Texas Business Today

Fall 2002

Ron Lehman
Commissioner Representing Employers
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JOB REFERENCES: WHAT'S AN EMPLOYER TO DO?
Some Practical Tips

By now, most employers have heard that the Texas Legislature enacted a bill in 1999 that essentially codified existing case law dealing with giving job references and defamation lawsuits. (The statute is found in Sections 103.001-103.005 of the Texas Labor Code). This law protects an employer from defamation liability if they release information about a current or former employee to a prospective new employer *unless* "the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed."

The question facing most employers now is how to put the law into practice. Keep in mind that there is no affirmative duty to give references to anyone. Many employment lawyers still advise their clients that the safest policy is simply not to discuss former employees with anyone, period. A number of Texas employers are still following that advice. However, should you decide that you are willing to go the reference route, whatever information is released should be factual, provided in good faith and non-inflammatory. Here are some practical tips for avoiding liability and how not to tempt employees to try to file lawsuits.

Point 1: Just the Facts, Please

When giving a job reference, release only factual information. Factual information is something you can prove, either with witnesses or company documentation. Facts do not include opinions, value judgments or moral criticism. Designate one person to facilitate reference requests to ensure that these inquiries are handled consistently and legally.

Point 2: Tell the Truth, the Whole Truth, and Nothing But the Truth

You may have heard that "truth is an absolute defense to a defamation lawsuit." The fact is, that's true. Tell a prospective new employer only what you know – and can prove - to be true. Telling true facts has been protected in the past by court decisions and is now protected by the new statute. An employer should never knowingly provide false or misleading information about a former employee; report only information that can be documented.

Point 3: Avoid Inflammatory Terms and Remarks

Although embellishing a story with colorful terms and frank

opinions is human nature (and often very entertaining), it should be avoided when giving job references. Inflammatory terms can make a person feel that they are being attacked unfairly and can inspire a former employee to find an attorney. Use points 1 and 2 above to combine facts with truth, as illustrated in the following examples:

Inflammatory: "We fired Joe for stealing; he's a thief."
Non-inflammatory: "We discharged Joe for failing to properly account for items that were entrusted to him. Items A and B were checked out to him, they turned up missing, and he failed to give a satisfactory explanation for what happened to them. Under our policy, that was a dischargeable offense."

Inflammatory: "Jane was fired for using drugs. We don't tolerate potheads and druggies here."
Non-inflammatory: "Jane failed a drug test on (date). The initial positive result was confirmed. Medical review of the result revealed no satisfactory explanation for the presence of the substance that was found. Employees who fail a drug test under such circumstances are subject to termination under our company policy."

JOB REFERENCES cont.

Inflammatory: "Frank was terminated for sexually harassing an employee."
Non-inflammatory: "Frank was terminated for violating our policy prohibiting harassment in the workplace."

There are many other situations in which it is tempting to use inflammatory terms; however, it is probably wiser to tone the language down. An employer's main objective is to express the facts in such a way that the listener understands what occurred without resorting to name-calling, character assassination, or moral judgment. This is a very good time for an employer to take the high road. And, as in most other areas of employment relations, if an employee or former employee feels that he or she is being treated fairly, they are far less likely to hire an attorney or complain to a government agency to vindicate themselves.

Point 4: Use a Written Release Form

It is common knowledge that it can be extremely difficult to get meaningful job references about an applicant from their prior employers. Past employers are often reluctant to comment out of fear of being sued for defamation, or they may suspect that the person requesting information is not really a prospective new employer. Case in point: *Frank B. Hall Company v. Buck*, 678 S.W.2d 612 (Tex.App. – Houston (14th Dist) 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009, 105 S. Ct 2704 (1985). In this famous case, a fired employee was having trouble finding a new job and suspected that his former employer was bad-mouthing him to potential employers. The ex-employee hired a private investigator to pose as a prospective new employer and call the former employer for a reference. The investigator tape-recorded the employer making scurrilous and unproveable allegations about the ex-employee's character and honesty. The jury decided that was defamation and awarded almost $2 million in total damages to the plaintiff.

It is especially difficult to get usable information from a "cold call" to another company over the telephone. Using a preprinted, fill-in-the blanks form such as the one below can help overcome the reluctance or fear often felt by employers when asked to give a job reference, and can give you a better chance of getting a useful, candid response.

Have the job applicant fill out one of these forms for each prior employer from which you intend to seek job reference information. Using the form will make it much more likely that the prior employer(s) will feel at liberty to release the information you request, or at least be more forthcoming than the usual work dates, job title and salary confirmation that really doesn't offer much value in the hiring decision. Also keep in mind that your company may refuse to hire any applicant who will not sign such an authorization

SAMPLE AUTHORIZATION FOR PRIOR EMPLOYER TO RELEASE INFORMATION

(Please read the following statements, sign below, and return to the Human Resources department).

I, _____, hereby authorize any investigator or duly accredited representative of XYZ Corporation bearing this release to obtain any information from schools, residential management agents, employers, criminal justice agencies, or individuals relating to my activities. This information may include, but is not limited to, academic, residential, achievement, performance, attendance, personal history, disciplinary and conviction records. I hereby ask you to release such information upon request of the bearer. I understand that the information released is for official use by XYZ Corporation and may be disclosed to such third parties as necessary in the fulfillment of official responsibilities.

I hereby release and hold harmless any individual, including record custodians, from any and all liability for damages of whatever kind or nature which may at any time result to me on account of compliance, or any attempts to comply, with this authorization.

_____
Applicant's signature

_____
Date

Texas Workers' Compensation System 101: Employer Rights and Responsibilities

Texas Employers have certain important rights in relation to claims of injury on the job by their workers. In 1989, the Texas Legislature made significant revisions to the previous workers' compensation (WC) law. The 1989 Texas Workers' Compensation Act (TWCA) placed responsibility for administration of Texas' workers' compensation law with the Texas Workers' Compensation Commission (TWCC), which replaced the old Texas Industrial Accident Board. Under the current TWCA, an employer that fails to fully exercise its statutory and regulatory rights in workers' compensation claims management reaps higher risk exposure and will pay higher insurance rates than necessary. Read on!

The law still contains many provisions that are favorable to employees. For example, covered workers injured at work still have the express right to select their own doctor for a work related injury, without interference from the employer, its accident/injury policies or its insurance carrier. The worker may change doctors once without anyone's approval, and subsequently with TWCC's approval. The worker is not required by law to work with his company's risk manager, or a case manager selected by the employer or its insurance company. Most important, the worker may not be terminated, or experience other adverse employment action, because he filed a workers' compensation claim or was injured on the job. This can cause problems when an employer needs to terminate an employee for other reasons, but the employee has a current WC claim.

Under the TWCA, insurance adjusters may no longer refuse to pay a particular medical bill because they believe the service was not medically necessary unless they have first received at least a minimal medical determination of that fact. And, "lump sum settlements" no longer exist. Instead, the statute sets out "categories" of benefits and requirements for entitlement.

