employees, but also patients, clients, visitors, contractors, and anyone else who comes in contact with employees. Second, establish a workplace violence prevention program either on its own or as part of the more comprehensive injury-prevention program, and make sure all employees know the details, especially that all claims of workplace violence will be investigated thoroughly. Third, employers should implement necessary controls to prevent violence that may include installation of alarm systems, adequate lighting, or controlled access to a workplace.

Employers in high-risk industries should implement additional precautions tailored to their specific threats. This is important because OSHA considers in evaluating employer fault whether the hazard was known by the employer or the industry.

Additional guidance is available on OSHA's workplace violence website at <http://www.osha.gov/SLTC/workplaceviolence/index.html>.

Sheila Gladstone chairs the Employment Law Practice Group at Lloyd Gosselink. She has spent the last 25 years helping employers navigate the complex laws governing the employment relationship, including establishing the right policies, forms, contracts, wage payment practices, and workplace training. She and attorney Elizabeth Hernandez are committed to keeping employers out of trouble, and defending them during governmental investigations and worker complaints. Gladstone can be reached at 512-322-5863 or at sgladstone@lglawfirm.com. 

Texas workers' comp nonsubscriber employers requirements changing

Effective January 1, 2013, Texas employers who do not carry workers' compensation insurance coverage have new requirements for reporting their non-coverage status to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC), the state agency responsible for regulating workers' compensation, and to their employees. In addition, they are required to report work-related injuries and occupational illnesses to the TDI-DWC. An employer's failure to comply with these notification requirements is an administrative violation and the employer may be subject to penalties [Texas Labor Code §406.004(a) and (e), §411.032(a) and (c), and Chapter 415, Subchapter C].

All employers in Texas that do not carry workers' compensation insurance and whose employees are not exempt from coverage under the Texas Workers' Compensation Act are required to notify TDI-DWC by filing the recently revised DWC Form-005, *Employer Notice of No Coverage or Termination of Coverage*. For notices required to be submitted to TDI-DWC on or after January 1, 2013, employers must file DWC Form-005:

- annually between February 1 and April 30 of each calendar year as long as the employer remains in operation and does not have workers' compensation insurance coverage (covering a notice period of May 1 of the year of notice submission through April

of the subsequent year);

- within 30 days of the employer hiring its first employee, unless this due date falls between February 1 and April 30 and the employer submits the notice within this time period; and
- within 10 days of receipt of a TDI-DWC request for filing a notice of no coverage.

An employer reporting notice of termination of coverage must file DWC Form-005:

- within 10 days after notifying the insurance carrier of the termination of coverage unless the employer purchases a new policy or becomes a certified self-insurer; and
- annually thereafter, on the anniversary of the cancellation date of the workers' compensation policy as long as the employer remains in operation and does not have workers' compensation insurance coverage.

Employers will be required to file the revised DWC Form-005 with TDI-DWC on and after January 1, 2013. Non-coverage status can be reported online on the TDI website at <https://txcomp.tdi.state.tx.us/TXCOMPWeb/common/home.jsp> under "Employer Online Filings."



Effective January 1, 2013, Texas employers will be required to abide by new requirements from the Texas Department of Insurance, if employers do not carry workers' compensation insurance. *Brand X Pictures/Thinkstock*

Employers completing DWC Form-005 online will be required to supply the business name, business type, Federal Employer Identification Number, and details on business locations or updated information on business locations. Hard copies of the revised form are available for download from the TDI website. The DWC Form-205, *Locations of Employer's Business(es)*, also is available for download from the TDI website. This form is filed as an attachment to DWC Form-005.

In addition to reporting non-coverage status to TDI-DWC, employers are required to notify their employees that they do not carry workers' compensation insurance coverage. An employer must post the recently revised *Notice to Employees Concerning Workers' Compensation in Texas* in their workplace in English, Spanish, and any other language common to the employer's employee population in the print type specified by TDI-DWC rules by January 1, 2013 and whenever the employer:

- elects not to have workers' compensation insurance;
- cancels or terminates workers' compensation insurance coverage;
- withdraws from certified self-insurance; or
- has its workers' compensation insurance coverage cancelled by the insurance company.

Employers must also provide a written copy of the recently revised *Notice to Employees Concerning Workers' Compensation in Texas* to each employee:

- at the time of hire;
- when the employer elects not to have workers' compensation insurance;
- within 15 days of notification to the insurance carrier that the employer is terminating workers' compensation insurance coverage unless the employer maintains continuous workers'

- compensation insurance coverage under a new policy or becomes a certified self-insurer; or
- within 15 days of cancellation of the employer's workers' compensation insurance coverage by the insurance company.

Texas employers with five or more employees who are exempt from workers' compensation coverage under Texas Labor Code §406.091 are also required to report work-related injuries and illnesses to TDI-DWC. Employers must report each work-related injury or illness by the seventh day of the following month using DWC Form-007, *Non-Covered Employer's Report of Occupational Injury and Illness*, for each:

- work-related injury resulting in the employee's absence from work for more than one day;
- occupational disease of which the employer has knowledge; and
- work-related fatality.

All employees are included under this requirement except domestic workers, casual workers engaged in employment incidental to a personal residence, certain farm and ranch workers, and employees covered by a method of compensation established under federal law.

Workers' compensation insurance coverage provides covered employees with income and medical benefits if they sustain a work-related injury or illness. Most Texas private employers can choose whether or not to provide workers' compensation insurance coverage for their employees. Except in cases of an intentional act or omission or gross negligence involving a fatality, workers' compensation insurance coverage limits an employer's liability if an employee brings suit against the employer for damages.

Copies of DWC Form-005, DWC Form-007, DWC Form-205 and *Notices to Employees Concerning Workers' Compensation in Texas* are available for download from the TDI website at www.tdi.texas.gov/forms/form20.html.

New and amended Texas Administrative Code §§160.1-160.3 rules as adopted by the Commissioner of Workers' Compensation may be viewed on the Secretary of State website at <http://www.sos.state.tx.us/texreg/index.shtml>.

If you have questions about employer workers' compensation reporting requirements, contact the TDI-DWC's Insurance Coverage section at 800-372-7713. 🇹🇽

*Source: Texas Department of Insurance
Information release, September 24, 2012*

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