

Trusted compliance advice for Texas employers

Editor: Michael W. Fox, Esq., Ogletree Deakins, Austin

In The News ...

Texas: No. 2 destination for illegal immigrants

A report from the Department of Homeland Security's Office of Immigration Statistics says Texas is the second most popular destination for illegal migration.

Only California is home to more illegal workers and residents. Florida rounds out the top three spots.

The states with the fewest illegal immigrants, in order: Wyoming, Montana, North Dakota, South Dakota, Alaska, West Virginia, New Hampshire, Vermont and Maine.

Find more U.S. immigration statistics at www.uscis.gov/graphics/shared/statistics.

Texas food company settles OT claims for \$1.56 million

The U.S. Department of Labor announced that McLane Co. Inc., a Temple wholesale distributor of food and grocery products, has paid \$1.56 million to 570 current and former employees for wage-and-hour violations.

Labor Department investigators found that McLane failed to pay overtime wages to eligible retail merchandising employees in violation of the Fair Labor Standards Act (FLSA).

The company incorrectly regarded retail merchandising specialists at its Nicholasville, Ky., location as outside

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Texas Employment Law is published by **HR Specialist** and is edited by Michael W. Fox, a shareholder in the Austin office of **Ogletree Deakins**. He has more than 30 years' experience representing employers in court and designing employment law policies. Contact him at (512) 344-4711 or michael.fox@ogletreedeakins.com.

FMLA won't cover tardiness, restroom breaks

Employees are becoming well versed in the FMLA game, and you're paying the price.

Unscheduled intermittent leaves now account for a huge slice of all leaves of absence under the FMLA. And while the law does allow employees to take FMLA leave in small bites for doctor's visits or to care for sick relatives, it doesn't give unfettered rights to random workday breaks or to arrive late without a good excuse.

That's why employers can (and should) demand medical certifications for all FMLA leaves and challenge intermittent-leave requests to arrive at a less-disruptive schedule.

As a new Houston-area court ruling shows, the FMLA wasn't intended to cover employees' random work

breaks that damage the company's productivity.

Recent case: Call center employee Kenneth Mauder, who has diabetes, was frequently late to work. His diabetes medicine caused temporary uncontrollable bowel movements. He demanded unfettered permission to take necessary, lengthy restroom breaks at work. The

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Free report How to Wipe Out Fraud and Abuse Under FMLA

For an 11-step process to prevent fraud by employees inclined to "work" the system, download our free three-page primer, *How to Wipe Out Fraud and Abuse Under FMLA*, at www.theHRSpecialist.com/whitepaper.

Caution: Erase risky wording in handbooks

Your employee handbook can be a great legal tool ... or your worst enemy. It can keep you out of legal hot water or scald you. For example, Texas, like most states, considers people to be employed at-will, meaning they can be fired for any nondiscriminatory reason. But too many employers choose the wrong wording in their employee handbooks. The result: It can destroy employees' at-will status and establish a contract that allows you to fire only for cause.

The solution: Add a tough at-will statement to your employee handbook, applications and job-offer letters that emphasizes your right to hire and fire at-will. Require new hires to sign an acknowledgment. Also, warn hiring managers never to make promises that imply job security, such as, "You'll have a long career here."

Recent case: A hospital terminated employee Christine Burwell for per-

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Warn managers: Don't 'set an example' with one worker

The mantra in real estate is "location, location, location." But when it comes to employee discipline, the mantra must always be "consistency, consistency, consistency." Remind supervisors to dole out discipline in equal amounts for equal behaviors. Trying to "get tough" on one worker or "set an example" will only trigger discrimination claims.

Recent case: When Lily Moss, a Texas state prison guard, uttered the "n" word twice, she was written up and demoted for violating a work rule against racial slurs. Moss sued for sex discrimination, alleging that male guards who used the terms "wetback" for Hispanic prisoners weren't punished. A jury sided with her, concluding that she'd been treated more severely because of her sex. (*Moss v. Texas Department Of Corrections*, No. 05-11403, 5th Cir.)