Medical benefits are available as soon as the injury becomes a claim, unless the claim is disputed within seven days. Temporary income benefits ("TIBS") are available for lost-time injuries. Impairment income benefits ("IIBs") are available when the worker reaches "maximum medical improvement" status as certified by a doctor (3 weeks of benefits per each 1% of impairment). Supplemental income benefits ("SIBs") are for serious injuries with high impairment ratings; they are paid monthly. An injured worker can potentially receive up to a maximum of 401weeks of these benefits (104 weeks of temporary income benefits). Lifetime income benefits are available for very seriously impaired workers. Death benefits are available to specified beneficiaries, defined in the TWCA, who survive an employee whose death was attributable to a work-related injury.

Some employees receive only medical benefits if there is very little or no lost time. Others receive medical and temporary income benefits. Most will also receive some impairment income benefits. Those who get a 15% impairment rating or higher may get supplemental income benefits, with a work search effort required. Only a small percentage of workers receive lifetime benefits. You must die to get death benefits (and you don't get to spend them!)

Employers do have several ways to minimize work injury costs and other attendant risks, such as fines and penalties imposed for violations of the TWCA by employers. One of your best opportunities is at the point of purchasing your w/c insurance coverage

SELECT YOUR WORKERS' COMPENSATION INSURANCE COMPANY CAREFULLY

This is your first, and one of your best, opportunities for cost control and maximizing employer input in a WC case. Don't underestimate this decision's power! All carriers and adjusters are not alike! Talk to at least three different carriers and their claims managers before you contract for WC claim handling (adjusting) services. Ask them the following questions to find out what their "usual" procedures are and to help you identify what changes you need to negotiate:

QUESTIONS TO ASK:

1. How long has your company covered WC claims in Texas, and how many w/c claims are on your current caseload in Texas? What continuing education in workers' compensation do you require from your adjusters annually? (This will help you determine the company's experience with the TWCA, which contains some provisions not found in other states).

2. *How many w/c adjusters do you have assigned to handle the cases from this geographic area of Texas? Do any of them specialize in my industry sector? What is the maximum caseload you allow each adjuster to have at one time?* These questions allow you to determine whether the carrier's WC claim adjusters are overloaded with cases, as the caseload affects quality of adjusting. Generally, each adjuster should handle no more than 100 to 150 cases at a time. Sometimes insurance companies will assign some "medical only" cases to a particular adjuster, leaving the others to handle lost time and complicated or disputed cases. Ask!

3. *What are your expectations of adjusters with respect to their contact with the employer? How often do your adjusters send written status reports to your client companies, as a rule?* This is negotiable! Ask for bimonthly reports on "routine" cases and biweekly or monthly written reports on more complex or disputed cases. Be sure to designate ONE person in your company (i.e., your Risk Manager or HR Manager) to receive these reports. That person should then notify your company's management of the status of the claim.

4. *What are your policies and time limits for assigning and investigating claims? Who is your WC manager? Can I meet with the claims manager before we make our decision to purchase our coverage from your company?* With these questions, you have an opportunity to request special efforts on specified circumstances under which you have experienced problems in the past, and to meet one of the most important "players" on your WC team. You can negotiate for the claim manager to require the assigned adjuster to call your risk representative within 24 hours of your referral of the case. This means your investigation can be more efficiently coordinated with management and "tailored" to the company's concerns (i.e., problem employee, dubious injury

Employer Rights and Responsibilities cont.

allegation, multiple claims employee, etc.), with the professional advice and assistance of the adjuster.

5. *What if we find that we are unable to work effectively with your assigned adjuster, or do not have faith in his/ her abilities to handle our cases properly?* Claims managers generally do not like to transfer cases to another adjuster because there is some risk of loss of continuity and knowledge about the case, as well as paper-tracking problems. But, you deserve an adjuster you can work effectively with. Negotiate this scenario! But be fair, and discuss any problem first with the adjuster before complaining up the ladder.

6. *How do you go about determining whether a medical service is reasonable and necessary or not? What are your criteria for selecting doctors you use for peer review reports and independent medical examinations? Will the Employer be notified before a specific doctor is contracted, and given a chance to object?* You want your adjuster to access medical opinions from highly qualified and experienced doctors who are objective, truthful, skilled in diagnosis and treatment in their areas, and (most of all) respected by the TWCC. They should be trained in quality control issues, managed care and cost control.

7. *What are the circumstances under which the carrier will ask for a peer review report (a review of medical records by a specialist in the relevant field) or an independent medical examination (by a doctor of the carrier's choice with written medical report)?* These questions should tell you something about the carrier's willingness to closely monitor the medical aspects of each case.

8. *What persons represent your insurance company in dispute proceedings? Does the adjuster also attend the benefit review conference proceeding? Does the company use its own adjusters or attorneys or contract out to adjusting companies or law firms for its contested case hearings and appeals? Who are some of the firms who have represented you in WC cases in the last year? Do you require the hearing representatives to contact the employer when they receive the case? How do you determine payment for representation services, and is it discussed with the employer first?* These questions will allow you to assess the expertise and internal management priorities/practices of the insurance company and get an idea of the cost of representation services.

9. *Whom in your company do you prefer the employer to call if we become unhappy with the progress of the case and cannot resolve the issue with the assigned adjuster or the Claims Supervisor or Manager?* You must insist on a specific person (or persons) for trouble-shooting, and get a phone number!

10. *What "return to work" services and expertise do you have to assist the employer in minimizing lost time costs?* Often, insurance companies can offer services such as vocational evaluations or placement services, rehabilitation services, etc. to the injured worker to get her back to work more quickly or re-employed as soon as possible with another company. This minimizes lost time and benefit costs, especially if you do not have an appropriate position within medical restrictions, or chose not to have a return to work policy.

Asking all of the foregoing questions (and any more you can think of) will help you, the Employer, to have a "higher priority" among the carrier's other, less sophisticated, WC clients. It will also help you obtain insurance adjusting services that meet your needs and desires at a cost your company can afford. It will help prevent misunderstandings of expectations on both sides and maximize good communication about your cases and their development. Any agreements reached on these issues should become part of an express written agreement to be binding. Your goal is to minimize costs by getting good investigation, adjusting and dispute resolution services "at the front end" of the WC path.

Christine Delmas
Attorney at Law

Business Briefs - Fall 2002

Shortage of College Graduates Predicted in the Next Decade

Although the recent downturn in the economy has slowed job growth, the U.S. still faces a possible shortage of skilled, college-educated workers in the next decade. This is according to a recent report entitled *Challenges Facing the American Workplace* published by the Washington, D.C. based Employment Policy Foundation (EPF). According to the report, if the trends of the last 10 years continue, the next decade will see the creation of 23 million new jobs; more than 1.7 million of those jobs will be created in Texas, resulting in a 17.4% growth rate. This is despite the recession and fallout from the 9/11 terrorist attacks. (These calculations take into consideration that there would be 5 million more current jobs if the growth trend from 1993-2000 had continued without a significant downturn).

