

Texas Business Today

Fall 2009

Tom Pauken, Chairman
Commissioner Representing Employers



TEXAS
WORKFORCE SOLUTIONS
* * * * *

Texas Business Conferences: Frequently asked questions answered

- Employee or Independent Contractor: Some clarification •
- New Regulation for Family Medical Leave Act

Small businesses keep driving economy despite downturns

In an October address to the American people, President Obama said, “Small businesses have always been the engine of our economy – creating 65 percent of all new jobs over the past decade and a half – and they must be at the forefront of our recovery.” By forging new paths and capitalizing on created opportunities, small businesses typically have led the way out of difficult economic downturns. The sheer number of new startups during times of recession is testament to the tenacity and ingenuity of the American entrepreneur.

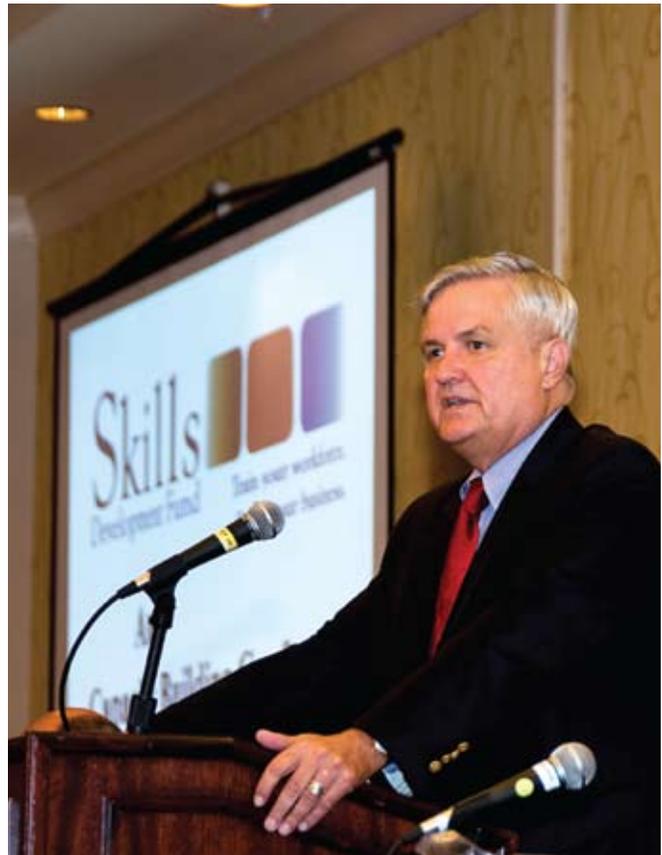
In Texas, small businesses accounted for 98.7 percent of total employers in 2006. That same year, firms with fewer than 500 employees represented 46.8 percent of the state’s private-sector employment. They account for nearly sixty percent of the nation’s goods-producing industries, and nearly half of all service-providing firms. In the second quarter of this year, over 85 percent of firms in the construction sector were small firms.

Chairman’s Corner

Economists have struggled to explain the resilience of small firms during economic downturns. A recent study by the Ewing Marion Kaufman Foundation found that new business startups are more resistant to recessions than larger established firms. It also found that “job creation from startups is much less volatile and sensitive to downturns than job creation in the entire economy.” It cannot be ignored that over half of all companies on the *Fortune 500* were started during times of economic decline.

Less than one percent of the federal stimulus money has gone to encourage capital investment and job creation

At the Texas Workforce Commission, we recognize the critical role of small businesses in the state’s economy. By helping Texas employers understand current interpretations and developments in the law, TWC helps level the playing field for emerging firms that may lack extensive familiarity with various labor laws.



Texas Workforce Commission (TWC) Chairman Tom Pauken speaks at a recent Skills Development Fund Conference in Austin. Pauken says TWC understands the critical role of small businesses in the state’s economy. *Texas Workforce Commission photo*

in the small business sector. Nonetheless, there are two little known provisions in the American Recovery and Reinvestment Act of 2009 which are of potential benefit.

For example, this year the federal government has doubled the Section 179 Expensing limits up to \$250,000 for various small business equipment purchases, allowing for the expensing of those capital investments during the current fiscal year. The capital investments have to be made by December 31, 2009 in order to qualify. In addition, there is an increased Energy Efficiency Tax Credit for any small business for weatherizing its property. That tax credit has been increased from 10 percent to 30 percent. (See “Business Briefs” on page 14 of this issue for additional details).

At the Texas Workforce Commission, we recognize the critical role of small businesses in the state’s economy. By

helping Texas employers understand current interpretations and developments in the law, TWC helps level the playing field for emerging firms that may lack extensive familiarity with various labor laws. For example, in this issue, one of our knowledgeable TWC staff attorneys discusses a topic relevant to many employers and small-business owners: laws and regulations surrounding the issue of who is an employee as opposed to who is an independent contractor.

