

Texas Business Today

Winter 2011

Tom Pauken, Chairman
Commissioner Representing Employers

The logo for Texas Workforce Solutions features the word "TEXAS" in a serif font, centered above the words "WORKFORCE SOLUTIONS" in a bold, sans-serif font. Below the text are five small stars arranged in a slight arc. The entire logo is set against a dark background with a subtle light effect.

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**Non-Competition Agreements: What's New
and Are They Right For Your Business?**

• Poor Attitudes in the Workplace • Refusal to Sign Policies or Warnings •

Texas' economic success serves as blueprint for rest of country

In a December 2010 report on the Texas economy, Comerica Bank Senior Vice-President and Chief Economist Dana Johnson said, "Looking ahead, I expect Texas to outperform the nation, as the state's low unemployment rate, moderate taxes and welcoming business environment attracts companies and people from other parts of the country." In an interview with *Smart Business*, he attributed Texas' positive 2011 projection to a number of improving measures that include a strengthening manufacturing sector and a positive growth rate in private-sector jobs relative to the nation at large.

Indeed, it is true. When it comes to job creation, Texas has outperformed the United States in nearly every sector as measured from peak levels before the recession. As I write this, the November year-over-year growth rate in

Chairman's Corner

Texas' employment is more than twice the national rate. Additionally, unemployment in Texas has consistently trended well below the

national level, even with headwinds like the sharp influx of jobseekers into the state.

In 2010, the manufacturing sector in Texas showed signs of vitality by nearly tripling the hiring rate of the nation which grew by less than 1 percent. In all goods-producing sectors in Texas, which include logging and mining, construction, and manufacturing, payrolls increased at a rate nearly nine times higher than that of the entire U.S. Among the 10 largest states, Texas has the lowest unemployment rate and the highest level of new job creation.

But no matter how well we do in this state, the continued stagnation and decline of our national economy will continue to have a negative impact on Texans -- particularly for those who have lost their jobs through no fault of their own.

The problems facing our national economy didn't just appear overnight, but have been building for more than a decade in the forms of excessive debt leverage, job outsourcing, and an unnecessary concentration of governmental power in Washington. Instead of addressing these issues head-on, our national leadership continues to pursue the same monetary and fiscal "solutions" that have done little to positively affect high unemployment, credit availability, or the record-high national debt.

This fall, the Federal Reserve Bank announced a second round of government bond purchases to the tune of \$600 billion in order to keep interest rates artificially low. Richard Koo, chief economist of Nomura Research, argues this approach was largely ineffective when tried in Japan which is still suffering the aftereffects of a



Texas Workforce Commission Chairman Tom Pauken speaks at the annual Texas Workforce Conference. *Texas Workforce Commission photo*

prolonged recession that lasted from 1990 to 2005. According to this view, the U.S. is already seeing signs of what he calls a "balance sheet recession", i.e., when high debt deflation triggers a prolonged period of deleveraging throughout the entire economy. This explains why the Federal Reserve's "Quantitative Easing" policies, which effectively amount to printing money, will do little to encourage capital investment or hiring from the private sector.

Rather than continue the policies of attempting to have our government spend its way to recovery, a truly long-term solution to high unemployment is to start growing the private sector again. I believe the best approach to putting Americans back to work is to completely eliminate our onerous corporate tax system and replace it with a revenue-neutral, business consumption tax that would be border-adjusted. All goods and services coming into the U.S. would pay the 8 percent business consumption tax while all exports would receive a tax credit. The 35 percent corporate tax rate would be eliminated as well as the 6.2 percent employer portion of the payroll tax. Instead of punitively taxing employment, savings and capital investment (as

our current system does), this new approach to business taxation would provide incentives to bring jobs home to America. Changing our tax policy would result in leveling the playing field with our trading competitors. It would help bring jobs home to America, get our economy moving again, and begin rebuilding our manufacturing base.

The crisis in unemployment is particularly worrisome for our younger generation of workers who just last spring witnessed an unemployment rate of 19.5 percent. That's twice the jobless rate of the general population, and the highest percentage of out-of-work young people ever recorded. Current levels have only marginally improved, largely on account of a falling participation rate among young people in the civilian labor force.

By encouraging proficiency in skill sets where there is the highest demand, we can help our younger generation regain competitiveness, and more importantly, help instill a heightened sense of self-worth as they develop the means to become self-sufficient, contributing members of society. The Texas Workforce Commission (TWC) has committed resources toward developing a workforce trained and knowledgeable in the most recent industry developments. Last year, more than 60,000 Texans received skills training in programs provided by the TWC and our partners in the 28 local workforce

boards. Working with our community colleges and Texas businesses, TWC helped provide for new and upgraded skills for Texas workers.

This is just one example of the Lone Star State's efforts to ensure prosperity and economic sustainability for future generations of Texans. I encourage our leaders in Washington to learn from our example, so that we as a country can move forward, confident about our children's futures and America's restored economic prominence. 🇺🇸

Sincerely,



Tom Pauken, Chairman
Commissioner Representing Employers



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Taking steps to deal with poor attitudes in the workplace

Staff at the Texas Workforce Commission (TWC) are uniquely positioned to observe how unemployment claims are caused, affected, and complicated by the, shall we say, less than fully desirable behavior of some employees. This article will

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illustrate how that can happen and

will suggest ways to deal with the complications while dealing with the unemployment claim and appeal process.