EPF, an employer-funded research foundation, based its report on data from the Census Bureau, the Bureau of Labor Statistics, and other sources. According to EPF, of the 23 million projected new jobs, 7 million will be in management and management-related occupations. Professional jobs will account for 7.5 million new jobs, including 2.1 million teaching jobs and 2.5 million jobs in computer science and mathematics. With job growth focusing on technical, professional and managerial jobs, EPF said that by 2012, there will be a need for 18 million new bachelor's degree holders. However, based on current graduation rates, there will be a shortfall of some 6 million degree holders. EPF's report points out that the average weekly earnings of four-year or advanced degree holders was $1,017 in 2002, in contrast with an average of $524 in weekly pay for all other workers. You may obtain a free summary of EPF's report or order a copy of the entire publication from the organization's web site at www.epf.org.

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It's Monday Morning; Do You Know Where Your Employees Are?

Would you have trouble assembling a softball team from the number of workers present in the workplace on a normal Friday afternoon? Could you put a barbershop quartet together on a Monday morning?

After working with a number of *Fortune* 1000 companies, Nucleus Solutions, an Arlington, Virginia-based consulting company, has learned a great deal about absenteeism in the workplace. Not surprisingly, Mondays and Fridays are the days employees are most often absent. And, younger employees – not older employees – have higher rates of absenteeism. According to the company, absenteeism rises most during times of economic downturn, downsizing, and when the demand for productivity is greatest. This could be just such a time: during the last two to three years, many major companies that are clients of Nucleus Solutions have seen absenteeism rates jump as much as 10 to 20% over previous years.
Rather than standing by helplessly and lamenting the expense caused by lost productivity due to absenteeism, Mike Scofield, senior vice president of Nucleus Solutions, encourages employers and managers to get proactive. Here are some steps he suggests:

- Understand the big picture; absences due to sick leave are only a part of the overall situation. Family and medical leave, disability leave, and absences due to workers' comp injuries should all be taken into account.
- Identify the root causes for absenteeism, and try to get a handle on the underlying reasons for variations in the level of absenteeism.
- Examine the workplace climate to determine what may be demoralizing workers into staying home.

As Scofield points out, "A highly engaged employee is less likely to misuse sick leave." For additional information, visit www.nucleus solutions.com.

Creating a Drug free Workplace Policy for the Small Business

Pre-screening potential employees by having them undergo drug testing is not all there is to creating a comprehensive drug-free workplace policy. But, it could be your first step toward reducing incidences of drug-related absenteeism or accidents in your workplace.

If you're still debating whether the time for drug testing has arrived, these statistics provided by the U.S. Small Business Administration may make a believer out of you:

- Nationwide, almost one in 10 employees uses drugs in the workplace;
- One-third of American employees injured on the job used marijuana within a few hours prior to the injury; 16.5% of the seriously injured employees had been both drinking alcohol *and* smoking marijuana;
- Drug-abusing employees incur three times higher medical costs and benefits, are involved in 3.6 times as many work-related accidents, and are five times more likely to file a workers' compensation claim.

As in most areas of employer/employee relations, having a written drug-free workplace policy in place is only the beginning; however, it is a very good beginning. Unfortunately, many small business owners just don't know how to get started. The South-West Texas Small Business Development Center has provided a roadmap to resources and assistance at its website, www.drugfree policy.org. Funded by the U.S. Small Business Administration, you will find a sample "drug-free workplace policy" online in both English and Spanish. While there are other sources that provide these types of policies, this site is well thought out and free of charge. With the click of a mouse, your can customize a policy tailored to your company.

What will make your policy truly effective is finding the right resources, vendors and contractors to help you implement your workplace rules. At www.drugfreepolicy.org you will also find organizations, suppliers and agencies you can look to for assistance – some government agencies, some organization associations, and some private enterprise. If you are aiming to make your workplace drug-free, carefully select these services just as you would a new office manager.

New and Improved "Especially for Texas Employers" Now Available

The Employer Commissioner's Office here at the Texas Workforce Commission has provided a number of publications to Texas employers for many years. One of the most popular and informative, "Especially for Texas Employers" is now available in hard copy, and online. If you would like to download the document, simply visit the agency's website, www.texasworkforce.org, click on the "Business and Employers" icon, go to "Publications" and look for the title. If you would like to order a hard copy of the handbook, please fax your request to 512-463-3196 or e-mail Employerinfo @twc.state.tx.us.

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Attorney at Law

From the Dais – Fall 2002

Dear Texas Employers:

The Employment Security Reform Act of 2002 was recently introduced in Congress and includes measures to reform the Federal Unemployment Tax Act (FUTA) system. This is a very positive development for the nation's employers; you may want to let your representatives in Congress know if you share this assessment.

A Little History

The current Unemployment Insurance (UI) system is a joint federal-state program, created by the passage of the Social Security Act of 1935. The Federal Unemployment Tax Act (FUTA) is found in the U.S. Internal Revenue Code and mandates that the states maintain a UI program in conformity with certain federal requirements. This UI system is financed by two taxes levied on employers – one federal and one state. The State UI tax is used to fund employment compensation benefits and is experience rated, meaning that an employer's tax rate is based upon past incidence of successful unemployment claims filed by former employees. On the other hand, the federal tax is a flat-rate tax levied on the first $7,000 of each employee's wages. The federal tax is used to fund: 1. The federal and state administration of the system; 2. The 50% federal share of extended unemployment benefits costs; and 3. Loans made available to states when their trust funds are depleted (as Texas' trust fund is currently).

Today, only 33 cents of every FUTA dollar Texas employers send to Washington is returned to the state to fund workforce programs. This fact infuriates business owners. Most businesses want all UI tax dollars to be spent on UI programs or be sent back to them to use to grow their businesses and create more jobs. If the taxes raise more dollars than are needed to run the programs for which they are intended, employers should get their money back.

The Employment Security Reform Act of 2002 would deliver a number of benefits for America's employers and workers; several key components of this bill are:

A FUTA Tax Cut – This proposal would cut FUTA taxes by 75% by January 2007. Today, the federal tax is .8%; under the proposed legislation, the tax would be reduced to .2% by 2007. While the difference between a .8% and a .2% tax sounds small and the cost per employee is "only $56 per year," in Texas alone, this cut would save employers approximately $219 million per year. And, this tax reduction would be particularly gratifying to many business owners because .2% of this .8% tax was imposed in 1976 as a "tiny, temporary surtax" which Congress promised to remove once a loan from the federal trust fund to the States was repaid. By 1987, the loan was paid in full, but the tax remained. Since then, Congress has extended this "temporary" tax five more times. In 2001, this "tiny" extension resulted in a $1.75 billion tax burden on the nation's employers.

This proposal would also reduce the total FUTA tax beyond the surtax – a wonderful idea because the FUTA collects far more than it needs. For example, in 1998, FUTA raised $6.1 billion, but only $3.5 billion was sent back to the States to spend on FUTA-
related programs. The balance was used to pay for unrelated government programs.

Streamlining FUTA Tax Form Filing – It is gratifying to see an effort to reduce the complexity of Form 940. This legislative proposal would eliminate many of the information requests and calculations found in Part II that employers must already report on state UI forms. The majority of paperwork coming from the federal government is tax-related, so any effort to streamline or eliminate forms or steps thereon would be beneficial to employers.