In a September survey by Intuit, 82 percent of 1,004 small business owners said they “see opportunities for their business despite the current economic climate.” I believe that we need to do much more at the national level to encourage job creation in the private sector, particularly for small businesses where most new jobs are created. The Kemp-Roth Job Creation Act of 1981 did just that for small businesses in the early 1980s, back when national unemployment rates were as high as they are today. 🇹🇽

Tom Pauken

Sincerely,
Tom Pauken, Chairman
Commissioner Representing Employers

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Cover image: Texas Workforce Commission photo

Frequently asked questions from employers – answered

The following questions were compiled from past Texas Business Conferences around the state:

Unemployment Claims and Appeals

Q: What is a base period?

A: The base period is a year-long period of time that determines both the amount of UI benefits a claimant can potentially draw and which employers will be in line for potential chargebacks if benefits are paid. Lagging behind the date the initial claim is filed, the base period is defined as the first four of the last five completed calendar

An Overview

quarters immediately preceding the initial claim. An easier way to think about it is to take the date the initial claim is filed, disregard that quarter (the quarter in progress), disregard the quarter immediately preceding that one (the lag quarter), and then go back in time four calendar quarters. That year-long period will be the base period, and any employer that paid the claimant wages during any of those quarters will be potentially liable for chargebacks. The liability will be proportional to the amount of wages the employer paid in relation to other base period employers, i.e., if you paid half the claimant's wages during the base period and another company paid the other half, you will each have half of the chargeback liability.

Q: A long-term, but part-time, employee was permanently laid off with two weeks' notice and received severance pay as per our policy. If he receives unemployment benefits, will the company be charged back for all of his benefits, or else receive a "break" for the amount of severance paid?

A: Severance pay paid under a policy or agreement has no effect on unemployment benefits, so it will not reduce the employer's chargeback amount. The company will be charged back with its share of whatever benefits are paid to the laid-off employee. The percentage of chargeback will be the same as its share of the wages paid to the employee during the base period of the claim.

Q: We terminated an employee for cause. We do not believe she deserves UI benefits. What do we need in order to prove our case?

A: At a minimum, your company will need to prove that the claimant was fired for a specific incident of misconduct connected with the work (a final incident) and that she either knew or should have known she would be fired for such a reason (usually shown with a final warning or a clear written policy warning of discharge for a particular type of problem).

Q: Right after her one-year anniversary with my company, one of my employees told me that she is unhappy here and has already started looking for another job. Can I take that as her resignation, and do I have to pay her for the unused vacation?

A: TWC would not consider the employee's expression of unhappiness as notice of resignation. Many employees think such things from time to time, and a few actually tell you, but it is only talk. Unless they actually give you a definite date as the effective date of their resignation, they have not resigned. An employer has to pay for unused vacation or sick leave only if stipulated in a written policy or agreement.

Q: The claimant was fired for missing a required meeting. His excuse was that his supervisor told him he did not need to attend, but his supervisor denied that. How can we

best handle the appeal hearing?

A: Be sure to have the supervisor testify during the hearing, as well as any other witnesses who could confirm that attendance was mandatory at the meeting for the claimant. In addition, submit a copy of any written notices or e-mails that put employees on notice about the meeting – send copies to both the hearing officer and the claimant prior to the hearing.

Q: An employee gave two weeks notice of quitting. We accepted the resignation immediately. He now claims we owe him for the two weeks we did not let him work. Do we owe him such pay?

A: No, unless you have a written policy or agreement promising to pay resigning employees for the unworked portion of a notice period. Under TWC policy, if an employee gives notice of intent to resign by a definite date that is two weeks or less in the future, the employer can accept that notice anytime within the two-week period without changing the nature of the work separation from a quit to a discharge. Just be sure to let the employee know that the company is "accepting the notice early" and will not need him to work out the notice period, instead of using terminology such as "we're letting you go early" or "we'll go ahead and process your termination today", which sounds like one would say in the event of a layoff.

Texas Payday Law

Q: My employee just quit last week and is refusing to return her uniforms. Can I hold her final paycheck until she brings the uniforms back?

A: No. Her duty to return the uniforms is separate from your duty to give her the final pay she earned. If you have a wage deduction authorization agreement, signed by her, allow-

ing you to deduct the replacement cost of the uniforms, then you could take that money out of her final paycheck. Be sure not to let such a deduction take the employee's pay below minimum wage (\$7.25/hour).

Q: Do I need written authorization to deduct child support from an employee's pay?

A: No. Court-ordered garnishments and required deductions such as those for payroll taxes, other tax debts, and guaranteed student loan wage attachments do not need to be authorized in writing. Generally speaking, any other type of wage deduction must be authorized in writing. Be sure the written authorization is as specific as possible regarding the purpose and amount of the deduction, and that it states that the deduction will be made from the employee's pay.

Q: Our former payroll employee accidentally overpaid two employees for several payroll periods. How can we legally get that money back?

A: After explaining the situation to the employees, ask them to sign a written wage deduction authorization agreement allowing the company to deduct the wage overpayments from their future paychecks in certain specific amounts. If they refuse, the company may either delay any anticipated pay raises or give the employees a temporary reduction in the pay rate in order to recoup the amounts in question. Try to keep the pay reduction as small as possible (as much under 20% as possible) to avoid giving them good cause to quit and file unemployment claims, and be sure to give the notice of pay reduction in writing.

