

Texas Business Today

Spring 2009

Tom Pauken, Chairman
Commissioner Representing Employers

TEXAS
WORKFORCE SOLUTIONS



Social Networking — It's Time to Address the Issue

- Worried About Your Job? Consider Skills Training •
- The Most Frequent Ways Employers Lose Unemployment Insurance Claims •

Worried about your job? Consider skills training

At a time of deepening economic concerns, encouraging more young Texans to get the appropriate training to fill the available positions in the skilled trades becomes even more important than in good times. We need to match skills training to the needs of the modern workplace, and that doesn't necessarily require a four-year college degree.

A college diploma signifies one kind of preparation for life. Thanks to rapid advances in science and technology, another kind of diploma (just as valuable to society) is a credential certifying that the individual

Chairman's Corner

in question has received the training necessary for a particular kind of skilled work.

Whatever we call the certificate, it is significant because it shows that the student has been well prepared to work in a particular field of endeavor. The name doesn't matter. The standardized, supervised, preparation it represents is what counts.

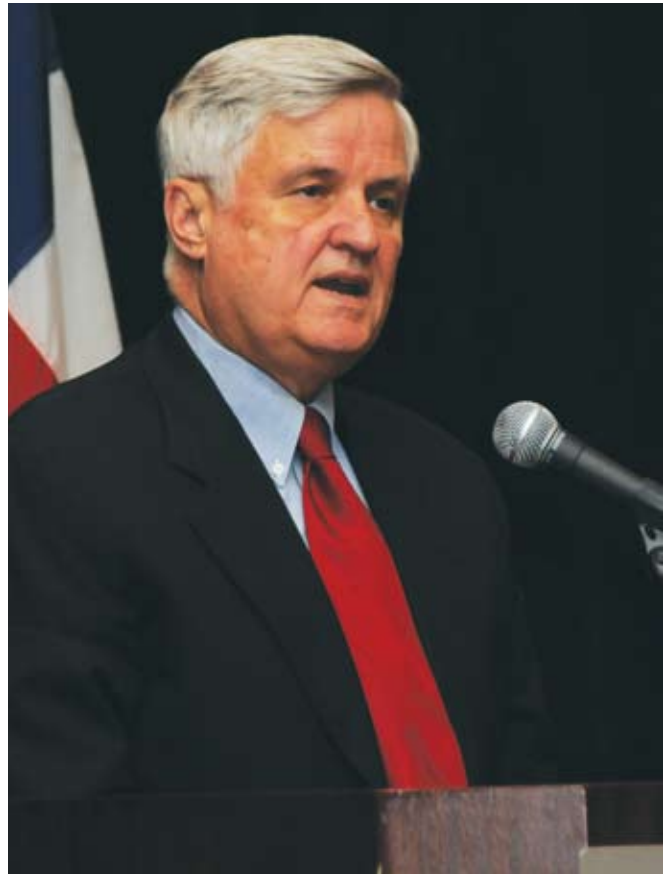
More and more Americans are receiving these credentials; but Texas, and the country as a whole, can do a lot more to train the individuals needed to handle the work that is there to be done.

Here is one example: If you want a construction worker trained to the exacting standards of the construction industry, you need to make sure that the person hired has the ability to do the job. One way to do that is for the worker to have a certificate showing training with the appropriate curriculum designed by an organization like the National Center for Construction Education and Research (NCCER), in Gainesville, Florida. NCCER is a 12-year-old nonprofit organization created by construction industry leaders to help ensure that tomorrow's workers receive today the specialized training and preparation they need.

NCCER tailored an instruction curriculum to fit standards developed by the industry as a whole. It's a national curriculum, consistent with federal guidelines. And, here's the real beauty of it: graduates acquire portable skills. What qualifies them for work in Florida also qualifies them for comparable work in many other states.

It gets better yet.

The construction industry's needs happen to be large, as I was reminded in a recent conversation with Ed Prevatt, senior manager for workforce development at NCCER. According to the NCCER, U.S. schools



TWC Chairman Tom Pauken speaks at an event in Austin. Chairman Pauken says Texans need to match skills training to the needs of the modern workplace. *Texas Workforce Commission photo*

aren't "preparing young people for the career opportunities that are available in our workplace."