Providing Better Services by letting the states – not the federal government - manage administration of the Unemployment Insurance (UI) and Employment Security (ES) programs – Under this proposal, the states will gradually assume the primary responsibility for funding the services and administration of the state UI and ES programs. Managing tax rates and administrative costs is not new to states. In fact, states are already responsible for collecting state UI taxes of approximately $30 billion per year to finance the cost of unemployment compensation benefits. States are also currently funding a small part of program administration through state revenues estimated at $311 million in 2001.

I have long believed that the respective state governments know their employers and workforces best, and this proposal would enable them to react quickly and efficiently to local demands. The proposed funding shift would empower the states to more fully fund and tailor employment services; in turn, better employment services will help businesses find and retain a qualified, skilled workforce. Further, a better-funded, customized employment service will get the unemployed back to work sooner, reduce the duration of UI benefits, save trust fund dollars, keep business taxes lower, and increase consumer buying power.

Better Fraud Detection by Providing Access to the National Directory of New Hires (NDNH) – The proposal would give states access to the NDNH which contains wage and hew hire information from all 50 states to identify individuals who may be receiving unemployment compensation benefits fraudulently (i.e., they're continuing to draw unemployment benefits even though they've gone back to work). Significant savings have already been realized from access to similar state "new hire" databases.

The less time employers spend dealing with "government overhead," the more time they can devote to growing their businesses and employing more workers. If you believe that the proposals advanced in this legislation are positive steps in the right direction, you may want to take a moment to write, fax, telephone or e-mail your representatives in Washington to let them know where you stand.

Speaking of Unemployment Insurance…

An unfortunate combination of a sluggish economy and a large jump in new unemployment claims (especially those filed by recently laid off, highly paid workers) has battered the Texas unemployment insurance (UI) trust fund. What this means is that the state must borrow money from the federal government. To repay that money and keep the fund solvent, there will be a tax increase for all

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employers in 2003 – even those that did not experience layoffs or have former employees successfully draw unemployment benefits. Texas employers will receive their 2003 tax notices in December 2002. Please pay attention when your TWC tax rate notice arrives to avoid "sticker shock" when your first quarter 2003 taxes are due next April. While final calculations are not yet available, it appears that higher taxes will result from an increase in the general tax rate for businesses that experienced layoffs during the last 12 months, as well as the addition of a deficit tax, and an increase in the replenishment tax for all employers.

In 2002, the minimum UI tax rate was .30% which was paid on the first $9,000 of each employee's wages. If that was your 2002 tax rate (and 75% of all Texas employers paid the minimum rate this year), you paid $27 per employee in state unemployment taxes. The maximum 2002 tax rate was 6.54%. If that was your company's tax rate, you paid $588.60 per employee in 2002 state unemployment taxes. That's a $561.60 difference per employee between a Texas business paying at the lowest and the highest tax rates.

The most recent estimates provided by the agency's Tax Department are that 2003 state unemployment tax rates will range from a minimum of about .50% of the first $9,000 of each employee's wages to a maximum of about 8.30% in 2003. This means that an employer paying at the minimum tax rate will pay $45 per employee in 2003, while an employer paying at the maximum tax rate will pay $747.80 per employee. The average tax rate for all Texas employers will be 1.43%, or $128.87 per employee.

What You Can Do to Protect Your Tax Rate

Much of the 2003 tax hike is due to circumstances that were beyond any Texas employer's ability to control. However, what this does mean is that it has never been more important than it is today to be winning the unemployment insurance claims that you should be winning. There are only a limited number of ways a former employee can be disqualified, primarily by being fired for engaging in misconduct connected with the work or by quitting for personal reasons unrelated to the job. If the separation was due to misconduct, the employer will have the burden of proving it. Get your policies, documentation, reprimands, and firsthand witnesses in order before you fire someone, not after.

Make sure your policies specifically point out what will and will not be tolerated in the workplace; let people know what they can and cannot do with your computers, phones, e-mail, fax machines and company credit cards. Do not allow a culture to develop in which a former employee can successfully argue that "everybody does it" and never gets in trouble. Also make sure that your managers and supervisors are trained in what is and is not permissible under your rules and policies and that they actually meet those standards on a daily basis. (For additional information on policies, discipline, etc., visit the agency's website at www.texasworkforce.org.)

Congratulations!

The Texas Workforce Network recently held its sixth annual statewide conference, "Building Solutions Building Excellence – Workforce and Economic Development" in Dallas. There were over 1,200 attendees from all over the state. It was a pleasure for me to participate in an awards ceremony honoring a number of Texas employers for their contributions to the Texas Workforce Network and their local communities. In an employer-driven system, not only should businesses be treated as primary customers, they are the co-designers and catalysts that help to bring about the changes needed to create a world-class workforce system. These awards are intended to acknowledge such efforts. Employer Awards of Excellence were presented to five overall statewide winners, and also to 28 regional winners, each selected by their local workforce development boards. The 2002 Employers of Excellence and their nominating workforce boards are:

- *Texas Workforce Network Current Workforce Award of Excellence*
  King's Daughters Hospital
  Central Texas Workforce Development Board
- *Texas Workforce Network Future Workforce Award of Excellence*
  Pedernales Electric Cooperative
  Concho Valley Workforce Development Board
- *Texas Workforce Network Transitional Workforce Award of Excellence*
  Integrated Health Services, Inc.
  Tarrant County Workforce Development Board dba Work Advantage
- *Texas Workforce Network Most Engaged Employer*
  University of Texas Medical Branch
  The WorkSource– Gulf Coast Workforce Development Board
- *Texas Workforce Network Employer of the Year*
  Texoma HealthCare System -
  Texoma Workforce Development Board

The 2002 recipients of the Workforce Development Board Employer Awards of Excellence and the local workforce boards that nominated them are:

- AIG Annuity Insurance Company
  Panhandle Workforce Development Board
- Bruce Thornton Air Conditioning, Inc.
  South Plains Workforce Development Board
- Lear Sigler Services
  North Texas Workforce Development Board
- Rubbermaid
  North central Texas Workforce Development Board
- Lockheed Martin Aeronautics Company
  Tarrant County Workforce Development Board dba Work Advantage
- HCA – North Texas Division, Inc.
  Dallas County Workforce Development Board
  dba WorkSource for Dallas County
- Mount Pleasant Independent School District
  North East Texas Workforce Development Board
- Stage Stores, Inc.
  East Texas Workforce Development Board

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- Sears Methodist Retirement System, Inc.
  West Central Texas Workforce Development Board
- The Hoover Company
  Upper Rio Grande Workforce Development Board
- Medical Center Hospital
  Permian Basin Workforce Development Board
- Town & Country Food Stores
  Concho Valley Workforce Development Board
- Lehigh Cement Company
  Heart of Texas Workforce Development Board
- City of Austin
  WorkSource – Greater Austin Area Workforce Board
- SYSCO Food Services of Austin
  Rural Capital Workforce Development Board
- Tarlton Supply Company
  Brazos Valley Workforce Development Board
- Tyson Foods, Inc.
  Deep East Texas Workforce Development Board
- South Hampton Refining Company
  South East Texas Workforce Development Board
- Formosa Plastics Corporation, Texas
  Golden Crescent Workforce Development Board
- Taco Cabana, Inc.
  Alamo Workforce Development, Inc.
- Wal-Mart Stores, Inc.; Wal-Mart SuperCenter of Laredo
  South Texas Workforce Development Board
- Kiewit Offshore Services, LTD
  Coastal Bend Workforce Development Board
- KTLM Telemundo Canal 40
  Lower Rio Grande Valley Workforce Development Board
- A & V Lopez Supermarkets
  Cameron Works, Inc.
- General Mills, Inc.
  Texoma Workforce Development Board dba Workforce Texoma
- McLane Southwest
  Central Texas Workforce Development Board
- Agrilink Foods, Inc.
  Middle Rio Grande Workforce Development Board
- HCA-Gulf Coast Division
  The WorkSource – Gulf Coast Workforce Development Board