Q: I fired an employee for falsely claiming he was authorized to work in the U.S., and did not pay him for the time he worked. Now TWC is telling me I have to pay him. If he was not legally authorized to work in the U.S. and had no right to work, how does he have a right to file a claim?

A: Neither the FLSA nor the Texas Payday Law condition an employee's right to be paid on their status as an



Alex Little, (center) president of Little Tyke Creative Child Care Inc. in Bedford, attended the Texas Business Conference in Fort Worth to receive tips on ways to improve and expand his business. *Texas Workforce Commission photo*

authorized worker. He did the work – your company received the benefit of his services – and so he has a right to be paid for the work he did. A case like this illustrates how important it is to carefully go through the I-9 process and use the Social Security Number (SSN) Verification Service to minimize the risk of hiring workers who do not have genuine SSNs. Contact TWC and IRS to learn the procedures for reporting wages for someone who does not have a valid SSN.

Benefits

Q: What paid holidays are required in Texas?

A: None. Paying employees for time off is left up to each employer to decide for itself. However, paid holidays that are promised in a written policy or agreement are enforceable under the Texas Payday Law.

Q: Do we have to offer health insurance to our employees?

A: Under current law, no.

Q: What is considered "full-time" employment?

A: While the definition of full-time and part-time employment is left up to each employer to decide for itself, 30 hours per week is enough to make an employee eligible for a company health insurance plan, and 1,000

hours of work within a twelve-month period makes an employee eligible to elect participation in any retirement or pension plan that the company may have.

Q: We have fewer than 20 employees. Can former employees elect to receive federal COBRA continuation coverage for 18 months, or must they accept Texas "COBRA" coverage for six months?

A: With fewer than 20 employees, federal COBRA continuation coverage is not available. Texas state law allows continuation coverage for up to six months, so that would be the best option for the former employees. Remember that the 65% COBRA premium subsidy applies to both federal and state COBRA benefits; the subsidy applies only to those who were laid off or terminated for reasons other than gross misconduct – it does not apply to employees who quit or were fired for gross misconduct.

Wage and Hour Law

Q: What breaks are we required to give employees?

A: Breaks are not required under Texas or federal law. It is up to a company to decide whether rest breaks or meal breaks will be allowed and under what conditions.



TOP: Texas Business Conference (TBC) attendees watch a presentation during the Ft. Worth conference. ABOVE: TWC staff attorney and TBC organizer Renee Miller speaks to hundreds of attendees at a recent TBC in Austin. *Texas Workforce Commission photos*

Q: Can we give employees comp time in lieu of pay for the overtime they work?

A: Not if your organization is in the private sector. Public employers may

compensate employees who work overtime with comp time, but that must be done at time and a half, i.e., one and a half hours of comp time for each overtime hour worked, and the employer needs to advise employees in advance

of the comp time policy (the best way is to have each employee sign a written wage agreement that includes the comp time policy).

Q: My employee told me I need to give her extra overtime pay based on the commission pay she earned for the past month. Is that true, and if so, how do I calculate the overtime pay? She is paid an hourly rate.

A: Commission and bonus payments must be included in the regular rate of pay for overtime purposes. Assuming that the employee has already been paid for the overtime based upon her hourly rate, she just needs to be paid an additional amount of overtime pay based upon the commission earnings. If it was a monthly commission, multiply it by twelve and then divide the annualized amount by 52 to determine the weekly equivalent. Take the weekly equivalent, which represents extra straight-time pay for the hours worked that week, and divide it by the number of hours worked to get the increase in the regular rate of pay for that

week. Then, divide that result by two, multiply that figure by the number of overtime hours that week, and add it to the commission to bring the commission pay up to time and a half for the overtime hours.

Q: I just found out that one of the crew managers has been letting his crew work overtime without turning in the extra hours. He promised them they would have a better chance of avoiding layoff if they looked like a more efficient crew. That is not legal, is it?

A: Correct – that is not legal. That is basically the same as working “off the clock.” Neither employers nor employees have a choice about overtime pay – if non-exempt employees work overtime, they must be paid for it.

Q: To trim overtime costs, we are considering paying the clerical staff on a salary basis. Do we have to get them to sign some kind of agreement?

A: An agreement will make no difference. If the employees are non-exempt, simply paying them a salary will not make them exempt employees. Even an agreement to not be paid overtime is not enough, since employees cannot waive their right to minimum wage or overtime pay. It is generally best to pay non-exempt employees such as clerical staff on an hourly basis. That way, if they ever run out of paid leave and miss work, the company does not have to worry about getting their written authorization to deduct the value of the unpaid leave from the salary.

Q: We have data entry clerks who work at home and are paid \$0.35 per line entered. Are they entitled to overtime pay?

A: Yes, if their total work hours exceed 40 hours in a workweek. To calculate overtime pay for employees paid on a piece-rate basis, determine their straight-time pay (lines entered times the per-line rate), divide that amount by the number of hours worked to get the regular rate of pay, multiply one-half of the regular rate by the number of over-

time hours, and add that result to the straight-time pay. That total would be the employee’s gross pay for the workweek. The regular rate of pay for such an employee must be at least minimum wage.