The NCCER study points out that "28 percent of today's ninth graders will complete college, but only 20 percent of the jobs will require a four-year degree...32 percent of the population will have the necessary skills that 65 percent of the jobs will require." Prevatt told me that 275,000 construction jobs go unfilled every year due to the lack of worker training. And, that's before the baby boomers, some 75 million strong, begin retiring in large numbers. Prevatt also told me about a study which shows that high school graduates with NCCER training earn, over a lifetime, \$375,000 more than they would have otherwise.


What works in construction would work with all

skilled trades. And, by the way, nearly all trades and occupations these days are skilled. Technology sets the pace. Gone are the days when a strong back was all the qualification one needed for many American jobs. Nuclear development, nursing, refinery operation, computer science – the whole roster of modern jobs – require a knowledge of the basics combined with appropriate skills training.

Job preparation, under the model I am talking about, can be tied to an existing secondary school, community college, or qualified job-training provider. The time necessary to complete it can be a matter of months to two years or more, depending on the difficulty or technical nature of the particular job. Flexibility counts.

A good job is a goal that any successful society strives to make available. Having a recognizable skill and using one’s talents to fill needed demands in the workforce is my definition of a good job. Work boosts the worker’s morale, gives a sense of purpose in life, and a reason to get out of bed in the morning. In addition, proficiency in a skilled trade can become a path to a secure economic future, even in difficult times that we are currently facing.

It’s high time we got over the notion that a four-year college degree is the only piece of paper that

shows a man’s or woman’s readiness for success and achievement. No well-trained worker is a second-class citizen. He or she is a contributor to the economic well-being of our society and to the long-term good of the place called home. 

Tom Pauken

Sincerely,
Tom Pauken, Chairman
Commissioner Representing Employers

A document certifying skills training of a higher order is a point of pride for the one who carries it. It tells the world he or she knows the job and how to do it: the very same message a college diploma is meant to convey.

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Cover image: John Foxx/Stockbyte/Getty Images

Employee social networking: It's time to address the issue

Technological advances are rapidly changing the way individuals – including your employees – communicate with each other and the rest of the world. Instant messaging, texting, and sites such as Facebook, MySpace, YouTube, and LinkedIn have been joined by Twitter – a relatively new conversational Web site. All provide the opportunity to rapidly interact with a huge universe of new people.

These changes are occurring quickly. Facebook, for example, grew 228 percent between February 2008 and February 2009, to 65.7 million users. Twitter, which is basically a giant chat room that allows users to post 140-character microblogs to however many users have signed up to “follow” them, saw a 1,374 percent increase during that same time frame, growing from 475,000 to seven million unique visitors.

On the one hand, most employees are not being paid to give in to these technological temptations during working hours. On the other, a number of

At Issue

major corporations such as Comcast, Bank of America, UPS, Wachovia, Southwest Airlines, Starbucks, and online retailer Zappos, for

example, all have official corporate Twitter accounts to provide marketing, customer service, or both. IBM Corp. uses Twitter to encourage research scientists to communicate with each other, and Silicon Valley tech giant Yahoo even has 25 to 30 employees who are designated to act as the company’s official Twitter representatives; they’re paid to spread the word about new Yahoo products and services.

No matter where your company falls in this brave new world of technology, as in any other area where it’s important to establish reasonable standards of workplace behavior, communicating your expectations to your employees is critical. Employers have had to cover similar ground before, first with personal phone use at work, then with e-mail, then with the Web, and now with social networks and blogs. In each case, as electronic communications have advanced, organizations have been forced to decide what employees may and may not do, and revise company policies accordingly.

Because these social network sites are available 24/7, another area of concern is what your employees may post or blog about the company, your trade secrets, their co-workers or your customers online after hours. As far as your employees’ off duty activities are concerned, most such actions are strictly their own business so long as their actions do not

No matter where your company falls in this brave new world of technology, as in any other area where it’s important to establish reasonable standards of workplace behavior, communicating your expectations to your employees is critical.

interfere with the rights of others, including the company they work for. In an employment context, employees are free to do what they will with their own free time, as long as what they do does not adversely affect their employer, co-workers, or the employer’s clients, customers, patients, vendors, or other partners with which the company does business. And, while your employees might believe that they’re posting about mundane company events, keep in mind that competitors can be out there, monitoring their every word. In many ways, these social networks are competitive-intelligence dream tools.

Below is a sample policy regarding use of social media by employees. As with any policy that an employer may obtain from an employee of the Texas Workforce Commission, this is only a sample policy and does not constitute an official policy or recommendation of the TWC or the State of Texas. It is always best to have such a policy reviewed by an employment law attorney of your choice who can consider all of the factors and aspects of the situation, and determine whether the policy meets a particular company’s needs.