First, let's review the basics. Unemployment benefits are for those who are unemployed through no fault of their own. TWC must investigate each claim and determine whether the work separation was the claimant's fault. The burden of proof is always on the party that initiated the work separation. Thus, if a claimant quits, he or she will need to prove that a reasonable employee would have quit for such a reason. Conversely, if an employer fires an employee, the company will have to prove that the discharge occurred for a specific final incident of misconduct connected with the work and that the claimant either knew or should have known that discharge would occur for such an incident.

While the list of all the different ways that employees start their bosses thinking about how the office would be without them would be almost as long as a list of differences between human beings, the following real-life examples will illustrate the type of conduct we are discussing here:

- An employee threw a \$500

"holiday gift card" back at the employer, saying "F*** you - I don't celebrate the holidays!" two hours after receiving a warning that his job was on the line due to poor attitude, insubordination, profanity, and not doing his job.

- An employee with similar holiday spirit wadded up her holiday bonus check and handed it back to her supervisor, saying she was not interested in anything from the company.
- A member of a resort's groundskeeping crew, warned about excessive use of his cell phone and getting his duties done, used his company-issued smart phone to post comments on his Facebook page about what a doofus his supervisor was and how boring a staff meeting was while the meeting was in progress.
- Many employees are afflicted with Friday-Monday disease and call in repeatedly on such days.
- Too many to count are the ones who use their work computers to search for other jobs, send their résumés out to other companies, and arrange interviews, all on company time. A distressing number of employees actually tell the coworkers they are doing that, adding that they hope they get fired so they can "collect unemployment" (see below for more on this kind of behavior).
- A security guard at an industrial plant was observed by his supervisor sitting in a chair in the security booth, with

his head down on his folded arms, for fifteen minutes. At his unemployment appeal hearing, the claimant explained that he had not been sleeping, but rather had been praying.

Many of the above problems are in the category of poor attitude. As it happens, one of the most common complaints from employers concerns employees with terrible attitudes. Poor attitudes manifest themselves in different ways that are at the same time both interesting and destructive. Literally hundreds of calls come in from employers about employees who are overheard telling coworkers something like "I hope they fire me so I can collect unemployment." Then there are the ones who exhibit passive-aggressive behavior that keeps them just short of being fired, but constantly on the manager's list of things and individuals that make the job of managing less fun. Perhaps the following statements are things you have heard from your employees:

- That's not in my job description.
- Why doesn't Joe have to do that?
- Why do you always ask me?
- That's Linda's job.
- You told me to do the other thing first.
- This is the worst company I've worked for.

Poor attitude cases can be very hard to deal with in an unemployment claim, simply because of the difficulty of proving some kind of tangible final act of misconduct on the part of the claimant. Too often, an employer's attempt to convince a claim

investigator or appeal hearing officer that the claimant had a bad attitude comes off sounding like a personality dispute between the employer and the claimant, and such cases rarely result in a favorable ruling for the employer. In general, it is best to avoid accusing the claimant of having a “bad attitude.” Rather, be specific about behavior or conduct that violated a rule or interfered with the work of others. Document the warnings that were given. Present firsthand testimony from those who were affected by the claimant’s attitude problems. Their testimony should clearly explain how the claimant’s poor attitude made it harder for them to do their jobs, adversely affected customer relations, or otherwise hurt the company. Specifics are extremely important. Depending upon the facts, if the employer explains the circumstances well, the TWC decisionmaker can independently arrive at the conclusion that the claimant had a bad attitude.

Steps to Take

No one magic solution exists for dealing with the myriad forms of undesirable conduct as noted above, but here are some specific things to try for salvaging the situation:

- **Persistent rule violations:** Document the problems and make notes of available evidence, including potential witnesses. Give appropriate counseling, warnings, or other forms of corrective action consistent with your company’s policy. Prior to discharge, give the employee a clear written final warning letting the person know that he or she is at the last step of the process, that no further chances will be given, and that if the complained-of conduct occurs again, the employee will be subject to immediate discharge. This is not a casual step to take — do not give such a final warning until and unless the company is truly ready to act in the event



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of a verified and provable final incident.

- **“I hope you/they fire me so that I can claim unemployment.”:** It seems that the worse the economy gets, the more this kind of talk occurs. Those who utter such words usually have one or more misconceptions relating to the unemployment claim system. When not coupled with misconduct, it is an indication of growing discouragement that could be a precursor to undesirable conduct. It may help bring the person back to reality to calmly explain some things she may not realize, such as even if she manages to qualify for unemployment benefits, the benefits are about half or less

than half of what she had been earning in regular employment; that the benefits last for 10 to 26 weeks, and extensions under federal law are not at all a sure thing; that claimants are under a host of stringent requirements for maintaining their eligibility on a weekly basis, and many claimants complain about how much trouble the system is; that there are many claimants who would be eager to take the job she is treating so casually; that if she would like to work somewhere else, it is much easier to find a new job while currently employed than while unemployed; and that if she has any hope of improving her career chances, she needs to do whatever it takes to ensure

that her past employers are able and willing to give her good references. Tell her that before she continues thinking that an unemployment claim will be easy street, she needs to search online forums frequented by claimants to obtain a realistic view of the kind of things she can expect.