Employee Policies

Q: To establish access to the company computer system for employees, company staff send e-mails with personal information, including employees’ ages and SSNs, to the IT department. These e-mails are copied to all levels of management, even those who are not directly involved with those employees. Is this all right?

A: To reduce the chance of personal information getting out to unauthorized people, as well as the related risk of identity theft, it would be best to restrict the recipient list to those who have a job-related need to know the information. In addition, limiting the number of people who know age-related information shrinks the circle of those who can be credibly accused of taking age into account in an adverse employment decision.

Q: Are we required to give employees one day off of work per week?

A: Only in the case of retail employees, or if the company could let a non-retail employee have a day off as a reasonable accommodation of the employee’s religious beliefs. Otherwise, there is no legal limit to the amount of time that an employer can require an employee to work.

Q: What makes a random drug test random?

A: Any procedure that makes it impossible to predict with certainty when a specific employee will be asked to take a drug test.

Q: If drug test results come back as “dilute”, or the lab reports some other problem with the sample, what can our company do? Can we have them retake the test? What if they refuse the second test?

A: While no law would prohibit your company from discharging the employee if the drug test sample is found to be altered or otherwise unsuitable for testing, it might be difficult to use that one thing as proof of misconduct in an unemployment claim, unless you have rock-solid proof that the sample submitted by the claimant was altered in some way (test results, perfect chain of custody, and preferably firsthand testimony from the one who tested the sample). Concerning retesting, everything depends upon what your policy provides. If your policy is flexible enough, or comes right out and provides for retesting upon proof of an untestable sample, then require the retest and discharge the employee if he or she refuses to cooperate.

Q: We accepted an employee’s notice of resignation early because we were concerned that she would not be a good influence upon the other employees. Now she is refusing to leave. What can we do?

A: Hopefully, you have waited until the end of the day to let her know that her resignation is being accepted early. Take a witness along and let the employee clearly know that she needs to remove her personal belongings and take them with her promptly, because she will not be allowed to return. If she persists, warn her that she no longer has permission to be on the premises and will be considered a trespasser if she does not leave within a prescribed number of minutes. If she still refuses to leave, tell her you will call the police and ask them to remove her as a trespasser. If she does not take her personal belongings with her, have a witness watch while you carefully assemble her possessions in a box, keep an inventory of what goes into the box, place a copy of the inventory (signed by both you and the witness) in the box, seal the box, label it, and place it somewhere near the reception area where it can be easily retrieved by the ex-employee or someone designated by that person. 

William T. Simmons
Legal Counsel to
Chairman Tom Pauken

Independent contractor or employee? Some clarification

“Contract labor” may be the most widely used misnomer in business today, particularly when determining whether a worker is an employee or an independent contractor. In basic terms, an employee is someone

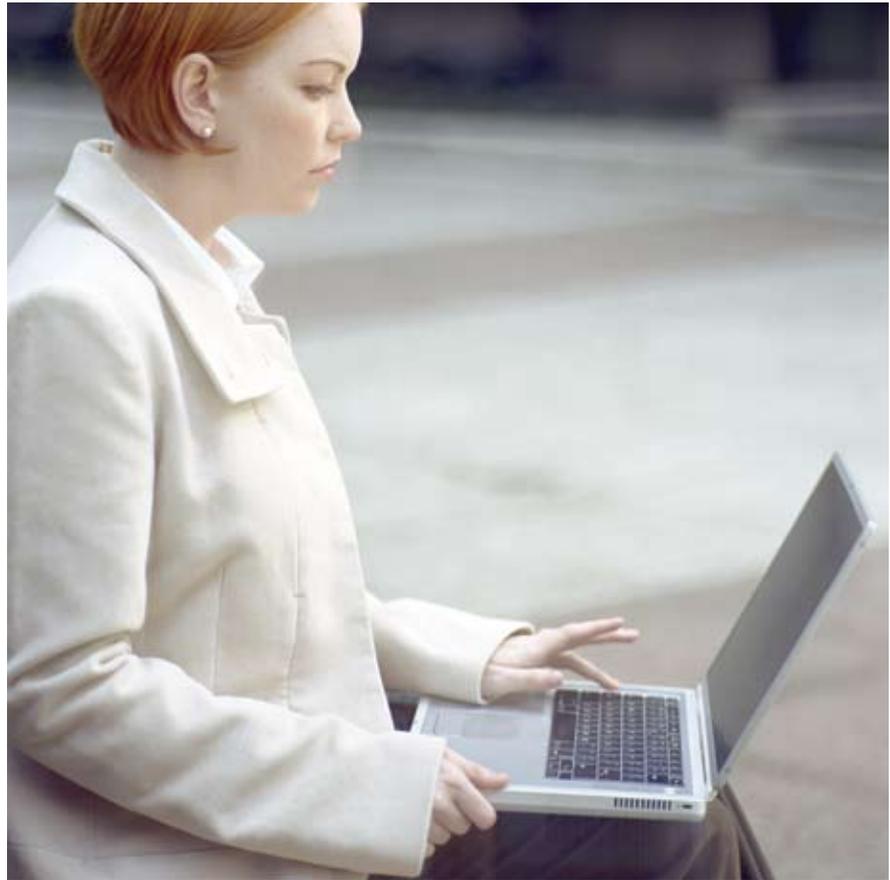
Legal Briefs

whose work is directed and controlled by an employer responsible

for extensive wage reporting and tax responsibility. An independent contractor is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer’s direction and control. The distinction depends upon much more than what the parties call themselves.