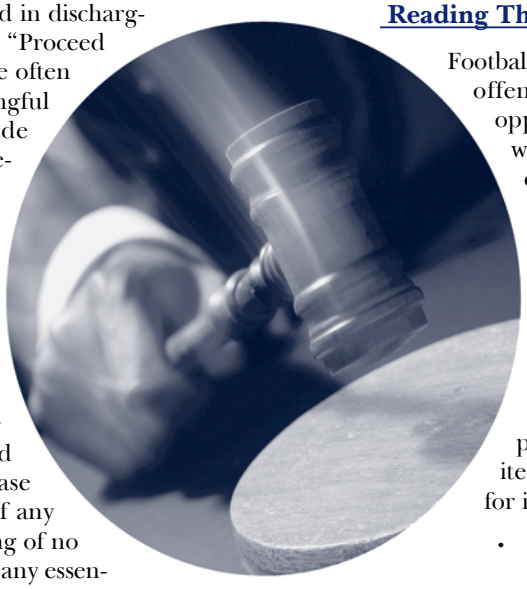
Congratulations to all 2002 Winners!

Sincerely,

Ron Lehman
Commissioner Representing Employers

Advanced Strategies for Success in Unemployment Hearings : A Winning Season

Employers know very well the risks involved in discharging employees, as the advice is often given: "Proceed with caution!" Although the at-will doctrine often protects an employer from liability for wrongful discharge, that protection does not include relief from expensive unemployment chargebacks. Employers also know that they have to prove misconduct to avoid a chargeback for unemployment benefits paid to a discharged worker. The problem is that it's difficult to know in advance whether TWC will consider the employer's reason for discharge a sufficient basis to disqualify a worker. In this article, we will cover the essential elements that an employer must be prepared to present to TWC if a discharged worker files an unemployment claim. Please note that proving the essential elements of any case is not guaranteed to secure you a ruling of no chargeback, but an employer who is lacking any essential element is exposed to the substantial risk of a losing case!



Reading The Defense

Football strategists know that successful, modern offenses are based on an ability to read the opponent's defense, and the same thing's true when it comes to winning an unemployment case against a discharged worker. Please remember that a fired worker has the right to present evidence. Your case will be stronger if you are prepared to overcome the claimant's evidence. When a worker is discharged, the employer should always be ready to show that the worker was fired for some form of "misconduct." Misconduct has a definition in the law, but to an employer it's simply any conduct that's prohibited, or the worker wouldn't have been fired for it. Some common examples:

- Unexcused or unauthorized absence or tardiness
- Failure to notify the employer of absence or tardiness

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- General carelessness
- Destroying tools, supplies, or other property, either intentionally or carelessly
- Stealing
- Dishonesty
- Rudeness to customers or other employees

For all of the most common forms of misconduct, a worker's defense often falls into three main categories.

- I didn't do what I've been accused of doing.
- I admit that I did what I was accused of doing, but I have a reasonable, legitimate explanation for my actions.
- I did what I was accused of doing, and I have no reasonable, legitimate explanation for my actions, but I didn't know that I could be fired for what I did.

Recognize that there may be other defenses a worker can present, and other forms of misconduct for which a worker may present a "defense" not listed here. Nevertheless, the examples listed will cover many common cases and present opportunities for an employer to begin preparing a strong offensive strategy.

The Employer's Playbook

Now that we know the most common defenses a discharged worker can present, we can start to prepare the employer's case. Simply put, the employer must be prepared to present evidence to overcome any defense the worker is likely to present, and we've covered the most common examples above. For each one, the employer has a potential offensive strategy, and each will be discussed in detail.

- The employer must present evidence to prove that the worker engaged in specific misconduct on a final incident, and the evidence should be sufficient to overcome the worker's denial of the conduct.
- The employer must present evidence to prove that the worker had no reasonable, legitimate explanation for the conduct involved in the final incident.
- The employer must present evidence to prove that the worker knew or should have known that the conduct involved in the final incident would lead to the worker's discharge when the employer found out about the incident.

Control The Ball

It's been said before, but it's worth repeating: firsthand testimony is the strongest form of evidence to prove that a worker engaged in specific conduct on the final incident leading to discharge. The advice of "document everything" just doesn't apply to proof of a final incident. An employer may "document" that a customer complained about a worker's rudeness toward the customer, but that's not enough to prove misconduct if the worker testifies, "I was not rude to the customer." The human resources manager may present a written statement from a supervisor attesting to the claimant's tardiness, but that will not overcome a worker who testifies: "I reported to work on time on the day I was fired."

Your stated reason for discharge should be as specific as possible. If you can, state what the claimant did, and not what he failed to do. "The worker committed unexplained spelling errors" may be stronger than "the worker failed to use the spell-checker." If any person observed the conduct for which the worker was finally discharged, then the employer must be prepared to have that person appear at an unemployment hearing to present firsthand testimony about the final incident. A written statement is not testimony, even if the written statement is sworn and notarized! Unfortunately, the reality of the modern workplace is that many workers perform their work, including interaction with customers, largely unsupervised. If the employer is unable or unwilling to have a customer participate in an unemployment case, then the employer is at a severe disadvantage. This does not mean that the employer is powerless in this situation. If you have evidence from your surveillance system that will prove the final incident, you must present the evidence (audiotapes and videotapes) at the hearing. It is never enough simply to say that you know what the worker did because you saw the videotape! Employers who have surveillance evidence and present it enjoy a high rate of success in hearings, but few employers use this type of evidence.

For some employers, surveillance may not be a practical option. Another recent development in the business world may serve those employers better: the "mystery shopper." "Mystery shopping" is a relatively new service available for a variety of different purposes, including monitoring work performance. Mystery shoppers can pose as customers or even co-workers to allow management to know how workers perform when they're not being directly supervised. Discipline is not the only potential use of mystery shopping. Mystery shoppers can reveal lapses in internal control for which only management can be held accountable, uncover structural problems that prevent your employees from effectively serving your customers, or show you the employees deserving of bonuses and promotions for outstanding performance.

If you decide to use mystery shoppers, select a service that can provide you with an individual who can ultimately testify in an unemployment hearing. And realize that you can always have "informal" mystery shoppers. Having a family member pose as a "challenging customer" so that you know how your employees respond is legitimate, and it gives you a witness for your potential unemployment hearing without having to drag a "real" customer into what can be a very unpleasant dispute.