- **“This company is so unfair and/or the boss is so bad – I wish they would just fire me.”:** A slightly more serious form of the type of talk noted above, this is the kind of thing most commonly shared with coworkers. Left unaddressed, this can slowly affect other employees and lead to unnecessary morale problems. At some point, the company will need to confront the employee about such conduct and ensure that he understands how it is placing his job in jeopardy. Have a list prepared of the bad effects you have noticed. Discuss them with the employee and ask if he understands how and why such things are wrong. Remind the employee that he is wrong if he thinks his coworkers enjoy or appreciate hearing about his problems with his job and the company – in reality, the coworkers consider listening to such things a burden; they do not enjoy anticipating having him approach them with such dreary complaints; between themselves, the coworkers are most likely rolling their eyes when they talk about him distracting them that way; and in the final analysis, the employee’s attempts to get others to share in his poor attitude probably succeed mostly in lowering their opinions of him. Remind the employee he can turn that around by stopping the problem behavior. Conclude by asking him for confirmation that he understands that unless

he ends such conduct, he will lose his job. Give him a copy of a formal written warning to that effect. He does not have to sign it – what is important is that you can explain that he was given a copy of it. You can do that in front of a witness if needed (see also the information in “Refusal to Sign Policies or Warnings” in this issue).

- **“Monday/Friday disease”:** As a practical matter, it is so difficult to prove misconduct in the case of an employee who habitually calls in “sick” and ends up with more three- or four-day weekends than anyone else. If pressed, such employees can usually manage to submit a doctor’s note, making it even less likely that TWC would be able to find that the employee’s persistent Monday/Friday absences constituted misconduct. If counseling fails to turn the situation around, and the company has to let the employee go due to their unavailability for work, it is possible that such a layoff could be seen as a medical work separation, resulting in chargeback protection for the company. For more on this topic, see the article “Medical Absence Warnings” in the book *Especially for Texas Employers* online at http://www.twc.state.tx.us/news/efte/medical_absence_warnings.html.

No doubt about it – unhappy employees seem to generate a lot of tension for themselves, their supervisors, and even their coworkers. While unemployment cases involving poor attitude and undesirable conduct can be difficult to win, an employer’s chances of turning the situation around with an unhappy employee are increased if the supervisor can work with the employee one on one to find out what the employee’s underlying concerns might be. If

the employment of an otherwise qualified employee can be salvaged with such counseling and/or simple changes in the work environment, that would be a win-win proposition for all concerned.

However, if reasonable approaches do not produce the desired effect, then a properly documented and well-handled discharge could help the other employees breathe a sigh of relief. The main things to remember are to document the problems, give appropriate warnings, and treat the employee as fairly as possible. With documentation and firsthand witnesses on the company’s side, the employer will do about the best it can to avoid an unmeritorious unemployment claim. 

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How to deal with employees who refuse to sign policies or warnings

One of the thorniest problems is that of the employee who refuses to sign anything, either out of fear that signing something will commit them to it (in reality, under the employment at will rule in Texas, the only thing an employee needs to do to be bound by a policy or warning is stay with the company after being advised of the policy or warning – (see *TEC v. Hughes Drilling Fluids*, 746 S.W.2d 796), or out of a general lack of cooperation. Below are some methods that employers can try to deal with such “refuseniks”.

1. Hold a mandatory staff meeting – the following steps could help:
 - a. Everyone knows they have to be there or face the consequences of an unexcused absence (remember to count it as work time for wage and hour purposes).
 - b. Prior to the meeting, publish an agenda (e-mail; paper memo; supervisors distribute individual copies to their employees and log who gets copies) showing “distribution and discussion of new employee policy handbook / new _____ policy” as one of the items to be covered during the meeting.
 - c. Before the meeting begins, have everyone there sign an attendance log as proof they were present.
 - d. The manager who leads the meeting should follow the agenda, especially the part about the new policy issues.
 - e. When the time comes to discuss the policy, distribute copies of the new policy to everyone in attendance and have people in charge who will personally ensure that everyone gets a copy.
 - f. Discuss the policy in as much detail as is needed to get the ideas across.
 - g. Distribute copies of receipt acknowledgement forms to everyone there and ask everyone to sign and leave them with a designated supervisor at the end of the meeting. Consistent with method 3 (shown below), those who refuse to sign the regular forms could be given a chance to sign a different form indicating that they disagree with the new policies. Under the employment-at-will rule noted above, staying with the company after learning of the new policies will mean that they are effectively bound by them.
 - h. Collect the receipt acknowledgement forms.
 - i. After the meeting, publish the minutes of the meeting, with special attention to the fact that the new policy issues were discussed, that everyone in attendance received a copy, and that everyone was asked to return a signed acknowledgement-of-receipt form.
 - j. Keep a copy of the meeting notice, the agenda, the attendance log, the policy, and the minutes of the meeting as documentation that specific employees were given reasonable notice of the new policy.
 - k. In the face of all that documentation, an ex-employee would be facing a real uphill battle for credibility if they try to claim at an unemployment appeal hearing that they were never told about a certain policy.
2. Publish new policies on employees’ computers at log-in. Each employee must click on an acknowledgement and agree button (something like “I have read this policy and understand that it applies to me”) that appears only after the employee has opened the policy document and scrolled down to the end. Doing that allows the employee’s regular desktop screen to appear. Your IT staff should know how to code this set-up; be sure to have the IT staff maintain reliable documentation showing how each employee went through the process.
3. On warning forms, have spaces for “I agree with the reason for this warning” and “I disagree with the reason for this warning”. Ask employees to choose one or the other and sign or initial their choice. Employees who would otherwise refuse to sign a warning at all might at least choose the option of disagreeing. If they do, they will be unable to make a credible claim that they never saw the warning (for a sample written warning, see item 12 in the “Discipline” topic in *Especially for Texas Employers* at <http://www.twc.state.tx.us/news/efte/discipline.html>).