Why is this distinction important? For one thing, employers must report and pay employment taxes on the wages of employees; for independent contractors, the only report of earnings that Texas employers make is the Form 1099. For another, almost all employment laws apply only to employees; independent contractors are generally covered only by statutes limited to discrimination on the basis of race, color, national origin, or citizenship. In addition, company benefits are limited to employees. Finally, properly classifying workers will help an employer avoid audits, unnecessary claims and appeals, back taxes, interest, and penalties.

The Texas Unemployment Compensation Act does not directly define “independent contractor.” Instead, it sets forth a broadly inclusive test, known as the “direction or control” or “common law” test. Under this test, “employment” means a service, including service in interstate commerce, performed by an individual for wages or under an



An independent contractor is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer’s direction and control. The distinction depends upon much more than what the parties call themselves. *Jack Hollingsworth/Photodisc/Getty Images*

express or implied contract of hire, unless it is shown to the satisfaction of the Commission that the individual’s performance of the service has been and will continue to be free from control or direction under the contract and in fact.” By implication, an “independent contractor” would be a person whose services do not meet the above test. To aid in application of the common-law test, TWC has adapted the old IRS twenty-factor test for use by the agency (online at www.texasworkforce.org/ui/tax/forms/c8.pdf).

It is important to note that it does not matter that one or both parties may call their arrangement “contract labor.” The above definition makes clear that the important consideration is the underlying nature of the work relationship. The law creates a presumption of employment and places the burden for proving otherwise on the employer. It sets forth the primary factor in an independent contractor relationship, namely, the absence of direction and control over the work.

The United States Supreme Court has established a widely accepted

Who is an Independent Contractor?

In order to be considered an independent contractor, a worker must meet three separate criteria (some states require only that two criteria be met):

- | | |
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| <p>1. The worker is free from control or direction in the performance of the work.</p> | <p>and is done off the premises of the business.</p> |
| <p>2. The work is done outside the usual course of the company's business</p> | <p>3. The worker is customarily engaged in an independent trade, occupation, profession, or business.</p> |

five-part test, known as the “economic reality” test, to help establish whether a person is an employee or an independent contractor. In *United States v. Silk*, 331 U.S. 704 (1947), a case dealing with whether an employer owed Social Security taxes on certain workers, the Supreme Court found the following factors important:

- (1) the degree of control exercised by the alleged employer;
- (2) the extent of the relative investments of the [alleged] employee and employer;
- (3) the degree to which the “employee’s” opportunity for profit and loss is determined by the “employer”;
- (4) the skill and initiative required in performing the job; and
- (5) the permanency of the relationship.*

*(quoted from *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987)). *Brock*, one of the leading cases from the Fifth Circuit explaining independent contractor/employee issues, goes on to state that the “focus is whether the employees as a matter of economic reality are dependent upon the business to which they render service.” The same case further notes that “it is *dependence* that indicates employee status...the final and determinative question must be whether the total of the testing establishes the personnel are so dependent

upon the business with which they are connected” that they are employees.

This emphasis on dependence and economic reality demands nothing more than a common sense approach. An employee has nothing to invest in an enterprise beyond the time he puts in and sells his services to only one “customer,” the employer. He is economically dependent upon that work. On the other hand, an independent contractor is not normally dependent upon only one customer, but rather, being in business for herself and with an investment in her own equipment and supplies, has an entire customer base upon which to fall back.

A third way of approaching this problem is called the “ABC” test, which is used by almost two thirds of the states (not including Texas) in determining whether workers are employees or independent contractors for state unemployment tax purposes. In order to be considered an independent contractor, a worker must meet three separate criteria (some states require only that two criteria be met):

- (A) The worker is free from control or direction in the performance of the work.
- (B) The work is done outside the usual course of the company’s business and is done off the premises of the business.
- (C) The worker is customarily engaged in an independent trade, oc-

cupation, profession, or business.

Finally, the Internal Revenue Service uses a so-called “Eleven Factor” test for determining the coverage of various federal employment tax laws. The eleven factors are all based upon the common law, economic reality, and ABC tests and represent their various criteria either reorganized or broken down into more detail.

The Texas Workforce Commission (TWC) is charged with auditing businesses to ensure that employee wages are properly reported and appropriate taxes paid on such wages. If TWC rules that an employer has failed to properly report all wages and pay taxes, it will assess back taxes and interest. Non-payment of taxes leads TWC to inform the Internal Revenue Service that the non-paying employer is not entitled to the federal tax credit with respect to the wages in question, which in turn can lead to an IRS audit. Finally, since TWC conducts a cross-match of its wage reports with the new hire database of the Child Support Division of the Texas Attorney General’s office, an employer that is found to have misclassified a new hire as a non-employee and failed to report the new hire may be liable for a \$25 per employee penalty for violating the new hire reporting law (for information on new hire reporting procedures, call 1-800-850-6442).