Tip: Punish those who utter slurs equally and spread the word that no ethnic slurs will be permitted.

Prepare solid justification for RIF decisions

Even in a staunchly at-will state like Texas, employers preparing for reductions in force must validate their reasoning. It's best to *anticipate* a lawsuit when planning a RIF. That's because Texas laws require employees charging discrimination only to show the discrimination was a "motivating factor" in the decision to hire, fire or demote.

Recent case: Jerry White was diagnosed with leukemia and took two years' medical leave. But a year after his return, an oil-industry downturn caused the company to prepare a RIF of more than 500 employees, including White.

He sued, alleging violation of the Texas disability discrimination law. The company won because it provided a detailed explanation of the RIF, including financial figures, its restructuring plan and a breakdown of its evaluation process. (*White v. Schlumberger*, No. 01-05-00685, Texas Court of Appeals)

Note: The 5th Circuit includes Texas, Louisiana and Mississippi.

Owners can be held *personally* liable for company's layoff violations

In trying economic times like these, more and more companies are likely to downsize. When funding falls through and loans dry up, keeping a factory going may be impossible.

But the federal Worker Adjustment and Retraining Notification Act (WARN) makes sure employees won't have the rug suddenly pulled out from under them. It requires employers to give employees fair notice before they lose their jobs.

What's more, a recent 5th Circuit Court of Appeals decision makes clear that a business owner may be held *personally* liable if the company he controls violates the WARN Act.

Recent case: When Plasticsource terminated 64 employees from their factory jobs at the company's El Paso plant, they sued. They alleged the company fired them without any warning whatsoever.

They sued David Coburn, claiming that because he owned a 75% stake in Plasticsource, he was therefore liable for damages under WARN.

The trial court ruled for the former employees, awarding them \$196,000.

Coburn appealed, arguing that WARN only applies to corporations, not their owners.

The 5th Circuit Court of Appeals disagreed. It said that WARN prohibits employers from ordering a "plant closing or mass layoff until the end of a 60-day" notice. It reasoned that "employer" could include a person, not just a corporation. It then applied Texas corporation law, which says that a corporation's protective shield can be pierced.

Since the trial court said Coburn was the corporation's alter ego, the appeals court allowed him to be sued personally. (*Plasticsource Workers' Committee v. Coburn*, No. 07-50399, 5th Cir.)

Final note: WARN was designed to give employees an opportunity to adjust to a mass layoff by giving them at least a 60-day warning and continued employment for those two months. The penalties for violating WARN include back pay for the entire 60-day period, plus a \$500-per-day penalty for not notifying local government units about a pending mass layoff. For more information, go to www.theHRSpecialist.com/WARN_Nuts&Bolts.

Tardiness, restroom breaks

(Cont. from page 1)

Transit Authority denied his request because those breaks were hurting the call center's responsiveness.

After the Transit Authority fired Mauder for performance reasons, he sued, alleging he was entitled to FMLA leave for those restroom breaks.

The court disagreed and tossed out Mauder's case, saying that such breaks weren't the sort of thing that the FMLA protected unless he actually was too incapacitated to come to work at all. (*Mauder v. Metropolitan Transit Authority of Harris County*, No. 05-20299, 5th Cir.)

Note: In cases of employees' physical problems, consider the ADA, which may require periodic breaks as an accommodation for a disability.

Erase risky wording

(Cont. from page 1)

formance reasons. Burwell sued for breach of employment contract, saying the employee handbook—which stated "employees may be dismissed for cause"—made her a "contract" employee, rather than an at-will employee.

Two lower courts sided with Burwell, but the Texas Supreme Court tossed out her case. It concluded that the handbook's language merely says employees may be terminated for cause; it didn't say that terminations could only be for cause. (*Matagorda County Hospital v. Burwell*, No. 03-0111, Texas Supreme Court)

Bottom line: While this employer eventually won its case, an at-will policy would have saved it thousands in legal fees and lost time.