Policy Regarding Use of Social Media by Employees of XYZ Company

While XYZ Company encourages its employees to enjoy and make good use of their off-duty time, certain activities on the part of employees may become a problem if they have the effect of impairing the work of any employee; harassing, demeaning, or creating a hostile working environment for any employee; disrupting the smooth and orderly flow of work within the company; or harming the goodwill and reputation

of XYZ Company among its customers or in the community at large. In the area of social media (print, broadcast, digital, and online), employees may use such media in any way they choose as long as such use does not produce the adverse consequences noted above. For this reason, XYZ Company reminds its employees that the following guidelines apply in their use of social media, both on and off duty:

1. If an employee publishes any personal information about themselves, another employee of XYZ Company, a client, or a customer in any public medium (print, broadcast, digital, or online) that:
 - a. has the potential or effect of involving the employee, their co-workers, or XYZ Company in any kind of dispute or conflict with other employees or third parties;
 - b. interferes with the work of any employee;
 - c. creates a harassing, demeaning, or hostile working environment for any employee;
 - d. disrupts the smooth and orderly flow of work within the office, or the delivery of services to the company's clients or customers;
 - e. harms the goodwill and reputation of XYZ Company among its customers or in the community at large;
 - f. tends to place in doubt the reliability, trustworthiness, or sound judgment of the person who is the subject of the information; or
 - g. reveals proprietary information or XYZ Company trade secrets;

the employee(s) responsible for such problems will be subject to counseling and/or disciplinary action, up to and potentially including termination of employment, depending upon the circumstances.

2. No employee of XYZ Corporation may use company equipment or facilities for furtherance of non-work-related activities or relationships without the express advance permission of (designated member of management).
3. Employees who conduct themselves in such a way that their actions and relationships with each other could become the object of gossip among others in the office, or cause unfavorable publicity for XYZ Company in the community, should be concerned that their



While you're employees might believe that they're posting about mundane company events, keep in mind that competitors can be out there, monitoring their every word. In many ways, these social networks are competitive-intelligence dream tools. *George Doyle/Stockbyte/Getty Images*

conduct may be inconsistent with one or more of the above guidelines. In such a situation, the employees involved should request guidance from (a designated member of management) to discuss the possibility of a resolution that would avoid such problems. Depending upon the circumstances, failure to seek such guidance may be considered evidence of intent to conceal a violation of the policy and to hinder an investigation into the matter.

4. Should you decide to create a personal blog, be sure to provide a clear disclaimer that the views expressed in the blog are the author's alone, and do not represent the views of XYZ Company.
5. All information published on any employee blog(s) should comply with XYZ's confidentiality and disclosure of proprietary data policies. This also applies to comments posted on other social networking sites, blogs and forums.

6. Be respectful to XYZ Company, co-workers, customers, clients, partners and competitors, and be mindful of your physical safety when posting information about yourself or others on any forum. Describing intimate details of your personal and social life, or providing information about your detailed comings and goings might be interpreted as an invitation for further communication - - - or even stalking and harassment that could prove dangerous to your physical safety.

7. Social media activities should never interfere with work commitments.

8. Your online presence can reflect on XYZ Company. Be aware that your comments, posts, or actions captured via digital or film images can affect the image of XYZ Company.

9. Do not discuss company clients, customers or partners without their express consent to do so.

10. Do not ignore copyright laws, and cite or reference sources accurately. Remember that the prohibition against plagiarism applies online.

11. Do not use any XYZ Company logos or trademarks without written consent. The absence of explicit reference to a particular site does not limit the extent of the application of this policy. If no policy or guideline exists, XYZ Company employees should use their professional judgment and follow the most prudent course of action. If you are uncertain, consult your supervisor or manager before proceeding.



As with every new technology, there are laws (i.e. privacy, defamation, copyright), social norms and business practices that warrant thoughtful consideration and communication with your employees. *John Foxx/Stockbyte/Getty Images*

While millions of individuals are having fun and even making productive use of these new technologies, it is always wise to keep in mind that technology does not absolve the users from acting responsibly, and that it creates as many obligations as it does opportunities for expression.