Source: http://www.twc.state.tx.us/news/efte/refusal_to_sign.html 

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Supreme Court to review Wal-Mart gender bias case

The Supreme Court has decided to grant review of what is the largest employment discrimination lawsuit in American history, potentially involving many hundreds of thousands of female employees who allege that Wal-Mart stores follow discriminatory hiring, promotion, and pay practices. The 9th Circuit

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Court of Appeals in San Francisco had

ruled that the female employees could maintain a class-action lawsuit against the store chain. Wal-Mart appealed on the grounds that its stores are independently operated and that the plaintiffs' individual situations were so different that it would not be appropriate to handle the matter as a class action, but rather as individual discrimination claims. If the Supreme Court upholds the class-action certification, the amount of back wages at stake in the case could potentially be in the billions of dollars.



Important Ruling in Workers' Compensation Case

In the case of *Leordeanu v. American Protection Insurance Company*, No. 09-0330, the Texas Supreme Court held on December 3, 2010 that an employee who was injured while traveling in her company car between two business-related destinations was injured in the "course and scope of employment" and thus entitled to workers' compensation benefits, even though her ultimate destination following the last business-related stop was her home at the end of her workday. With that holding, the court interpreted the so-called "dual-purpose rule" which puts within the course and scope of employment any

Under Texas and federal law, an employer is not required to respond to calls for information about current or former employees. The only exception would be if the call comes from a law enforcement authority, in which case your company is entitled to request proof that the caller is actually from that agency. *Stockbyte/Thinkstock*

dual-purpose personal/business travel that satisfies two tests: 1) it would have occurred even in the absence of the personal reason for the travel, and 2) it would not have occurred had there been no business reason for the travel. In the *Leordeanu* case, the plaintiff was at the end of a long workday, having started with business appointments, proceeded to a dinner with clients, and finished with a trip to a company-provided storage unit to unload business materials from her company car. The accident in which the employee was injured occurred en

route to the storage unit. The Texas Supreme Court, noting that the trip to the storage unit would have been made even if the employee had not intended to return home thereafter, held that the accident was work-related and thus covered by workers' compensation.

National Labor Relations Board Proposes New Workplace Poster

On December 22, 2010, the National Labor Relations Board

(NLRB) published a new draft rule in the Federal Register under which both unionized and non-unionized employers would be required to post for their employees a notice of their rights under the National Labor Relations Act. Interested parties may file comments with the NLRB until February 22, 2011. As with most laws requiring workplace posters, the proposed rule provides various sanctions for non-compliance, including cease-and-desist orders, tolling of the statute of limitations for filing an unfair labor practice charge, and a finding that willful refusal to comply may be taken as evidence of an unlawful motive in an unfair labor practice case. Details are available at <http://federalregister.gov/a/2010-32019>.

Requests for Job References: What's an Employer To Do?

Here in the Employer Commissioner's Office, business owners and Human Resources managers frequently ask us what information a Texas employer is required to disclose about a previous employee when prospective employers call. Many of you report receiving repeated calls about previous employees, with the caller demanding all sorts of sensitive and sometimes confidential information about the former employee's tenure with your company.

Here are some thoughts on those issues:

1. Under Texas and federal law, an employer is not required to respond to calls for information about current or former employees. The only exception would be if the call comes from a law enforcement authority, in which case your company is entitled to request proof that the caller is actually from that agency (example: ask for a call-back number and see who answers when that number is called).
2. Confirmation of employment



Under the Texas Payday Law, payouts of accrued leave are required only if a written policy or other form of agreement promises such a payment. Jupiterimages/ Polka Dot/ Thinkstock

- and dates of employment are usually safe territory, and many companies choose to release such information.
3. Since most of the time, you don't know who is really calling, or why they're really calling, you may wish to adopt a uniform policy of non-release of information over the phone. You can tell such callers something along the lines of, "I'm sorry, but we do not release information about our current or former employees over the phone. However, we would be glad to release any information that our former employee/your applicant authorizes us in writing to release to you. The other company could then have their applicant sign a form such as the one that can be found in our book, *Especially for Texas Employers*: http://www.twc.state.tx.us/news/efte/authorization_to_release_information.html.
4. Companies wanting usable job reference information should definitely have all of their applicants sign such forms, since it may make it easier to obtain information beyond the usual.

5. For detailed information concerning the legal issues involved with reference checks and tips for handling calls, you may visit: http://www.twc.state.tx.us/news/efte/references_backgroundchecks.html and http://www.twc.state.tx.us/news/efte/job_references.html.

When Accrued Leave Payouts are Required

Under the Texas Payday Law, payouts of accrued leave are required only if a written policy or other form of agreement promises such a payment. If a policy is silent on that point, or if the policy provides that unused leave is forfeited upon an employee's work separation, no such payment will be due. Employers should take care that their written policies express very clearly what employees can expect, and should enforce the policies as consistently as possible. More commentary on this topic is available in *Especially for Texas Employers* online at http://www.twc.state.tx.us/news/efte/accrued_leave_payouts.html and http://www.twc.state.tx.us/news/efte/vacation_and_sick_leave.html#accruedleave.

Non-competition agreements: What's new and are they right for your business?