A TWC audit generally begins in one of four different ways. First, a former worker may file an unemployment claim. If no wages were reported for that claimant by the em-



To determine if a worker is an independent contractor, factor in whether the work the person does is done on the premises of the business. *Jupiterimages/Comstock Images/Getty Images*

ployer, the claim may be disallowed, in which case the claimant will probably appeal. The Tax Department will investigate, and such an audit has the highest priority. Second, a competitor or someone else may report that an employer is misclassifying its workers. The Tax Department will audit the employer's entire workforce and will hold the source of its information confidential. Third, TWC may perform a random audit of the employer as part of its goal of auditing two percent of all businesses every year. Fourth, TWC may decide to target a specific industry or geographical area. For instance, the hair salon industry was targeted in that way back in the late 1980s due to a high number of reports both from within the industry and from ex-workers.

Employers often confront these issues when short-term or as-needed workers perform services for them. Any employer using what it consid-

ers to be "contract labor" should ask itself some questions up front:

Is the service provided by the individuals in question essential to, and an integral part of, the service the employer provides to the public? The less able an employer is to offer its primary service without the help of the people whose status is at issue, the more likely it is that they will be considered employees. Consider this: if certain services are so essential to a business that it will stand or fall based upon how well those services are performed, the business will naturally want to exercise enough direction and control over the services to ensure they are good. That amount of control might qualify such workers as employees.

What opportunity for profit or risk of loss is there for the worker? What kind of investment,

other than his or her time, does the worker have in the enterprise? An employee is paid for her time. She would not be expected to provide her own workplace, materials, tools, and supplies, or otherwise to invest her own money in the business. An employee who makes a costly mistake can be fired, but cannot legally be forced to work without pay. An independent contractor, on the other hand, is an independent businessperson with expenses of his or her own. He will be expected to provide or purchase everything he needs to do the job. If he fails to satisfy the customer, he would be required to redo the work for no additional compensation, or else face the risk of non-payment by the customer. These things create the opportunity for profit or loss.

What is the compensation arrangement? Is the compensation negotiated, or is it imposed by

the employer? A true independent contractor's main concern is her own bottom line, not that of the employer. Since she is responsible for her own overhead, including the hiring of any helpers she may need, there is always an element of negotiation in any bona fide contract for services. Usually, but not always, an independent contractor is paid by the job. It is up to him to figure out how much he needs to finish the job at a profit. If he miscalculates, the loss is his.

Does the individual provide his services to the public at large? Does he advertise his services in newspapers, the Yellow Pages, or specialized journals? If a person holds herself out to the public as self-employed and available for work for any customer with whom she can negotiate an acceptable price, she is likely to be held an independent contractor. The more the worker advertises, the more it is apparent that she is in business for herself, since an independent business stands or falls based upon its business development efforts.

Is there a non-competition agreement? Generally, non-competition agreements and independent contractors do not go hand-in-hand. Such a provision in a contract is strongly indicative of an employment relationship, chiefly because it proves that the services in question are directly related to the primary service provided by the employer and not offered to competitors. If those services were not related, there would be no "competition" and thus nothing against which to guard. The power to keep a person from pursuing his or her own business interests and to force a person to sign such an agreement is typical of the power wielded by employers over employees.

Does the worker provide his services on a continuous basis? The more long-term, continuous, and exclusive the relationship is, the more likely it is to be employment. Independent contractors, on the other hand, generally perform their work

The law creates a presumption of employment and places the burden for proving otherwise on the employer. It sets forth the primary factor in an independent contractor relationship, namely, the absence of direction and control over the work.

one job at a time and are paid on the same basis.

Is the worker required to provide services under the employer's name? Does she represent herself to the public as being an employee of the employer? On whose behalf are the services performed? If the general public would perceive the person to be a representative of the employer because of business cards, uniforms, or other advertising, this would be more indicative of an employee than an independent contractor. An employee performs services on behalf of the employer for customers of the employer. An independent contractor performs services on her own behalf for her own customers.

Does the employer retain the right to dictate how the work should be done? Is the worker required to work a certain schedule, to notify the employer if he will not come to work, or to get the employer's approval for any helpers who are hired? When an employer contracts for outside services, it is normally interested only in the end result, not in the details of how the contractor performs the work. The employer should have no interest in how the independent contractor allocates either his time or that of his helpers. By the same token, the employer would have no interest in the contractor's right to hire his own helpers, beyond the right to contractually specify that anyone providing services on a project must be properly licensed under whatever laws apply to the work.

The above points are all general factors, but there are many details that can be helpful in determining

whether given workers are independent contractors or employees:

Cash flow - how the money gets from the customer or the client to the worker is important. If the client pays the employer in general, and the employer pays the worker either by the hour, by salary, or by commission, the worker looks more like an employee.

If, on the other hand, the employer pays the contract price for work completed, the worker would appear to be an independent contractor.