Finally, should your company decide to adopt such a formal policy, all employees should sign for copies of the policy and be trained in its meaning. The best way to do that would be to:

- hold a mandatory staff meeting;
- distribute an agenda to all employees in which discussion of the policy appears as an action item;
- have all employees sign an attendance roster and hand out copies of the new policy;
- discuss it and hold a question-and-answer session with everyone present;
- pass out copies of acknowledgment of receipt of policy forms for everyone to sign specifying the policy received;
- collect the signed forms before adjourning the meeting.

Like much of the Internet, social networks are great innovations that give users the opportunity to create and communicate with whole new communities. Any policy an employer may choose to cover the use of such forums can easily be summed up in a new “Golden Rule”: your employees should be encouraged not to say anything about the company or other individuals that they would not want said about themselves. While millions of individuals are having fun and even making productive use of these new technologies, it is always wise to keep in mind that technology does not absolve the users from acting responsibly, and that it creates as many obligations as it does opportunities for expression. As with every new technology, there are laws (i.e. privacy, defamation, copyright), social norms and business practices that warrant thoughtful consideration and communication with your employees. A sensible policy will go a long way toward addressing those areas before the risks outweigh the benefits to you and your employees. 🇺🇸

New hire reporting can benefit employers

Since the passage of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, all employers are required to report certain information about newly-hired employees to

Business Briefs

a State Directory of New Hires within 20 days of their first day on the job. In Texas, that office is the New Hire Reporting Division of

the Office of the Attorney General (OAG). While the initial rationale for the new hire reporting requirements was to improve the collection of child support, a number of other benefits have since occurred.

In addition to enhanced collection of child support, the benefits of Texas employers reporting new hires include:

- Reporting new hires lowers employers' Unemployment Insurance (UI) contributions by returning overpayments of UI benefits to the Unemployment Compensation Trust Fund.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Reporting new hires reduces government spending on public assistance.

Reporting new hires assists state agencies such as the Texas Workforce Commission and the Texas Department of Insurance in detecting fraudulent claims and preventing overpayments.

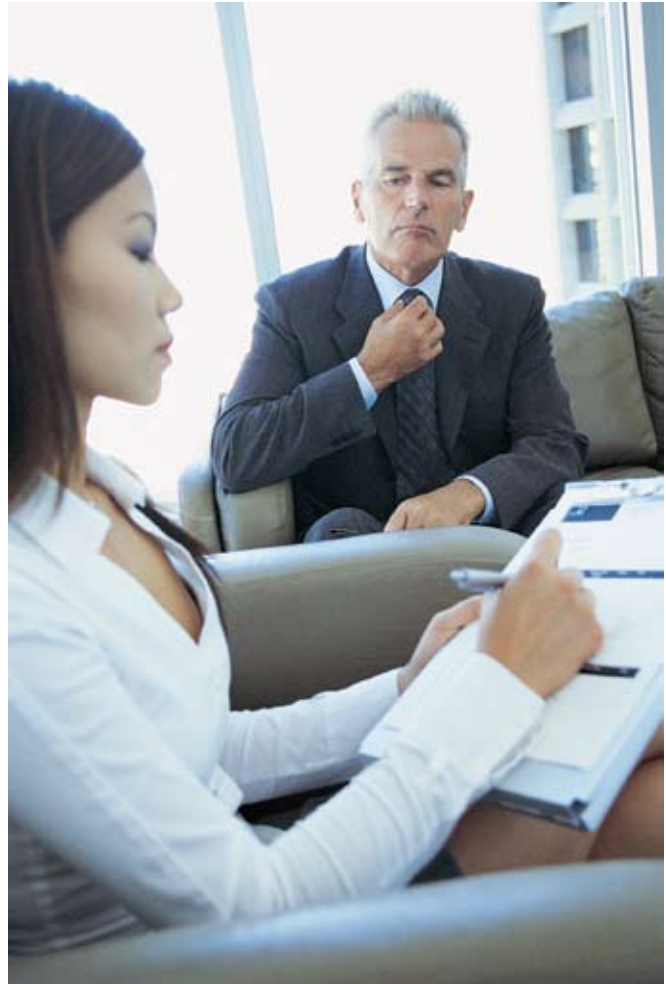
What do employers report to the OAG?