It is fairly common to hear employers on our Employer Hotline tell us that a valued employee has left the company and has now opened shop across town and is competing with the employer. The former employee has not

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only taken the employer's customers, but also his or her business. Many Texas employers who call our Employer Hotline often ask whether a non-competition agreement can be enforced against such a former employee. Usually, the answer is, "it depends," and when it comes down to non-competition agreements in Texas, it depends on various issues. In order to understand Texas' non-competition agreement laws, we must dissect the Texas statute that governs such agreements. In 1989, the Texas Legislature enacted section 15.50(a) of the Texas Business & Commerce Code which states the requirements that make a non-competition agreement enforceable.

Legal Requirements for a Non-Competition Agreement

Section 15.50 of the Texas Business & Commerce Code requires that a non-competition covenant (1) be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made;" (2) impose "limitations as to the time, geographical area, and scope of activity to be restrained that are reasonable;" and (3) not "impose a greater restraint than is necessary to protect the goodwill or other business interest" of the former employer.

Ancillary To An Otherwise Enforceable Agreement

The first part of the statute requires that the employee's promise not

to compete be "ancillary to or part of" a related or underlying contract imposing binding obligations on the employee and the employer. In other words, a covenant not to compete is "ancillary to or part of" an otherwise enforceable agreement if: 1) the consideration given by the employer in that agreement gives rise to the employer's interest in restraining the employee from competing and 2) the covenant is designed to enforce the employee's consideration or return promise in that agreement [see *Light v. Centel Cellular Co.* 883 S.W.2d 642 (Tex. 1994)]. I know, you are thinking: can you please explain this to me in plain English?

To begin, there has to be "consideration," which in contract law is generally anything of value promised to another for signing a contract. For example, A signs a contract to buy a car from B for \$5,000; A's consideration is \$5,000 and B's consideration is the car. Therefore, the employer cannot have the employee sign a non-competition agreement and promise the employee additional compensation in return for a non-competition agreement because after all, the employee, by working, will be compensated in any event. Texas employers cannot "buy" a non-competition agreement [see *Trilogy Software, Inc., v. Callidus Software Inc.*, 143 S.W.3d 452 (Tex. App. - Austin 2004, *pet. filed*)]. However, stay tuned to see what the Texas Supreme Court decides on *Marsh USA, Inc. vs. Cook*, because *Marsh* may allow employers to give money in exchange for an agreement not to compete, which may make such agreements easier to enforce. In addition, the promise given in the underlying agreement must give rise to the employer's interest in preventing the employee from competing. In other words, whatever the employer promises to give to the employee (e.g., employer promises employee proprietary information)

in exchange for what the employer wants the employee to promise (e.g., employee promises not to compete) needs to be in the employer's interest. For example, proprietary information is consideration that, like the court in *Light* stated, "gives rise to the employer's interest in restraining the employee from competing." Therefore, it is in the employer's interest to keep the employee from competing when it gives an employee proprietary information. The court in *Light* gave "business goodwill", "proprietary information", and "confidential information" as examples of employer interests worthy of protection.

You are probably thinking: What is considered "proprietary information or confidential information?" In a 2009 case called *Gallagher Health Insurance Services v. Vogelsang*, 312 S.W.3d 640 (Tex. App.-Houston [1st Dist.] August 21, 2009, *pet. filed*), the court enforced a two-year non-compete agreement that Ms. Vogelsang, an insurance broker, had signed acknowledging she would receive different types of confidential information such as: confidential client information, pricing of special insurance packages, and information concerning the customers' policies. Ms. Vogelsang had left her position at Gallagher Health Insurance Services (GHIS) to work for a competitor and she argued that the information she had obtained while working for GHIS was not confidential information because it could have been obtained from public sources. The company argued that the information took two years to acquire; 2) was only shared with the company's employees and agents on a "need to know" basis; 3) was not "readily ascertainable by competitors;" and 4) gave the company a "valuable competitive advantage in the insurance brokerage industry." The court found that the not-to-compete covenant was enforceable because Ms. Vogelsang had signed and agreed not to compete

against GHIS in exchange for GHIS's promise to provide her with confidential information. However, Justice Jennings disagreed with the rest of the court, stating in the dissenting opinion that just because GHIS's information was only provided on a "need to know basis" did not make it worthy of protection and GHIS did not demonstrate that its customers' identities could not be easily obtained by others outside of GHIS. In other words, Justice Jennings believed GHIS failed to show that its customers' information was confidential, which brings us to the next question: Can a non-compete agreement be enforced when a former employee is taking his or her former employer's customers? The answer: maybe.

Texas courts focus on whether the identities of those customers are confidential. Whether customer identities are confidential depends on whether their information can be easily found, for example, in telephone books, or if the employer took reasonable steps to keep the customers' information confidential. For example, in a Texas Supreme Court case called *DeSantis v. Wackenhut Corporation*, 793 S.W.2d 670 (Tex. 1990), the court found that the employer, a company that specialized in furnishing security guards for businesses throughout the United States, failed to prove that its "customers could not readily be identified by someone outside its employ, that such knowledge carried some competitive advantage, or that its customers' needs could not be ascertained simply by inquiry addressed to those customers themselves." The employer had tried to argue that it had provided Mr. DeSantis confidential information (i.e., identities of Wackenhut's customers, and the customers' special needs and requirements); therefore, Mr. DeSantis should be prevented from competing with the employer. However, the court thought otherwise. Arguably, the "he's stealing my customers" defense may not be an employer interest worthy of protection. In addition, the court in also opposed the employer because the employer's need for protection afforded by the agreement not to

compete was unduly burdensome on the employee, because, after all, the employer was preventing the employee from having a livelihood.