Cover The Fundamentals

One of the most-often ignored aspects of the employer's unemployment case is proof that the worker had no reasonable, legitimate explanation for the conduct on the final incident. A typical example is the worker who is discharged for three days of absence without notice, in violation of the employer's policy. The employer presents a copy of the policy signed by the worker, and the worker openly admits to the absence without notice when questioned by TWC. The employer may still lose! How is this possible? Please

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recognize that there is almost always a reasonable, legitimate explanation for every action a worker can take, including absence without notice. Serious illnesses can justify the absence, and it's not beyond comprehension that a worker may be unable despite the worker's best efforts to contact the employer by telephone, often due to the serious illness.

How is an employer ever to obtain the evidence to prove that a worker had no reasonable, legitimate explanation for the conduct on the final incident? The answer is simple: before firing *any* worker, just sit the worker down and ask, "Why were you not at work for three days? Why did you not call in?" Again, please recognize the importance of having an observer present during any questioning of this nature. A worker may say, "I just thought I didn't need to call," but you won't be able to prove that the worker made such a statement if the worker tells the TWC, "I couldn't call because I couldn't reach a phone." If you have an observer present during the questioning, you have proof that the worker had no reasonable explanation for the final incident.

Many employers in these situations will want to notify the absent worker of the discharge, but that may be completely unnecessary. Many times, an employee being considered for discharge has no interest in continuing work, but the worker would prefer a discharge for the advantage that gives the worker in the unemployment arena. A worker who is not currently reporting to work should not be told anything other than: "You're on the schedule. Please report to work as soon as possible." Telling the absent worker, "You've been replaced," can be construed as a discharge.

The strategy of questioning a worker before firing the worker applies to *every* discharge, not just absence without notice. Always ask (with an observer present), "Why did you do it?" The "it" in this question is nothing more than the conduct on the final incident. "Why were you late?" "Why were you rude to the customer?" Recognize that TWC will always ask these questions of a discharged worker, and you have to be able to prove that you offered the worker the same opportunity before discharge and that the worker didn't have a satisfactory answer.

Special Teams

The third element of the employer's offensive strategy is nothing more than the age-old advice of issuing warnings before discharge. Unless your own written policies guarantee three warnings before discharge, you're not required to issue three warnings. To be safe, there should always be at least one warning that is clearly marked: "FINAL WRITTEN WARNING." Except for possibly your own policy, there is nothing to stop you from making the first warning a final warning. Documents with headings like "meeting notes," "friendly reminder," or "fun facts about keeping your job" don't clearly communicate the disciplinary nature of the notice.

Keep your warning notices as simple as possible. Here's a sample warning notice :

"Last week, you committed xyz. We don't tolerate xyz. If you commit xyz or any other misconduct in the future at any time, you can be fired immediately without any further warning. YOUR JOB IS IN JEOPARDY." (In your actual warning notice, just replace "xyz" with the specific conduct that caused the warning.)

You must expect that a discharged employee will simply state: "I was never warned." When that happens, you must be prepared to present the written, signed warning that you issued to the worker. Please secure your signed warnings in locked cabinets at all times! They are valuable documents potentially worth thousands of dollars!

There are some rare cases of egregious conduct for which no warning is necessary before discharge. Some conduct is wrong in and of itself, even in the absence of policies and warnings. A worker who challenges the company president to step outside to fight does not need to receive a warning! The reality of the modern workplace is that common misconduct is rarely as extreme as a worker challenging the boss to a fight, so most cases become much stronger if the employer has proof of at least one clear, written warning.

Game Day

Now you're ready to take the field, with some final coaching. Remember that you must have all of your evidence *before* a worker is discharged. Facts that you learn after a worker is discharged are irrelevant to your discharge decision, so those facts are likewise irrelevant in the potential unemployment case. Investigate fully *before* you discharge! Lengthy delays between the time you learn of the final incident and the time of the discharge will be held against you. You're deemed to have condoned the conduct, so TWC won't call it misconduct. Investigate quickly *before* your discharge!

Finally, keep in mind that you aren't guaranteed to win even if you've prepared all three basic elements of your case discussed in this article. Individual cases are too complex to cover here, so call us (800 832 9394) with your questions *before* you take the step of discharge. If you lack even one of the three basic elements covered in this article, you are exposed to serious risk of losing your potential unemployment case. Be prepared before you discharge! Good luck!

Jonathan Babiak
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Legal Briefs – Fall 2002

Attention Employers: New Rights for Non-union Employees Facing Discipline

Union members have had the right to have another employee present during an investigatory interview since the U.S. Supreme Court issued its decision in *National Labor Relations Board (NLRB) v. J. Weingarten* (420 U.S. 251) in 1975. Since that case involved a clerk being investigated by the Weingarten Company, the right to have a co-worker present during such an interview has become known as an employee's "Weingarten rights."

Until recently, it was somewhat unclear whether *Weingarten* rights applied only to unionized employees. Then, in November 2001, the D.C. Circuit Court of Appeals ruled in a landmark case that employees have the right, whether union or non-union, to request that a co-worker be present during a meeting or investigatory interview from which disciplinary action might result. (*Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board, 268 F.3d 1095 (D.C. Cir. 2001).* And, in early June 2002, the United States Supreme Court declined review of the appeals court's decision, meaning that it found no compelling reason to disagree with it. (*Epilepsy Foundation of Northeast Ohio v. NLRB,* U.S., No. 01-1292, cert. denied 6/10/02).

The Facts

In January 1996, Arnis Borgs and Asraful Hasan, both employees of the Epilepsy Foundation of Northeast Ohio, were suspected of composing a memo criticizing their boss and sending it to their boss's supervisor; they were each asked to attend a disciplinary meeting. Mr. Borgs refused to attend his meeting alone, and asked if Mr. Hasan could accompany him. The Foundation's response was to send Borgs home; the following day, he was fired for refusing to meet with his supervisors. Mr. Hasan went to his disciplinary meeting and was given a warning notice for his role in creating the memo. Several months later, Hasan was fired for refusing to accept supervision.

The two fired workers then took their case to the National Labor Relations Board. In a 3-2 vote, the NLRB overturned a 12-year precedent and ruled that Borgs' request to have a co-worker present was a protected activity even though he was not a union member. (88 LRRM 2689, 2001). In extending the holding in *Weingarten* to the non-union workplace, the NLRB observed that "…the right was grounded in the language of Section 7 of the Act, specifically the right to engage in 'concerted activities for the purpose of mutual aid or protection.' This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a co-worker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" (page 3 of NLRB decision, Cases 8-CA-28169 and 8-CA-28264, July 10, 2000.)

On appeal, the D.C. Circuit Court of Appeals affirmed that part of the NLRB's ruling, but reversed the part of the ruling that applied

the rule retroactively to the Epilepsy Foundation, since the employer had acted in good faith reliance on the NLRB rule at the time of the incidents, namely that *Weingarten* rights extend only to union employees.