There are six basic items employers must report within 20 days of the first day on the job for all new employees:

- Company name
- Payroll mailing address
- Company Federal Employer Identification Number (FEIN)
- Employee name
- Employee address
- Employee Social Security Number

The OAG has made reporting convenient for Texas employers by offering several methods to report. These methods include:

- Paper copy (W-4, printed list, or on a state form)
- By telephone at 1-888-TEX-HIRE (888-839-4473) or FAX: 1-800-732-5015
- By Internet, including online submission and file uploads (www.oag.state.tx.us, select "Child Support")



By reporting new hires, Texas employers can have a positive impact on lowering overpayments and fraud in the Unemployment Insurance system. New hire reporting helps lower employer UI tax contributions. *Digital Vision/Getty Images*

- By a shareware program that generates a file for submission
- By File Transfer Protocol (FTP)
- By an electronic file on diskette or tape, mailed to the OAG. The mailing address for the OAG is: Texas Employer New Hire Reporting, Operations Center, P.O. Box 149224, Austin, Texas 78714-9224).

Employers with multi-state operations may designate a single state to report all new hires, or they can choose to report in the individual states where they have employees. Companies choosing to designate a single state for new hire reporting requirements must notify the Secretary of the Department of Health and Human Services of their

Although Texas employers are reporting new hires in record numbers, the Office of the Attorney General has indicated that the current rate of compliance is at best 60 percent.

election by letter or FAX to:

Department of Health and Human Services
Multistate Employer Registration
Office of Child Support Enforcement
P.O. Box 509
Randallstown, MD 21133
FAX: (410) 277-9325

There is a \$25 per employee penalty for knowingly failing to report new hires, and a \$500 per employee penalty for conspiring with new hires to fail to make the record.

Although Texas employers are reporting new hires in record numbers, the Office of the Attorney General has indicated that the current rate of compliance is at best 60 percent. OAG statistics indicate that the smaller the employer, the less likely they are to report their new hires as required by federal law.

In order to make new hire reporting an even bigger benefit, Texas employers are encouraged to comply with the requirement to report their new hires. By doing so, Texas employers can have a positive impact on lowering overpayments and fraud in the Unemployment Insurance system, which will ultimately help to lower employers' UI tax contributions.

New Survey: Employers Focused on Employee Retention, Not Hiring

According to a new survey from CareerBuilder.com and USA Today, employers are more focused on keeping the employees they already have than on hiring new workers as they strive to stay afloat in a turbulent economy.

The survey of 2,500 human resource professionals and hiring managers and more than 4,400 private sector employers, found that 64 percent of employers expect no change in the head count of their permanent, full-time employees during the second quarter of 2009. And, while 13 percent increased the number of their full-time employees during the first quarter, 14 percent anticipated that they would be adding full-time employees in the second quarter.



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According to the survey, 42 percent of employers reported making cuts in benefits and perks during the first quarter of 2009, and 31 percent indicated there would be cuts in the second quarter. The top three areas to be impacted are employee bonuses, 401(k) matching contributions, and health care coverage.

And, a word of caution to employees who've decided this is a good time to slack off: 23 percent of the employers responding said they are going to take this opportunity to replace poor-performing employees with top tier talent that may have previously been unavailable.

Heads Up: New COBRA Amendments Require Immediate Attention

The American Recovery and Reinvestment Act of 2009 (the federal "stimulus law") signed into law on February 17, 2009, includes a COBRA provision that can have a significant financial impact on covered employers.

COBRA applies if an employer has 20 or more employees and provides for continuation of health plan coverage for up to 18 months following the work separation. Until now, the employee who lost group coverage, not the employer, was required to pay the entire health insurance premium.

COBRA rights accrue once a “qualifying event” occurs – basically, a qualifying event is any change in the employment relationship that results in the loss of health plan benefits. COBRA does not apply if the employee was terminated for “gross misconduct,” but the burden of proving that is on the employer. In the case of an employee with a spouse (make sure you are aware of the definition of “spouse” in all states in which you do business), it is essential that an employer notify both the employee and the employee’s spouse of the employee’s COBRA rights.

What’s New?

Effective February 17, 2009, amendments to the COBRA law require employers to subsidize the health benefit continuation payments during 2009, as outlined below:

Eligible individuals pay only 35 percent of their COBRA premiums, and the remaining 65 percent is paid by the employer and reimbursed via a federal tax credit.

The premium reduction applies to periods of health coverage beginning on or after February 17, 2009, and lasts for up to nine months.

To be “assistance eligible” under the amendments, the qualifying work separation needs to have occurred between September 1, 2008, and December 31, 2009.

The subsidy lasts for up to nine months, but the amendments do not extend the maximum COBRA continuation period. Coverage also ends if a former employee becomes eligible for Medicare, Medicaid, another plan, or a health flexible spending account. The subsidy covers medical, vision and dental benefits, but does not cover medical flexible reimbursement plans.