While Texas courts look at whether the customers' identities are confidential, they also seem to look at the former employee's position. For example, in *M-I LLC v. Stelly*, Civil Action No. 4:09-cv-1552, 2010 WL 3257972 (S.D. Tex. Aug. 17, 2010), the court agreed with the employer's non-competition agreement, which prevented the employee from contacting all of the former employer's customers, including the customers the employee dealt with while working for the former employer. One of the factors the court looked at when determining the enforceability of the agreement was the upper management position held by the employee. The employer provided evidence showing that the employee was much "more than a manager and salesman." For example, the employer proved that the employee had relationships with "major international clients" and "participated in the design of the employer's tools" and "formulated company growth strategies and discussed product development with engineers." The court also found that the employee did have "sensitive information" and "intimate knowledge of tool designs and functionality" which was an interest worthy of protection and therefore, the court enforced the non-compete agreement which restricted the employee from all customer contact. Usually, in the context of sales employees, "a covenant not to compete that extends to clients with whom a salesman had no dealings" (i.e., customers the former employee never dealt with while working for the former employer) is unenforceable (see *Wright v. Sport Supply Group, Inc.*, 137 S.W. 3d 289 – Tex. App.-Beaumont 2004, no pet.). It is evident that the enforcement of a Texas non-competition agreement can vary from case to case.

Reasonable Time Limitations

Section 15.50 of the Texas Business Code also requires a non-

competition agreement to contain a reasonable time limitation as to how long the employee is restrained from competing. Texas courts have upheld two to five years as reasonable in a non-competition agreement [see *Stone v. Griffin Comm. & Security Systems, Inc.*, 53 S.W.3d 687 (Tex. App.-Tyler 2001, no pet.)]. So, will the time limitation be "reasonable" under the law if an employer picks any number between 2 and 5? No, not necessarily. The employer's reason for the time period will usually be balanced with the hardship the employee has to face (i.e., not being able to work). For example, in *Alex Sheshunoff Mgmt Servs. L.P. v. Johnson* 209 S.W.3d 644 (Tex. 2006), the Texas Supreme Court held that the non-competition agreement was reasonable in that the employee could not contact any clients or prospective clients for one year because he was a high-level employee and could not have otherwise capitalized on goodwill that he helped develop during his time with the former employer. Alex Sheshunoff Management Services, L.P., a company that provides consulting services to banks and other financial institutions, promoted Mr. Johnson to director of its Affiliation Program where he was to maintain relationships with current and prospective clients. Mr. Johnson left Sheshunoff to work for a competitor, and Sheshunoff argued that Mr. Johnson had been given confidential information and specialized training and in return had promised (i.e., he signed the non-competition agreement) not to "solicit or aid any other party in soliciting any affiliation member or previously identified prospective client or affiliation member." Sheshunoff provided evidence that Mr. Johnson had participated in confidential meetings regarding the company's "plans to introduce a bank overdraft protection product" and had received an "internal manual on this new product." The court took into account the "amount of information" Mr. Johnson received, "its importance, its true degree of confidentiality, and the time period" over which it was received. At the

end, the court found it reasonable to prevent Mr. Johnson from contacting Sheshunoff's clients or prospective clients for one year, which meant that Mr. Johnson could not work for the competitor that had hired him. As you can see the time limitation has to be reasonable, but what is "reasonable" depends on all the facts and how the court analyzes those facts. However, an indefinite amount of time is unenforceable, so employers should be sure to insert a specific time limit in a non-competition agreement.

Reasonable Geographical Limitations

In addition to a time limitation, a geographical limitation is required in a non-competition agreement. A "reasonable geographic scope is generally considered to be the territory in which the employee worked for the employer." [see *Butler v. Arrow Mirror and Glass, Inc.* 51 S.W.3d 787(Tex. App.-Houston [1st Dist.] 2001, no pet.)]. However, just because an employer may not want a former employee to work within, for example, a 20-mile radius, which the employer considers the territory the employee worked in, does not mean that such an agreement would be enforceable. Every case's outcome will depend on the facts. For example, in *Cukjati v. Burkett* 772 S.W.2d, (Tex. App.-Dallas 1989, no writ), the court found that because most pet owners travel a few miles to obtain veterinary services for their pets, a covenant not to compete which restrained a former employee from practicing anywhere within a 12-mile radius of the employer's veterinary hospital was considered unreasonable.

Texas courts also have refused to enforce non-competition agreements with nationwide limitations when the employee did not have nationwide responsibilities for the former employer. However, in a case called *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114 (Tex. App.-Houston [14th Dist.] 1999, no pet.), the court agreed with the employer in holding that based on the employee's job description and

responsibilities, it was reasonable to keep the employee from working in other oil and gas consulting firms in North America. In *Curtis*, the former employee worked as the Vice President of Pipelines and Energy Marketing, and the covenant not to compete barred the employee from participating in competitive business in Canada or the United States. The court agreed with the employer in that it was reasonable to restrict the employee from working for 20 oil and gas consulting firms in North America (i.e., specific firms the employer listed). The court stated that given the employee's high-ranking position and the unique aspects of the industry involved, just like we saw in *M-I LCC v. Stelly*, it was reasonable to restrict the former employee from working for certain companies in North America.

Therefore, it seems as though a Texas employer can have a non-compete agreement that prevents a former employee from competing for certain companies in North America. However, does this mean you can restrict, for example, a former administrative assistant from working anywhere in the United States? Probably not, but then again it depends on the facts of the case.