Now What? Some Practical Advice

As the appeals court pointed out, neither the NLRB ruling nor the appeals court decision go so far as to impose certain additional requirements on employers that might otherwise be an onerous burden on the disciplinary or investigation process:

- The employer is not required to inform an employee of his or her *Weingarten* rights or tell an employee about their right to have a co-worker present during the investigatory interview. The employer must only allow a co-worker to be present if it is specifically requested by the employee.
- The ruling does not give an employee the right to delay a meeting if their co-worker of choice is unavailable at the time the employer wants to hold the meeting. If the employee asks for a specific co-worker who is unavailable at the time of the meeting, the employer can tell the employee to choose another co-worker.
- The ruling does not discuss the right of the employee's co-worker to speak during the meeting or ask questions. Presumably, a reasonable amount of consultation between the employee and the co-worker would be allowed. However, if the co-worker is disruptive or otherwise interferes with the meeting, the employer would

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presumably have the right to ask the employee to select a different representative.

- As the court of appeals noted, an employer has no obligation to hold an investigatory interview before disciplining an employee. The employer can forego a meeting altogether and simply act on the basis of other evidence in the matter. However, that alternative may often be unsatisfactory, since employers usually want to know exactly what happened so that appropriate action can be taken.

- Employees may ask a co-worker, *but not their attorneys*, to accompany them to an investigatory interview; employers can either allow the co-worker to be present or deny the request and end the interview immediately. Employers also have the option of giving employees a choice of:
(1) having the interview without representation or
(2) ending the interview.

- Finally, the employer should always document its efforts to comply with the employee's right to have a co-worker present during such a meeting.

Some Final Thoughts

Although Texas employers are not bound by the D.C. Circuit's decisions, there is no reason to believe that the NLRB would rule any differently in a dispute involving a Texas employer. And, the U.S. Supreme Court's recent ruling indicates that the highest court in the country found no compelling reason to disagree with the decision.

The recent court decision extending *Weingarten* rights to non-union employees could in part be a reflection of the political climate existing at the time the NLRB decision was made. Because the NLRB is an administrative agency made up of political appointees, its decisions sometimes vary according to the political philosophies of the board members.

Reactions to this decision have been decidedly mixed. On the one hand, employers are hopeful that the recent extension of *Weingarten* rights will be limited in some way by a more conservative influence on the NRLB. On the other, labor unions remain optimistic that the rights of workers to engage in concerted activities will extend outside the traditional union context in the future. While there is always the possibility that the NLRB will reverse this ruling in the future, until that occurs, employers should make sure they are aware of this ruling. Consulting with an employment law attorney regarding any questions about this important legal issue would be a wise investment of time and resources.

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Pre-Employment Assessments: Some Tips on Doing it Right

"My assets go home every night!" So remarked Michael Eisner, Disney's CEO. Eisner's comment is an example of the current thinking that business value goes much deeper than traditional valuations based solely on capital assets. To a greater extent than ever before, organizations are measured on their ability to gain a return on their intangible assets: assets such as knowledge and the ability to effectively apply that knowledge through a competent, compatible, committed workforce.

The understanding that organizational value lies beyond the financial statements and the physical plant is forcing recognition of the extraordinary impact that human resource departments can have on the successful execution of corporate strategy. In the past, we have all paid lip service to the idea that people are a company's greatest asset. Yet, staffs were built with only a cursory screening of whatever applicants were available at the lowest cost. Now, the "people factor" is finally becoming a strategic focus in reality.

Successful human resource departments must now become the strategic provider of the organization's competencies: providing exceptional people and the necessary training to achieve the organization's vision. Success in this newly-valued role will greatly determine the degree of greatness that the organization achieves as a whole.

Uncommon success is the result of the right strategies executed by the right people. While this seems intuitively obvious, most companies fall well short when it comes to execution. Getting our arms around the "people factor" is imprecise and difficult. Even if we really know what we want, it is difficult to identify it when it walks in the door.

Jim Collins, author of the book *Good to Great*, says that great companies place a priority on having the right people before developing the right strategy. Collins proclaims: "We expected that good-to-great leaders would begin by setting a new vision and strategy. We found instead that they first got the right people on the bus, the wrong people off the bus, and the right people in the right seats - and then they figured out where to drive it."

This may be easy to say but not so easy to do! In truth, most hiring systems are just not refined enough to truly differentiate the top producers from the less effective. We are generally able to eliminate the majority of the applicants who obviously don't represent what we seek, but selecting the true "A" performer from a pool including lots of "B's" and "C's" is largely guesswork. The performance difference between "A" performers and "C" employees is at least 50%, and often 100% or 200%. In the area of sales, it may be 500% or more. Selecting the right people is not just about good HR procedures; it is, indeed, about great business strategies.

To fulfill its true, high-impact role in organizational success, the human resource function must move from primarily being an establisher and enforcer of procedures to being an effective evaluator of risk and reward. It must move to making sound business decisions as a strategic corporate partner. The human resource function, more than any other, can truly build the corporate foundation for greatness. It is the guardian of the company's values, because it is the organization's people, first and foremost, that project the company's image in the marketplace. Getting the right people on the bus and in the right seats is the goal of every hiring decision. The question becomes: how is this best accomplished?

The Increasing Impact and Use of Pre-Employment Assessments

Of the two general categories of job-applicant evaluation, skills competency and compatibility, most hiring systems focus on skills competency. However, rarely are people fired for lack of competence. It is incompatibility with organizational values and culture that is the cause of most problems.

One definition of exceptional employees is "honest, hard-working, drug-free, reliable individuals who identify with your core values and culture, do things your way, and project the image you want to project, all while gaining a sense of self-satisfaction and accomplishment from their contribution to the organization, and loving the environment in which they work." This definition demonstrates the significance of matching people first to organizations, and then to jobs. Failure to achieve this compatibility causes good people to fail, because they are simply on the wrong bus. All of us know someone who was fired from one company yet went on to become a superstar in another. They didn't suddenly improve their skills. They just found the right "bus."

Use of pre-employment assessments is rising rapidly as employers try to define their organization's unique compatibility factors. Recent advances in psychometric research have created a new breed of pre-employment assessments, specifically designed for business, to meet this demand.

Recent research has shown that employers utilizing "validated selection tests" for pre-employment assessment outperform other businesses, experience lower turnover, and report four times the market value to book value.

What Should a Pre-Employment Assessment Measure?

Simplistically, an employer wants to know:

1. Can the applicant do the job?
2. Does the applicant want to do the job?
3. Will the applicant do the job within our organizational values and culture?

The "can-do" factor is a question of both skills competency and abilities. Knowing that the abilities and other compatibility factors are present, the hiring manager may decide to make the investment in training to compensate for lack of skills. More and more employers are seeking abilities and compatibility first, even at the expense of skills. Matching abilities to the position has more impact on employee job satisfaction than any other single factor, including personality. Individuals whose abilities exceed the requirements of the job may become bored and be difficult to keep challenged. As a result, they are a likely turnover prospect. In some

Pre-Employment Assessments - cont.

jobs they may even become a safety hazard because their mind, not being fully engaged, wanders off. Conversely, when mental abilities are less than the job requires, the employee has difficulty keeping pace with the rate of change. This inability becomes a source of frustration to the employee, to co-workers, and to management.