For detailed guidance from the U.S. Department of Labor on these changes in the law, see the fact sheet at <http://www.dol.gov/ebsa/newsroom/fsCOBRAPremiumReduction.html>.

For employers with fewer than 20 employees, the Texas “COBRA” law – the Small Employer Health Insurance Availability Act – would apply, and the same subsidies would apply to the payments made by the ex-employee. This Act requires health benefit continuation rights for employees (and their beneficiaries) of company health plans if the company has two to 50 employees; the state law is very similar to the federal law, but with a shorter benefit continuation period (up to six months following the qualifying event). If the employee had federal COBRA coverage as well, the six months under Texas law begins after the federal COBRA period expires. For more information, visit the




It would be a very good idea to contact your insurance carrier, COBRA administrator, employment law attorney or human resources department immediately for detailed information about the new COBRA amendments and how they will affect your company. *Keith Brofsky/Stockbyte/Getty Images*

Texas Department of Insurance Web site at <http://www.tdi.state.tx.us/pubs/consumer/cb040.html>.

Now What?

This is a significant change in the law that’s going to require quick action. It would be a very good idea to contact your insurance carrier, COBRA administrator, employment law attorney or human resources department immediately for detailed information about the new amendments and how they will affect your company.

For additional information, you may also check with the Employee Benefits Security Administration of the U.S. Department of Labor 1-866-444-3272. 

Military Veteran Wins Damages, Reinstatement in USERRA Lawsuit

A federal judge recently awarded approximately \$779,000 in back pay, damages and attorney's fees to a financial advisor who was not reinstated to his previous position at Wachovia Services after returning from active military duty. If the decision is ultimately upheld, the award would be the largest ever made under the Uniformed Services Employment and Reemployment

Legal Briefs

Rights Act (USERRA), the 1994 federal law that is intended to protect the reemployment rights and benefits of members of the

military when they return to civilian life.

In late March 2009 in the case of *Michael Serricchio v. Wachovia Securities, L.L.C.*, New Haven, Connecticut federal Judge Janet Bond Arterton not only made the award under USERRA, she also ordered Wachovia to reinstate Mr. Serricchio as a financial advisor with full employment benefits effective April 1.

The Facts

In 2001, Mr. Serricchio earned over \$200,000 in commissions annually as a financial advisor for Prudential Securities in Stamford, Connecticut. He was also a member of the Air Force Reserves, and was one of the first Reservists called to active duty after the terrorist attacks of 9/11. He was called for active duty from September 2001 through October 2003.

When he returned from active duty more than two years later, he contacted his former employer, which had since become Wachovia, and a part of Wells Fargo & Company, and had moved its operations to Westport, Connecticut. When Serricchio asked to be reinstated, he was told he could have an advance of \$2,000 per month, which he would have to repay with commissions earned

by cold-calling on new accounts, or from his savings. Instead, Serricchio filed a lawsuit in 2005, and a jury ruled in his favor in June 2008.


Wachovia appealed, and in late March, Judge Arterton granted Serricchio \$291,000 in back wages, and \$389,000 in damages, plus costs and fees. The judge ordered Wachovia to reinstate Mr. Serricchio on April 1 as a financial advisor with full benefits. She also ruled that Wachovia must pay Serricchio a salary of \$12,300 per month for three months, and a monthly draw of \$12,300 for the next nine months as an advance on future commissions.

A spokesman for Charlotte, North Carolina-based Wachovia indicated that the company is considering their options, including a possible appeal of the ruling.

What's Next?

While this is not a Texas case, it does merit watching for several reasons. First, if upheld, it would be the largest monetary award ever made under USERRA. Second, the case is also important because it stands for the proposition that USERRA applies to employees who work on a commission basis.

Finally, as thousands of veterans return from Operation Iraqi Freedom in Iraq and Operation Enduring Freedom in Afghanistan, many of them will be returning to Texas. It will be very important for Texas employers to understand what may be required of them when their employees return to Texas to re-integrate into civilian life.

For additional information about USERRA, you may visit the agency's Web site at www.texasworkforce.org, click on the "Texas Veterans Leadership Program" and scroll down the page to the section labeled "Employers" on the left side of the page. Further information is available by clicking on the "Uniformed Services Employment and Re-employment Rights Act." 