Alternatively, if the client pays the worker, and the worker remits an agreed-upon fee or percentage to the employer, that would look more like an independent contractor situation. If the worker merely collects the pay from the client, passes it along to the employer as an agent would, and receives a share of it back, he would appear more like an employee than an independent contractor.

"Rent" - closely related to the cash flow issue is that of the compensation the worker gives the employer for the use of its facilities or equipment. Keep in mind that the opportunity for profit or loss is an important hallmark of an independent contractor. An employer normally provides its employees with everything needed to do their work. A business contracting with an independent contractor normally expects the contractor to supply what is needed to accomplish the project. If the worker uses the employer's facilities and equipment at no cost, he looks like an employee. If the worker must pay some negotiated amount in rent or usage fees regardless of the contract price or of how much he takes in from customers, that looks very much like the kind of prof-

The bottom line in any case in this area will be whether the facts show that the worker in question is in effect an independent business entity in a position to make a profit or loss based upon how he manages his own enterprise. Employers in doubt over any of their workers are encouraged to request a ruling on the status of such individuals from TWC's Tax Department and to call their local TWC tax office for further information.

it or loss opportunity any independent business that rents commercial space or equipment would have. It is important to note that this kind of compensation does not have to be separately invoiced or structured as "rent" in order to be a factor in the profit or loss equation. The price for the work in the underlying contract can simply be adjusted to reflect the reasonable value of the employer's assets used by the contractor in performing the work. Any such adjustments should be specifically noted in the contract.

Hours of work - clearly, any worker who is told to work certain hours does not have control over her own schedule, an essential component of the profit or loss equation. If the worker has a key to the facility and can work during hours outside the normal operating times of the employer, she will look more like an independent contractor. If an independent contractor wants to take time off, that should be up to her. If she can do that and still meet her contract obligations, that should not matter to the employer. That is not to say that the contract can not specify that the contractor will be available within certain guidelines for purposes of consultation or progress checks. However, the more control the employer exercises over the hours of the worker, the greater the risk is that the situation will be considered employment.

Assignments - closely related to the issue of hours of work is that of

how the work is assigned to the workers. A worker receiving assignments from the employer as they come up is likely to be indistinguishable from a regular employee. An independent contractor, having been engaged to perform a specific job or project, derives his "assignments" from the terms of the contract and determines what his daily tasks will be in fulfillment thereof.

Insurance - if the employer provides liability insurance for the workers, the situation would likely be held to be employment, since the workers would not have ordinary business liability as a risk of doing business.

Advertising and listings - the employer should not be providing advertising for the workers. Independent businesspeople provide their own advertising, such as business cards, business stationery, Yellow Page listings, brochures, and so on. In addition, workers who are independent contractors should have their own listings in the phone book, if not also separate numbers. If they are listed in ads and directories as being associated with a particular business, the risk is that they may be considered employees, rather than self-employed businesspeople.

Benefits - an employer who provides benefits such as vacation and sick leave, health insurance, bonuses, or severance pay will almost inevitably be considered the employer of

the workers. The power to award benefits carries with it the power to deny them, and that kind of power is exercised by employers. Think about it: a business that contracts to have its roof fixed would not be telling the roofers whether they could or could not go on vacation. It would be up to the roofing contractor to decide whether workers could go on vacation and still have the roof fixed by the contract deadline. Similarly, the business would not be extending its employee health plan to the roofing company's workers. The same considerations apply to any industry.

Termination of the relationship - a business that has the right to fire a worker at will is generally considered the employer of that worker. An independent contractor will usually have some kind of contractual recourse if fired before completion of the work, and the contract will generally specify conditions that must be met if the contract is to be cancelled.

These are the main factors TWC will consider when determining whether certain workers are employees or independent contractors. TWC's official test is a variation of the old IRS twenty-factor test (see www.texasworkforce.org/ui/tax/forms/c8.pdf). No one factor will determine the entire case, and not every case will involve all the factors discussed herein. Each case is decided on an individual basis after weighing all of the factors present. The bottom line in any case in this area will be whether the facts show that the worker in question is in effect an independent business entity in a position to make a profit or loss based upon how he manages his own enterprise. Employers in doubt over any of their workers are encouraged to request a ruling on the status of such individuals from TWC's Tax Department and to call their local TWC tax office for further information. 

William T. Simmons
Legal Counsel to
Chairman Tom Pauken

New FMLA regulations roll out

The Family and Medical Leave Act (FMLA) applies to employers with 50 or more employees stationed within 75 miles of each other, and new FMLA regulations became effective on January 16, 2009.

Business Briefs

If you haven't already done so,

there are several steps your company should take to comply with the new regs.