Reasonable Limitations on Scope of Activity

A reasonable restriction on the scope of activity can be a substitute for failing to include a geographical restriction in a non-competition agreement. For example, as we saw in *Sheshunoff*, the covenant prohibited the employee from providing services to the employer's clients for a period of one year after the employee separated from the employer. In other words, while the non-competition agreement did not include a geographical limitation (e.g., 20-mile radius), the court still found the agreement enforceable because it included a reasonable limit on the former employee's activities (i.e., the former employee could not contact any of the employer's clients).

Generally, like the previous two

requirements, this requirement is enforceable if the court decides that the restraint is tailored to match the employer's protectable interest. For example, in *Sheshunoff*, it was reasonable to restrain the former employee from contacting the employer's clients, since the former employee did obtain sensitive information which the court considered a protectable employer interest, and the information could affect the employer if obtained by a competitor.

In all, enforcing a non-competition agreement is more difficult than one may think. For example, keep in mind that merely having the employee's signature does not automatically enforce what is in the agreement. One must seek legal representation and have a court rule that the agreement is enforceable which takes time and money.

Here are three basic points to consider when contemplating the creation of a non-competition agreement:

1. Reasonableness: Remember that the agreement has to protect a legitimate business interest without unduly burdening the employee from finding a job.
2. Exchange for Something: Consideration must be present on both sides. The employer and employee have to "give up" something.
3. Time, Geographic Limitations, and Scope of Activity: Be specific and as reasonable as possible when setting these limitations.

For creating an enforceable non-competition agreement, it is always best to consult with an attorney. 🇹🇽

Marissa Marquez
Legal Counsel for
Chairman Tom Pauken

Federal income tax withholding: What's new in 2011

Employers will see changes when calculating Social Security taxes on their employees' January 2011 paychecks due to the recently passed Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

This Act includes a new Social Security tax break for 2011 which may result in an increase in take-home pay for employees. Through calendar year, 2010, employees have paid 6.2 percent

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of their eligible wages into Social Security.

With the Social Security tax rate change, only 4.2 percent of employees' eligible wages will go to Social Security. The employer-paid portion of 6.2 percent remains unchanged.

The 2011 Social Security wage base limit is \$106,800, and the Medicare tax rate is 1.45 percent for both employers and employees, unchanged from 2010. There is no wage base limit for the Medicare tax.

Another 2011 tax change that may affect some employees' pay is the end of the Advanced Earned Income Credit (EIC). This advanced payment expired on December 31, 2010; however, EIC eligible employees can still file for the credit on their annual personal income tax returns.

According to the IRS, employers should implement the 4.2 percent employee Social Security tax rate as soon as possible, but not later than January 31, 2011. After implementing the new 4.2 percent rate, employers should make an offsetting adjustment in a subsequent pay period to correct any over-withholding of Social Security tax as soon as possible, but not later than March 31, 2011.

To obtain Publication 15 (Circular E), Employer's Tax Guide, that contains the Percentage Method Tables for Income Tax Withholding to be used in 2011, please visit the IRS website,

www.irs.gov. That publication will also be available at IRS offices beginning in January 2011.

Employers to See Slightly Higher Unemployment Insurance Tax Rate

The standard minimum Unemployment Insurance (UI) tax rate paid by Texas employers in calendar year (CY) 2011 will be 0.78 percent, up from 0.72 percent in CY 2010, the Texas Workforce Commission (TWC) announced recently. The taxes replenish the Texas Unemployment Compensation Trust Fund which provides unemployment insurance for Texas workers who lose their jobs through no fault of their own.

By utilizing a public bond sale strategy and suspending the deficit tax component of the tax rate, TWC stabilized the CY 2011 employer tax rate increase, which was necessary to offset two years of higher UI benefit payments.

The minimum tax rates are paid by 213,000 or 63 percent of all experience-rated employers. An employer paying the standard minimum tax will pay \$70.20 in tax per employee in CY 2011, compared with \$64.80 in tax per employee in CY 2010.

Texas employer UI taxes at the minimum rate remain lower than many other states. Alaska employers at its minimum tax rate pay \$201 per employee; Arkansas employers at its minimum tax rate pay \$100 per employee; and Illinois employers at its minimum tax rate pay \$89 per employee.

The maximum UI tax rate, paid by 2.2 percent of Texas experience-rated employers, is 8.25 percent, down from a maximum rate of 8.60 percent in CY 2010. The average tax rate of 2.03 percent for CY 2011 is up from 1.83 percent in CY 2010, while the average experience tax rate of 1.96 percent for

CY 2011 is up from 1.74 percent in CY 2010. The new employer tax rate of 2.70 percent remains unchanged.

The components of the CY 2011 tax rate are:

- The general tax rate – this is based on claims against an employer's account. If TWC has paid benefits to former employees who were laid off or separated through no fault of their own in the past three years, then those employers will pay a general tax.
- The replenishment tax rate – charged to all employers to cover unemployment claims that are not charged to a specific employer. This tax tends to rise following economic slowdowns when claims increase and businesses close.
- The employment training assessment – charged to all employers who are eligible for a computed tax rate to finance the Skills Development Fund and the Texas Enterprise Fund. The employment training assessment calculation is a separate line item on the Employer's Quarterly Tax Report.
- The obligation assessment rate – collected to repay bond obligations. It is experience-rated, based on an employer's 2010 tax rate.