Employees can be penalized for work-injury absences

Texas employers can count employees' time off due to work injuries against their attendance records when calculating absence-related discipline, as a new court ruling makes clear.

The key is to establish a well-defined attendance policy that explains why attendance is crucial to your business and how you treat all absences. Don't create the impression that you're punishing employees because they file workers' compensation claims.

Firing an employee the first time he or she is injured at work isn't a good

idea, but neither is tolerating chronic absences when business necessity requires regular attendance.

Recent case: Gladys Hernandez sued AT&T after being fired for excessive absences. The call center she worked at required regular attendance and had a clear policy of progressive discipline. Certain absences were not counted, such as vacation days. Absences for work-related injuries weren't automatically excluded.

Hernandez was repeatedly warned for absences and finally fired when she

missed a day due to an alleged wrist injury. She sued, citing workers' comp retaliation. But the court tossed the case, saying nothing in Texas law requires employers to excuse time off for work injuries. (*Hernandez v. AT&T*, No. 08-05-00150, TX App. Ct.)

Final tip: If you have 50 or more employees, you're covered by the FMLA and can't penalize for FMLA-qualifying absences. Insist that injured workers obtain medical certification. If they can't, you can safely use the work injury to discipline for absences.

Terminations

Manager who did the hiring also should do the firing

It may be a good idea to track who in your organization makes the decisions to hire specific employees. That way, those managers can also be part of the decision to discharge employees who turn out to be duds.

Why? Because employees—even members of a protected class (i.e., race, sex, age, etc.)—will have a hard time arguing that bias played a role in their dismissal if the same person who fired them also hired them.

This is what courts refer to as the "same-actor inference." Basically, if an applicant is hired (despite membership in a protected class) and then fired by the same person, bias seems an unlikely reason.

The rationale: Why would someone hire a minority, a woman or an older applicant if he or she were biased against minorities, women or older people?

Recent case: Bernard White, who was over 40 years old, was hired by a

business associate to work for Omega Protein Corp., a fishing company. Five years later, that same associate fired White because of poor performance.

White sued, alleging age discrimination. But Omega pointed out that the same person who hired White, also fired White. Plus, the person who fired White was also over 40 years old. The court applied the "same-actor inference" and dismissed the case. (*White v. Omega Protein*, No. 05-20630, 5th Cir.)

FLSA

Be wary of limitations to FLSA professional exemption

Don't assume that medical employees with advanced training and licenses meet the "learned profession" exemption, which allows employers to pay lawyers and doctors by the hour and still not pay them overtime.

That blanket exemption applies only to lawyers who practice law and doctors who practice medicine, not other related professionals.

Many employers in the medical field assume that the exemption includes highly trained and licensed physician assistants and nurse practitioners, so they pay those employees on an hourly basis.

But the first federal appeals court to

consider the issue has now ruled that such classifications aren't legal.

Case in point: Nurse practitioners and physician assistants in five states sued their employer, EmCare, after the company refused to pay overtime.

EmCare said the employees were hourly medical professionals exempt from overtime.

The U.S. Labor Department sided with the employees, saying nascent professionals such as nurse practitioners and physician assistants still had to be paid on a salary basis to be deemed exempt under FLSA rules. A court agreed. (*Belt, et al., v. EmCare*, No 05-40370, 5th Cir.)

Advice: The simple fix is to pay nurse practitioners, physician assistants and other medical quasi-professionals who otherwise fit the "professional" exemption on a salary basis.

Free checklist

How to make the 'exempt vs. nonexempt' decision

To help you determine which employees are exempt from the FLSA, access our easy-to-use "FLSA Checklist: Exempt vs. Nonexempt Status" at www.theHRSpecialist.com/checklist.