YOUR RIGHTS UNDER USERRA THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

Easy mistakes that are easy to avoid

The most frequent ways employers lose unemployment insurance claims

It is obvious to any employer who has dealt with unemployment claims that such claims are hard to defend against, mainly due to the fact that the law itself is meant to help ex-employees, not employers. Strange, then, that some employers make mistakes before or after claims are filed that make the claims even harder to win. Presented here are the most frequently made mistakes.

An Overview

Prior to Claim

- Terminating an employee in the heat of the moment
- Failing to discuss the problem with the employee prior to termination
- Terminating an employee without reasonable warning
- Ignoring company procedures or prior warnings
- Taking no action when employees complain
- Firing someone for a reason that is unlikely to be considered disqualifying misconduct

Post-claim

- Missing a claim response or appeal deadline
- Assuming that if TWC does not recontact the company, the claim has been dismissed or denied
- Changing the explanation for the work separation
- Failing to prove the case against the claimant
- Failing to present firsthand testimony from eyewitnesses

Prior to the Claim - Mistakes made before a claim is filed

Terminating an employee in the heat of the moment

Despite the employment at will doctrine in Texas, an otherwise legal discharge will not necessarily be without a price. A discharged employee can always file an unemployment claim. In that case, it will be up to the employer to prove that the discharge resulted from a specific act of misconduct connected with the work and that the claimant either knew or should have known he could lose his job for such a reason. The mistake usually happens when the employer, acting in the heat of the moment, fires the employee without considering whether the employee has received the number of warnings that the policy manual says that employees can expect or whether the employer will be able to prove the misconduct in question.

Although no law requires employers to let employees know why they are being terminated, it can be a mistake to fire someone without discussing the problem leading to termination and without giving the employee a chance to explain his or her side of the story.

Failing to discuss the problem with the employee prior to termination

Although no law requires employers to let employees know why they are being terminated (in the vast, vast majority of situations), it can be a mistake to fire someone without discussing the problem leading to termination and without giving the employee a chance to explain his or her side of the story. That having been said, there are some trouble situations where it is best just to say whatever it takes to get the employee out of the workplace without causing a scene or without giving a lawsuit-prone employee additional fuel for a lawsuit; if in doubt, consult your attorney. Still, TWC claim examiners and hearing officers generally look with favor upon employers who confront the soon-to-be-former employee with the problem and let the employee try to explain. For one thing, that avoids the related problem of giving a false reason for termination, which is almost always fatal to a case. For another, there is always the possibility that the employee will point out something that will make the employer realize that the discharge might not be appropriate. Finally, it gives the appearance of fairness, which is important from a perception standpoint. (Remember, the TWC people processing the UI claims are themselves employees, not employers, and they generally have a well-developed idea of what they consider fair and right.)

Terminating an employee without reasonable warning

There is no set number of prior warnings that must be given before an employee can be fired. There are, however, two very important considerations

Losing Unemployment Insurance Claims

Prior to Claim

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here. First, since the test is whether a “reasonable employee” could have expected to be fired for the reason in question, the employer has to show that either the employee did something that was so bad, he had to have known he would be fired without prior warning, or that the employee had somehow been placed on prior notice that he could lose his job for such a reason. “Prior notice” would come from a policy expressly warning of discharge or from a (preferably written) warning to the effect that a certain action or lack of action would result in dismissal. The second consideration is explained in the next topic.

Ignoring company procedures or prior warnings

Here is another reason employers should ignore the temptation to take advantage of the right under the employment at will rule to change policies and procedures at will: doing so can lead directly to losses in UI claims. Remember, an employer must show that the claimant either knew, or should have known, that his or her job was on the line for the reason in question. That will be impossible to show, for example, if the employer fires the employee without giving the employee the benefit of progressing through whatever disciplinary process the company usually follows. The problem also shows up if an employee gets a written warning stating that it is the “first written warning,” and the list of further steps on the form shows a “second written warning” or “final warning,” but the employee is fired for a subsequent offense without getting the (apparently promised) intermediate or final warning. The point is that the employer should try its best to do what it says it will

do. If employees have been led to believe that certain steps will occur prior to termination, follow those steps, or else be prepared to lose the UI claim.

Taking no action when employees complain

Of course, not all complaints are valid, and some employees are chronic complainers. That having been said, nothing stirs the sympathy of TWC claim examiners and hearing officers like the story of a claimant with a halfway-legitimate grievance, whose employer either took no effective action to address the grievance or retaliated somehow against the claimant. Complaints usually do not come out of thin air. Listen, investigate, act, and document your actions. Employers that seem responsive to employee concerns not only face UI claims with more confidence, but also generally have fewer worries about employee turnover and unions coming in.