The "will-they-do-the-job" factor is about matching core behavioral competencies. These are the behavioral traits that need to be aligned with the requirements of the job and the values of the organization. It is preferable to have these behavioral tendencies mapped against the working population as a whole. This mapping not only depicts the applicant's traits, but also helps to determine the relative size of the applicant pool. For example, if an employer is seeking people who fall in the top 15% of the population in terms of energy level, then the company is working with a smaller applicant pool, meaning it may take longer to fill the position. Consequently, the employer may need to have a little more patience or run the risk of selecting someone without the necessary energy to sustain the pace the job requires.

The "do-they-want-to-do-the-job" factor is about interests. People become more engaged in and passionate about things that interest them. What we want to learn here is simply whether the job contains elements that appeal to the interests of the job candidate. The assessment method you choose should have the capability to create a compatibility model representing proven superior performers (the top 20% or so). This model should clearly differentiate the superior performers from the rest of the population, thereby demonstrating the correlation between assessment results and performance on the job. Once the compatibility model is developed, applicants may be compared to it to see how well they fit. Preferably, this fit should be reported as a percentage so an acceptable baseline may easily be developed.

Does Using an Assessment Increase My Exposure to Litigation?

Pre-employment assessments or tests must be job-related and non-discriminatory, i.e., required of all applicants in a particular job category. Protection from litigation, particularly claims of discrimination, is best achieved by being objective, consistent and fair. The assessment must be administered using consistent procedures. The information must be relevant to job performance, and it must be used in a consistent manner. When this is done, assessments can bring a level of objectivity to an otherwise very subjective process, thereby reducing exposure to litigation.

If you have at least 15 employees, be certain that your hiring process, including the administration of assessments, complies with the Americans with Disabilities Act (ADA) by providing reasonable accommodation for individuals with disabilities.

Elements of Effective Assessments

One critical aspect of an effective assessment is a clear correlation between the results of the assessment and an employee's eventual performance on the job. This correlation brings a level of objectivity not obtained through the interview process, even when using behavioral, structured interviewing techniques. Developing this objective correlation is where many "personality" tests fall short. Generally, if the test reports results in one of four quadrants, colors, letters or numbers, then it is known as *ipsative,* meaning that it measures respondents against themselves rather than job-related standards. For example, two job applicants may have the same test profile, say XYZ, because each applicant is more "X" than they are "Y" or "Z". What may not be known is that one applicant may be 10 times more "X" than the other. This means there are some key personality differences between the two applicants that, in turn, may mean significant performance differences.

An assessment must also have a "fakeability detector." How does an employer know if the respondent is being truthful or just answering the questions with answers they think the company wants to hear? In other words, the assessment must distinguish between results that are trustworthy and those that are merely distorted.

Assessments should be self-explanatory and easily understood for use by all managers, particularly managers at remote field locations. If the assessment requires interpretation or a certified individual to present the results, then its usefulness is somewhat limited, and the cost of using it is increased. All managers should be able to easily and objectively use the information for selection, promotions, and coaching. This not only increases usability and reduces expense, but it can also reduce exposure to misuse and litigation.

Reliability and validity are two technical properties of assessments that measure quality and usefulness. These are the two most important features of an assessment.

Reliability refers to the repeatability of results. In other words, does the instrument measure what it claims to measure consistently or dependably? Reliability is the extent to which a person gets the same results when retaking the assessment. Reliability ratings above 90% are considered to be excellent, 80% to be good, and 70% to be adequate.

Validity is the most important issue in selecting an assessment; it is the extent to which an assessment measures what it claims to measure. An assessment cannot be valid if it is not first reliable. Validity is measured by a validity coefficient value where 0.35 and above is considered very useful.

The higher the reliability and validity, the greater chance there is of hiring the best candidate for the job.

Other Critical Factors

Ensure that a technical manual exists for the assessment and that it contains the statistical tables demonstrating that adverse impacts have been considered. Adverse impact can be acceptable only if proven to be based on business necessity – it is a bona fide occupational qualification, not mere preference - and is proven to be job-related for the position in question. In other words, be able to prove that better performers are selected when the assessment is used.

Be certain that the assessment has been designed specifically for business use. It must comply with privacy laws and should avoid questions involving sexual practices, and religious and political beliefs. If it is not appropriate to ask the question in an interview, it should not be asked on an assessment!

Pre-Employment Assessments - cont.

The assessment should be normed against the working population at large. This will allow the decision maker to clearly see the segment of the population where the respondent falls. For example, if the respondent falls in the upper 2.5% of the population in "assertiveness," a potential employer would know that the individual is more assertive than 97.5% of the workers in the labor market.

Look for ongoing value well beyond the hiring event. The assessment information should become part of a leadership system used to assist in coaching to peak performance, team building, career development, conflict resolution, and succession planning. In the final analysis, it is a company's employees that give it a competitive advantage. Reliable, valid assessments are the means to hone your organization's edge.

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Lead Consultant, VP of Performance Intel

For comments or questions regarding this article, you may contact Mr. O'Donnell at 972-982-0030 or e-mail him at bernie@performanceintel.com

Checklist for Choosing an Assessment

- Designed specifically for use in staff selection and coaching
- High reliability and validity scores
- Normative (normed against a population), not ipsative
- Measures cognitive, conative, and personality
- Provides job-match "models" that are tailored to a specific company and job
- Does not require technical interpretation, with reports that are clear and easily understood
- Contains built in checks to spot "distortion" and faking
- Provides the minimum return on investment required for other significant company investments
- Has current validation (not more than 5 years old) & supportive technical manual
- Data from each assessment has multiple uses, e.g., staff selection, career coaching and development, succession planning, team engineering, team building, management coaching, and training needs analysis
- Complies with EEOC, ADA, and other appropriate Texas and federal requirements
- Easy to administer, preferably internet-accessible, with paper administration as a backup
- Does not require certification, fees, or extensive training to implement
- User company can query, control and secure the assessment information data base
- Provides guidance to assist in interviewing and coaching
- Provides coaching guidance
- Takes less than 90 minutes to complete

The U.S. Dept of Labor's 13 Principles for Using Assessments

1. Use assessment tools in a purposeful manner
2. Use the "whole-person" approach to assessment
3. Use only assessment instruments that are unbiased and fair to all groups
4. Use only reliable assessment instruments and procedures
5. Use only assessment procedures and instruments that have been demonstrated to be valid for the specific purpose for which they are being used
6. Use assessment tools that are appropriate for the target population
7. Use assessment instruments for which understandable and comprehensive documentation is available
8. Ensure that administration staff are properly trained
9. Ensure that testing conditions are suitable for all test takers
10. Provide reasonable accommodation in the assessment process for people with disabilities
11. Maintain security of assessment instruments
12. Maintain confidentiality of assessment results
13. Ensure that scores are interpreted properly

IN THIS ISSUE

Texas Business Today

Texas Business Today is a quarterly publication devoted to a variety of topics of interest to Texas employers. The views and analyses presented herein do not necessarily represent the policies or the endorsement of the Texas Workforce Commission. Articles containing legal analyses or opinions are intended only as a discussion and overview of the topics presented. Such articles are not intended to be a comprehensive legal analysis of every aspect of the topics discussed. Due to the general nature of the discussions provided, this information may not apply in each and every fact situation and should not be acted upon without specific legal advice based on the facts in a particular case.

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