FMLA users can shop for a second opinion

IOWA A company fired an employee for excessive absenteeism. She asked her doctor to certify that her absence was due to a chronic gastrointestinal disease (thereby qualifying her for FMLA leave). The doctor refused, as did a second doctor. A third doctor agreed to sign the FMLA certification, which the employee delivered in the 15-day limit. When the company refused to reinstate the woman, she filed an FMLA suit. The court let her case go to trial, saying FMLA regulations are silent about whether employees can approach multiple doctors to gain a signature on their FMLA certification form. (*Cook v. Electrolux Home Products*)

Advice: You may not realize that employees can go “window shopping” for the best medical diagnosis. But you don’t have to blindly accept the employee’s word. You can seek a second (and, if necessary, a third) opinion on the “seriousness” of the condition. You can choose the doctor for the second and third assessments, but you must pay for those visits.

Team-building is good; humiliation is bad

CALIFORNIA As part of a morale-boosting exercise, a security company staged employee team competitions. The “losing” teams were spanked with yard signs and forced to eat baby food and wear diapers. At least one employee’s morale wasn’t boosted. She quit over the incidents and sued, alleging sexual harassment. A jury awarded her \$500,000 in damages for emotional distress and lost wages, plus it slapped an extra \$1.2 million onto the company’s tab for punitive damages. Two supervisors who concocted the exercise were found *personally* liable for \$50,000 each. (*Orlando v. Alarm One*)

Advice: If your team-building exercises go beyond three-legged sack races and into the realm of reality TV, you could be headed for a lawsuit instead of improved camaraderie. Engaging employees in fun and games is fine, but make sure that the joke’s not at their expense. Stay away from activities that could embarrass, humiliate or injure employees.

Listen to worker complaints; don’t editorialize

OHIO Jordan Norton complained to his boss that he was offended by hearing the Lord’s name used in vain. He also argued that the company maintained a sexually hostile environment, citing boorish language by co-workers. The supervisor warned Norton that his complaint would only stir the pot further, and that co-workers would take a dim view if told to clean up their language. From that comment, Norton concluded that his supervisor took his complaint lightly. After the company fired Norton, he sued, alleging retaliation, and won. (*Norton v. Firstenergy Corp.*)

Advice: Process every employee complaint without commenting on its merits or on the potential consequences of making the complaint. Remind managers to do the same. Never make snide comments like, “This doesn’t seem like a big deal,” or, “A harassment claim could make it harder to work with your boss.” Such comments could be viewed as prejudgment of a complaint.

‘Excellent’ evaluation can still be retaliation

MARYLAND A government employee filed several race-bias complaints that were settled. When he transferred to a new position, he earned an “excellent” rating, plus a pay hike. But he still filed another race-bias suit. Why? His rating wasn’t high enough to also earn a bonus that year. The rating, he said, was retaliation for earlier lawsuits. A federal court let his case go to trial, saying he should have a chance to prove the rating was still retaliation. (*Webster v. Rumsfeld*)

Advice: Always document evaluations and bonus decisions with tangible job-performance data. Avoid vague generalities such as “excellent employee” or “bad attitude.” Instead, use measurements such as sales numbers, work quality, productivity and other valid business reasons for all decisions. As this case shows, high praise can be deemed retaliation if the review is worse than a previous one and hurts the employee’s ability to earn a bonus or a promotion.

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Dow Chemical pays \$861,647 in overtime for employee training

The U.S. Department of Labor has announced that Dow Chemical of Freeport paid \$861,647 in back wages to 648 operating engineers as a result of a federal investigation.

Cynthia Watson, the Wage and Hour Division's regional administrator in the Southwest said Dow Chemical "failed to compensate employees for hours spent studying during mandatory training."

The Labor Department discovered Dow Chemical's violations of the Fair Labor Standards Act (FLSA) following a two-year investigation conducted between 2005 and 2007.

The FLSA requires training to be counted as working time unless it's outside normal hours, is voluntary, is not job-related and no other work is concurrently performed.