In order to comply with new Family and Medical Leave Act (FMLA) regulations, you must begin using the new FMLA forms. *Stockbyte/Getty Images*

1. Revise your existing FMLA policy in your employee handbook. Make sure that the policy contained in your handbook is consistent with the new FMLA regulations, including the newly added types of FMLA military family leave. The revised policy should contain all of the information that is included on the FMLA poster entitled "Notice to Employees of Rights Under the FMLA."
2. Post the new FMLA workplace poster, "Notice to Employees of Rights Under the FMLA" where it can be easily seen by current and prospective employees. To obtain a free copy of the poster, visit the Texas Workforce Commission's Web site, www.texasworkforce.org, and type "required workplace posters" in the search box. You will be taken to the Department of Labor's poster advisory page, where the new FMLA poster can be downloaded.
3. Train all human resources personnel and managers to be aware of the new regulations and their provisions.
4. Begin using the new FMLA forms:

- The Notice of Eligibility and Rights and Responsibilities form. This notice must be given to employees within five business days of an employee's request to take leave for an FMLA qualifying reason.
- The Certification form. This form should be provided to the employee, along with the Notice of Eligibility and Rights and Responsibilities form, within five business days of an employee's request to take leave for an FMLA qualifying reason. Employees must be given at least 15 days to return a completed certification.
- The Designation form. This form notifies the employee whether the requested leave is FMLA-qualifying or non-FMLA qualifying, whether the employee will be required

to substitute company-provided paid leave as part of the time off taken, and whether a fitness for duty certification will be required before returning from leave. An employer must provide a Designation Notice to an employee requesting leave within five business days after the employer's determination regarding whether the leave qualifies as FMLA leave.

- All new forms references above are available from the Department of Labor's website at www.wagehour.dol.gov.

As always, be sure to carefully document all communications with employees about leave-related issues. If there is ever a question whether or not an employee was improperly denied leave, or some other question about their entitle-

ment to take FMLA leave, you want to be sure that you can demonstrate that you took all appropriate steps to comply with the new regulations.

2009 Tax Incentives for Small Businesses

The American Recovery and Reinvestment Act (also known as the “stimulus bill”) passed Congress in February 2009, and contains a few tax incentives that may help your small business – if you act quickly. Here are a few tax credits that can help boost your bottom line next April, if you take advantage of them in 2009:

Section 179 Expensing. Until December 31, 2009, the stimulus doubles the small business expensing limit from \$125,000 to \$250,000. For the 2009 tax year, small business owners can deduct up to \$250,000 for software or purchased equipment as soon as it is put to use. Computers, heavy machinery, office furniture, equipment and vehicles may be deducted under Section 179, but property investments, including building or land upgrades are not covered. If you hold off on these investments until 2010, the allowance will drop back to only \$135,000.

Estimated Tax Requirement Modified. Many individual small businesses may be able to defer paying a larger part of their 2009 tax obligation until the end of the year. For 2009, eligible individuals may make quarterly estimated tax payments equal to 90 percent of their 2009 tax, or 90 percent or their 2008 tax, whichever is lower. Individuals may qualify if they received more than 50 percent of their gross income from their small business in 2008, and meet other requirements.

Energy-Efficiency Tax Credit. If you’ve been considering making your businesses greener, this might be a good time to take that next step. Under the stimulus package, energy efficiency tax credits have

increased from 10 percent of cost to 30 percent, and the maximum credit has been raised from \$500 to \$1,500. More expensive upgrades, such as geothermal pumps, solar panels and solar water heaters are not limited to the \$1,500 maximum. The \$200 tax credit cap on efficient windows has been removed as well. This may make 2009 a good year to insulate, upgrade and weather-proof your workplace.

50 Percent Special Depreciation Allowance/Bonus Depreciation. The new law extends the 50 percent depreciation allowance that was available for 2008 acquisitions of qualifying property that was placed in service in 2009. This provision enables businesses to deduct half of the adjusted basis of qualifying property. While the extension applies to qualifying property placed in service in 2009, it will remain in effect through 2010 for long production period property and certain transportation property.

For additional information on these and other small business tax incentives, you may visit www.irs.gov, or consult with your accountant.

New Surveys: Some Businesses Plan to Hire

Despite the U.S. unemployment rate hitting a 26-year high of 9.8 percent in September 2009, two surveys released in late October indicate that many businesses are preparing to hire employees in the near future. According to the National Association for Business Economics (NABE) October 2009 Industry Survey, the number of employers planning to hire workers during the next six months exceeded the number projecting job cuts for the first time since December 2007 when the recession began.

The survey of 78 NABE members also revealed that more companies increased rather than decreased capital spending during the third quarter of 2009. It was the first time



Two surveys released in late October indicate that many businesses are preparing to hire employees in the near future. *Stockbyte/Getty Images*

that had occurred since October 2008.

According to NABE, job losses “appear to be slowly abating” with the percentage of firms slashing payrolls falling from 36 percent to 31 percent during the quarter. And, the percentage of companies adding employees doubled from an all-time low of six percent to 12 percent in October.

In another survey released by Intuit, Inc. of Mountain View, California, 44 percent of the small business owners responding plan to hire new employees within the next year. The survey also revealed that while many small business owners believe benefits are critical to attracting qualified new hires, they are finding them difficult to pay for.

Sixty percent of the respondents expect their businesses to grow in the next year, with newer businesses exhibiting the most optimism: eighty percent of companies that are less than three years old expect to grow over the next 12 months.

When it comes to hiring job applicants, small business owners said they are looking for candidates with broad skill sets: 50 percent of the small businesses responding said they would be looking for a “jack of all trades” or a “people person” as opposed to a “creative genius” (11 percent) or a “mathematical wizard” (four percent). 

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

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

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