Texas law allows employers to "buy down" their 2011 tax rates by reimbursing part or all of the chargebacks that affected their rates for the year. The deadline for making a voluntary contribution under that program is the 60th calendar day following the mailing of the C-22 tax rate notice (which happens in early December of each year). Information on the voluntary contribution program, as well as a handy calculator for estimating what amount of buy-down is necessary to achieve a certain tax

rate, is available on TWC's Web site at the following address: <https://services.twc.state.tx.us/UITAXSERV/voluntaryContributionAnalysis.do>.

Source: Tax Department, Texas Workforce Commission (December, 2010)

Texas Population Grows to 25.1 Million

According to 2010 Census figures released in late December 2010, Texas added 4,293,741 residents since 2000, a 20.6 percent increase over the decade. By comparison, the population of the United States grew to 308,745,538, an increase of 9.7 percent in the same time period, and the slowest national growth rate since the Great Depression.

Percentage-wise, Texas' growth was the fifth highest nationally, trailing behind Nevada (35.1 percent), Arizona (24.1 percent), Utah (23.8 percent), and Idaho (21.1 percent).

California, with 37,253,936 residents, grew by 10 percent and remains the most populous state. (However, its growth has slowed to the extent that for the first time in its history as a state, California will not gain a U.S. House seat after a census; by contrast, Texas will gain four new Congressional seats). Texas is second, followed by New York (19,378,102), Florida (18,801,310), and Illinois (12,830,632). Michigan was the only state to lose population over the past decade.

Texas' Growth Trend Seen in Four Parts of the State

The growth trend isn't playing out evenly across the state. Dallas-Fort Worth, Houston-Galveston, San Antonio-Austin, and the Rio Grande Valley account for approximately 90 percent of the change in the state's population.

New Portal Helps Service Members, Employers Meet

A new, state-of-the-art Web portal, <http://www.EmployerPartnership.org>

has been rolled out to provide Texas' and America's employers with a direct link to some of the country's finest employees: service members and their families. The Partnership allows veterans, reserve-component members, their families, and wounded warriors to leverage their military training and experience for career opportunities in today's civilian job market with national, regional, and local Employer Partners. The user-friendly tools will make it easier for both job-hunters and employers seeking their skills.

The new portal simplifies the job application process by allowing users to set up a personal profile and maintain a record of their job searches and search parameters, meaning users don't have to start from square one every time they enter the system, saving them both time and inconvenience.

In addition, a resume builder helps users create a résumé and maintain it in the system. They can even set an alert function that notifies them when particular job announcements are posted. The new portal will also be easier for the approximately 1,200 employers already participating in the program to use. They will now be able to enter position vacancies directly into the system and track applications, as well as being able to tap into resumes already in the system and reach out directly to candidates who qualify for their positions.

The program continues to attract employer partners ranging from Fortune 500 companies to metropolitan police departments to "mom-and-pop" businesses. If you're interested in requesting membership in the Employer Partnership for your company, please visit the above-referenced Web portal for details.

Texas Cities Rank Tops With Military Retirees

Speaking of veterans, Texas cities rank at the very top of military retirees' preferences when it comes to where to live after retirement. USAA and Military.com released a survey in December 2010 listing

the following Texas cities in the top ten spots for military retirees: Waco, first place; Austin/Round Rock, third place; College Station/Bryan, fourth place; and San Angelo, sixth place. The rankings were based upon criteria such as proximity to a military base, VA hospitals or clinics, base amenities, state taxation on military pensions (Texas does not tax military pensions), employment and education opportunities, and general quality of life issues. Interestingly, although San Antonio did not make the overall top 10 list, it was number 2 on the "military metro" list and number 8 on the "large metro" list.

Sources: <http://www.military.com/finance/usaa-best-places-to-retire/2010/> and www.usaa.com

Doing Business with Public Sector Agencies

In an example of how small- and medium-size businesses can join together in an innovative way of doing business, the Comptroller's Office has awarded the state contract for delivery of office supplies and furniture to a consortium, AHI Enterprises, LLC, comprised of eight independent and locally owned office supply stores in Texas. Cities, counties, schools, and state agencies can order their office-related products through AHI, a certified Historically Underutilized Business (HUB). An interesting aspect of this arrangement is that public funds spent for office necessities stay with local vendors. Any public entity can use the AHI website at www.ahitexas.com to order supplies in line with procurement rules. The site also offers customers 24/7 access to their order and usage history, as well as to inventory and price lists, with a Texas SmartBuy interface that is consistent with existing internal reporting systems. This kind of consortium may be seen more in the future, as state and local governments attempt to stay in compliance with purchasing guidelines and try to keep their taxpayer money as local as possible.

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.

Topics have been selected based on the hundreds of employer inquiry calls we receive each week, and include such matters as the Urban Legends of Texas Employment Law and the Basics of Hiring, Texas and Federal Wage and Hour Laws, Employee Policy Handbooks: Creating Your Human Resources Roadmap, Unemployment Insurance Hearings and Appeals, and Independent Contractors. The registration fee is \$85.00 and is non-refundable. Seating is limited, so please make your reservations early if you plan to attend.

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

Upcoming Texas Business Conferences

- The Woodlands March 25, 2011
- Austin April 29, 2011
- El Paso.....June 10, 2011
- Fort Worth.....July 8, 2011
- Tyler.....July 22, 2011 (tentative)
- San Marcos Aug. 12, 2011
- South PadreAug. 26, 2011 (tentative)
- Houston.....Sept. 8, 2011 (tentative)
- Houston.....Sept. 9, 2011 (tentative)
- Waco Sept. 16, 2011

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