Jury awards \$110,000 to female workers at Texas dry cleaners

A federal jury in Houston has awarded \$105,000 to Maria Ruiz, a teenage dry cleaning employee, plus payments of \$5,000 to other female employees.

The EEOC filed the suit in July 2007, alleging that Nazar Ali, the owner and manager of Bellair Cleaners Inc., a dry cleaning company, sexually harassed the female employees he supervised. According to the EEOC, Ali inappropriately touched Ruiz, made offensive

remarks and kept her against her will during a long car ride while graphically describing "his sexual appetites and intent to have sex with her against her will."

The EEOC further alleged that Ali inappropriately touched his female employees and asked them for sex. The employees said their complaints to Ali's wife and business partner were ignored.

The jury found that Bellair Cleaners had violated Title VII of the 1964 Civil Rights Act by sexually harassing Ruiz and the other female employees. The jurors awarded Ruiz \$30,000 in compensatory damages and \$75,000 for punitive damages.

Final note: The EEOC has said that it is stepping up enforcement on behalf of teen employees. For more information on the initiative, go to <http://youth.eeoc.gov/>.

13 Texas firms make *Fortune's* 'best to work for' list

Texas came in second only to California in *Fortune* magazine's annual list of the 100 best companies to work for. Winners headquartered in Texas were:

Austin—National Instruments and Whole Foods

Dallas/Fort Worth—Alcon Laboratories, The Container Store, Shared Technologies, TDI Industries, Texas Instruments

Houston—Camden Property Trust, David Weekly Homes, EOG Resources, Methodist Hospital Center

San Antonio—Rackspace Managed Hosting, Valero Energy.

Texas law extends workers' rights to use deadly force

Texas employers are approaching the one-year anniversary of a law that extends an individual's right to use force without retreat in the face of a criminal attack.

Until now, a 1995 exception to a 1973 statute required people to retreat except when an intruder unlawfully entered their homes. Senate Bill 378, however, extended the right to people in their vehicles and workplaces as well. The new law went into effect on Sept. 1, 2007.

How to prevent identity theft in your workplace

Identity thieves go where the data are and, increasingly, that means U.S. workplaces.

Since 2005, Texas bars and restaurants have been required to post signs warning employees that it's a felony "to use a customer's debit or credit card number without the customer's consent." The sign says violators could face up to two years in prison for the offense. Businesses can be fined for failing to post the sign.

Advice to prevent ID theft: When possible, keep employees' Social Security numbers off name tags, personnel records, paychecks and other documents.

Encourage employees to take advantage of their rights to obtain one free credit report each year (see www.annualcreditreport.com). When employees suspect identity theft, they should place a fraud alert on their credit reports, which requires companies to contact them before opening an account in their names.

Final tip: Consider offering identity-theft resolution services as an employee benefit. The benefit, which costs from \$5 to \$120 per employee per year, helps employees cut the time and red tape involved in restoring their credit after an identity theft.

Final note: Employers have to reconcile providing employees with a safe workplace (as required by OSHA) and allowing guns on or near the premises. Before creating a weapons policy for your company, consult with an experienced attorney.

Arlington hotel settles pregnancy discrimination suit

A poorly timed layoff has cost an Arlington hotel owner \$20,000. Arlington Host Corp., which formerly owned and operated the BallPark Inn in Arlington, settled a pregnancy discrimination lawsuit brought by the EEOC on behalf of a front-desk clerk who was pregnant when she lost her job.

Arlington Host agreed to pay \$20,000 to Heidi Guevara, who charged that she was targeted because of her pregnancy.

Food company settles claims

Continued from page 1

sales employees exempt from the FLSA's overtime requirements. McLane failed to keep required records of hours worked.

Final note: Overtime lawsuits are practically a cottage industry. If the Labor Department doesn't step in, chances are a private attorney will.

That's why it's crucial to be proactive. If you have any doubts about how you are classifying employees, get expert help.

One useful tool: Access our easy-to-use "FLSA Checklist: Exempt vs. Nonexempt Status" to help make the decision. Go to www.theHRSpecialist.com/checklist.

When must you pay hourly employees for their travel time?

You don't need to pay nonexempt employees for their commuting time to and from the workplace. That's simple.

But what if such employees occasionally travel off-site (or even overnight) for work reasons?

Many employers are baffled about when to pay nonexempt workers when they travel locally or on overnight trips. Mistakes can spark anything from mild complaints to class-action lawsuits, a black eye for you either way.

The federal FLSA sets rules on compensating hourly employees for travel time. The best way to decipher them is using a case study:

Home-to-work travel

Let's say Robert Smith is a nonexempt employee who sometimes travels for work. It's clear that you don't need to pay for his commute to work; the Portal-to-Portal Act of 1947 covers that.

But suppose you ask Robert to pick up some company documents along the way to work. In that case, you'd pay him from the time he picks up the documents. The law says that if the travel

is for the company's benefit, it is compensable. If it is purely commuting, it's not.

Working at different locations

The U.S. Labor Department says that travel time spent by employees as part of their principal activities, such as travel among job sites during the workday, is considered "work time" and must be paid.

Example: Say Robert reports to headquarters before making his rounds to visit other company locations. In that case, the commute to headquarters is commuting time, but all travel from headquarters until his last stop is paid time.

Time from the last stop to home is unpaid commuting time. Any travel that is a regular part of the employee's job is paid time.

Out-of-town day trips

Generally, time spent traveling to and returning from the other city is work time. You can exclude the employee's regular commuting time and meal breaks.

For example, say Robert drives to DFW airport and takes a 6 am flight to a seminar in Chicago. He arrives at

8:15 am and takes a cab to the seminar.

The seminar runs from 9 am to 5 pm, with an hour lunch break. After the seminar, he chats with friends for an hour before taking a cab back to the airport. He flies back to Dallas and drives home.

Which hours count as "compensable" time?

You don't have to pay Robert for his trip to the airport; that's commuting time. But you do have to pay him from the time he arrives at the airport through his flight and cab ride, and during the Chicago seminar. (You don't have to pay for his lunch period.)

Do you pay for Robert's chatting time with friends? If there are no other flights home until later, yes. But if Robert simply opts for a later flight to swap stories with his buddies, the answer is no.

The cab back to the Chicago airport and the flight home are paid time. The drive home from the airport is considered unpaid commuting time.

Final tip: Make sure nonexempt employees understand when they will be paid before they travel. Spell out the rules clearly in your employee policies.

Know the FLSA rules for rest periods, on-call time, training and more

In addition to travel time, employers face many other questions about what counts as "compensable time" under the federal FLSA. Here are answers to some of the stickier issues:

ON-CALL TIME. Employees required to remain on call on the employer's premises are considered working while on call. Employees required to remain on call at home (or who can leave a message where they can be reached) are considered not working (in most cases) while on call.

WAITING TIME. Employees are paid for waiting time when they are "engaged to wait." Employees fall under that definition if

they're required to be at a work site while waiting to perform work.

REST AND MEAL PERIODS. Federal law says you typically must pay employees for short rest periods, usually 20 minutes or less. You generally don't need to pay employees for bona fide meal periods (typically 30 minutes or more).

Employees must be completely relieved from duty during unpaid breaks and meal periods. *Example:* If you require your assistant to eat lunch at her desk in case a call comes in, she must be paid because she hasn't been fully relieved of her duties.

SLEEPING TIME. Employees required to

be on duty for less than 24 hours are considered "working," even if they're permitted to sleep. Employees required to be on duty for 24 hours or more may agree with their employer to exclude from hours worked any scheduled sleeping periods of eight hours or less.

TRAINING PROGRAMS AND MEETINGS. You don't have to pay employees for time spent at training programs, lectures or similar activities as long as they meet the following four criteria: (1) The event is outside normal hours. (2) It's voluntary. (3) It's not job-related. (4) No work is performed during that time.

Source: Adapted from Labor Department fact sheet No. 22, www.dol.gov/esa/regs/compliance/whd/whdfs22.htm.

Understanding the Texas Workers' Compensation Act

THE LAW The Texas workers' compensation system is designed to replace the wages of employees who miss work due to on-the-job injuries. The system works as a no-fault guarantee. Employees who can show they were injured while working are entitled to a portion of their earnings and paid medical care for those injuries. They needn't prove employer negligence. In exchange, injured employees can't sue employers for negligence.

Texas is unique in one very important respect: It's the only state in which employers can choose to opt out of the workers' comp system. Every other state makes carrying workers' comp insurance mandatory. About 38% of Texas employers opt out of the system.

If an employer does opt out and one of its employees is injured, the employee can sue for negligence. If employees can prove negligence, there's no limit on how much they can collect.

Texas also allows *employees* to opt out of the workers' comp system. They can do so when first hired and employers must tell employees about that right.

Employees in Texas can't collect workers' comp benefits for certain kinds of at-work injuries, including those that occur:

- While the employee is in a state of intoxication
- While the employee is attempting to

injure himself or while unlawfully injuring another person

- By someone who was not a co-worker and for personal reasons
- While participating in a voluntary off-duty recreation, social or athletic activity that wasn't part of the employee's duties
- By an act of God
- By horseplay.

WHAT'S NEW In recent years, the Texas workers' comp system has become one of the most expensive in the country. The cost of an average claim in Texas ran 76% higher than the national median.

That's why the Texas Legislature passed workers' comp reform in 2005. Among some of the key changes:

✓ **New health care networks.** Previously, workers could shop around for sympathetic doctors to certify their injuries. Now, injured workers must obtain health care through a provider listed in a state certified health care network.

✓ **Work search compliance.** The law encourages injured employees to return to productive work as soon as possible. Employees must now show, when possible, that they're actively looking to return to the work force. To earn supplemental income payments, injured employees must actively participate in vocational rehab, search for work through the Texas Workforce Commission and document their job searches.

✓ **Presumption of intoxication.** The law creates a presumption that an employee who tests positive for alcohol or drugs immediately after an injury was under the influence. Such employees aren't eligible for benefits.

HOW TO COMPLY You're required to post in your workplace all new notices concerning medical care. (*See Resources box at left for details on obtaining posters and forms.*)

Notify your workers' comp insurance carrier within eight days of:

- Any injury that requires an employee to take more than one day off

Earn financial incentives for workplace modifications

Small employers (those with two to 50 employees) can take advantage of a law provision that encourages employers to bring injured employees back to work sooner. Eligible employers who make certain modifications to their workplaces can earn a \$2,500 payment to help offset the costs. Modifications can include handicap ramps, restroom remodeling, new furniture and other accommodations. Small employers should also check with their tax planners about tax credits available for modifications that make the workplace accessible to the disabled.

- Work-related deaths
- Learning that an employee has contracted a work-related disease.

Notify insurance carriers by completing a form, *Employer's First Report of Injury or Illness*. Provide a copy to the employee along with another document, *Injured Workers' Rights and Responsibilities*. Everything you post also must be available in Spanish and any other appropriate language. Keep copies of all notices in the employee's personnel file.

Work with your insurance carrier to learn how the carrier plans to take advantage of the new health care network provisions. Also, make sure you create a drug and alcohol screening procedure so that you can benefit from the new intoxication presumption.

Finally, if you don't opt out of the state workers' comp system, it's important to stay on top of developments, including pending regulations on the new law that could affect your responsibilities. The Texas Department of Insurance publishes a semiannual newsletter, *The Workers' Comp Update*, with the latest workers' compensation news.

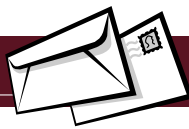
Resources

Texas workers' comp law

The Texas Division of Workers' Compensation, which is part of the Texas Department of Insurance, provides materials on the state workers' comp law, including information on required postings. The agency's regulations govern implementation of the law. Find those regulations at www.tdi.state.tx.us/wc/rules/employer/index.html.

Obtain workers' comp forms and postings at www.tdi.state.tx.us/wc/forms or by calling (800) 252-7031.

Next Nuts & Bolts: *Personnel records*
Coming soon: *The FMLA*



Texas workers can't demand to see personnel file

Q We fired an employee for violating our attendance policy. We have good documentation, including signed warnings. We just got a letter from a lawyer representing her that demands a copy of her personnel file. I think she wants it to sue us. Do we have to give it to her?

A The short answer is no, not if her job was located in Texas and if you're a private (not government) employer. Under Texas law, personnel files are employers' property and employees have no legal right to either see it or copy it. That is not true in a number of other states, or if the employer is a governmental employer.

Although you are not *required* to allow employees to review their files or receive copies, many employers set their own policies. Some may permit review, but not allow any copies. Others permit copies of any document or any document signed by the employee. If you have a policy, you should follow it.

If your former employee does file the lawsuit, she will be able to obtain the file (and a lot more) through the discovery process. Providing some of that information now—perhaps documents signed by the employee—might be a good approach since it could convince the employee's lawyer that a lawsuit would not be successful.

Look deeper into dubious FMLA leave

Q If an employee uses FMLA leave randomly for migraine headaches, how can we verify the real reason for the leave? Can we ask for information each time the employee is absent?

A You're certainly not the only employer to complain about employees taking advantage of intermittent leave. There's no way to stamp out this type of abuse altogether. However, you can minimize it by making sure that you promptly designate all time off—including intermittent leaves—to help you exhaust the 12-week FMLA clock as quickly as possible.

Also, don't accept FMLA certification forms that include blanket statements, such as "intermittent leave recommended." You have the right to demand more specific information. If you have reason to be suspicious of a certification, you can send the employee to a company-selected physician for a second opinion.

How to pay hourly workers for weekend travel time

Q How do you pay hourly employees that are traveling on a day that is not considered a workday, like Saturday or Sunday? What if they normally have a 10-minute commute to the office but instead they have to go to the airport, and the airport is an hour from their home?

A This question raises one of the more complicated areas of what is an already complicated statute. The easy question

first: Even though the airport drive is longer, it would still be viewed as regular commute time and so would not be considered "hours worked" for FLSA purposes.

For the more complex issue—the hourly employees traveling on their non-normal workday of Saturday or Sunday—you must pay all travel time unless you provide them public transportation. Assuming that you do, you must count the hours as time worked as long as it is during what would be their normal work time during the week.

For example, if a person normally works 9 am to 5 pm and his trip is from 2 to 4 pm on Saturday, you are required to pay him for those two hours. However, if his trip was from 7 to 9 pm, you are not required to pay for the time worked.

Must you pay for unused vacation time?

Q We have an employee who is leaving after being here for five years. He gets two weeks' vacation a year, but hasn't taken any in the past two years. Our handbook says employees lose their vacation time when they leave the company. He says that's illegal. Do I have to pay him for his unused vacation time?

A Pay for vacation is considered "wages" under the Texas Payday Law, which is administered by the Texas Workforce Commission (TWC). While some states do have provisions that require employers to pay for unused vacation time, Texas law is different. It permits an employer to decide its own policy without any qualifications.

However, if employers put their policies in writing, they must follow them.

Since your written policy says that vacation is lost on termination, you would not be required to pay for the vacation weeks that the employee failed to take.

Note: Since the Payday Law requires that companies follow their written policies, it's very important that the policy be clear. Vacation-pay policies are notoriously difficult to write if you want them to be construed only one way. If an employee files a claim for vacation pay and there are two (or more) possible interpretations of the policy, the TWC will make a determination using a procedure that is similar to the one used for unemployment claims.



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