Firing someone for a reason that is unlikely to be considered disqualifying misconduct

The following reasons for termination are all “good cause” to discharge an employee. Unfortunately, it takes more than “good cause” to disqualify a claimant from unemployment benefits – the employer must prove that the claimant was fired for a specific final incident of work-related misconduct that happened close in time to the discharge, and that the claimant either knew or should have known that discharge would result from such an act. Moreover, an act is not misconduct unless it was within the claimant’s power to control. Following are the most common examples



There is no set number of prior warnings that must be given before an employee can be fired. There are, however, two very important considerations here. First, since the test is whether a “reasonable employee” could have expected to be fired for the reason in question, the employer has to show that either the employee did something that was so bad, he had to have known he would be fired without prior warning, or that the employee had somehow been placed on prior notice that he could lose his job for such a reason. *George Doyle/Stockbyte/Getty Images*

of problems that TWC generally does not consider to be disqualifying misconduct:

- Long-simmering discontent with an employee’s way of doing things or with the employee’s personality
- Inability to do the work well, without proof that the claimant was failing to do his or her best
- Incompetence, without proof that the claimant was failing to do his or her best
- Marginal performance for months or years
- Expressing simple discontent with the job or the company
- Looking for another job without wasting company time or resources
- Announcing a possibility of looking for other work at some unspecified point
- Announcing an intention to work for a

competitor, with no proof that the claimant had actually done anything to harm the employer’s interests

- Seeming to be unhappy, without proof that the claimant’s mood was adversely affecting his or her work
- Visiting job banks or potential employers on the Internet, without proof that such activity is against a prior final warning or a known policy that warns of termination

Post-Claim - Mistakes made after a claim is filed

Missing a claim response or appeal deadline

A late claim response means that the employer waives any rights it has in the claim, including the right to protest chargebacks to its tax account. Filing a late appeal means that the TWC must dismiss the appeal without considering the underlying merits of the case.

In both cases, missing deadlines means that no matter how good the employer’s case is, the employer will be out of luck if the claimant ends up drawing benefits. There is no alternative to filing claim responses and appeals on time.

Do whatever it takes to meet the deadlines. In an emergency, put the words “We protest,” [or] “We appeal,” followed by “More information will follow later,” on a piece of paper, and then fax or hand-deliver it to any TWC office. Such a response or appeal will be sufficient if filed by the end of the fourteenth day after the date the claim notice or ruling was mailed. The fourteen-day deadline is for calendar days, not working days. You can also mail the response or appeal, but it must be U.S.-postmarked by the fourteenth calendar day. If you mail it too late to get the timely postmark, bring a reliable witness with you who can later help you testify that you placed it in the U.S. mail at the time you did. If you get from this discussion that meeting these deadlines is important, you are correct.

Assuming that if no response from TWC comes, the claim has been dismissed or denied

UI claims do not simply go away by themselves. Even if a claim is disallowed by reason of insufficient wage credits, the last employing unit will get a ruling to that effect warning that a future valid claim might be filed. If you have responded to a claim or filed an appeal, yet receive nothing from TWC in a couple of weeks, something is probably wrong. Follow up! Call your local TWC office or the employer commissioner’s

office (1-800-832-9394) and ask about the claim or appeal status. If you lack confidence in whatever you hear from the first person you contact, do not hesitate to ask to speak with another person. Be sure to record the facts of the call: the name of the person you contacted, the office where they work, the number you called, the date and time of the call, and what you were told. If you are told that no response was received from your company or that “nothing is in the system,” offer to send another copy, and in the accompanying note, mention that you had sent the same thing earlier on such-and-such a date.

Changing the explanation for the work separation

Sometimes an employer will give one explanation for the claimant’s work separation at the time of responding to the claim notice, but give another explanation when the claim examiner calls, when writing an appeal letter, or when testifying at an appeal hearing. It is almost a 100 percent certainty that the inconsistency in explanations will be noticed by TWC personnel, and the probability is almost as high that the TWC people will be suspicious of the change in the story. Many TWC people, quite frankly, take a changed work separation explanation as a sign that the employer is not credible and is just looking for the right words to get the claimant disqualified. This is why it is critically important to study the facts behind the work separation carefully and get it right the first time. Remember, if the deadline is near and the employer needs more time, the company can file a quick timely response notifying the claim examiner that the employer wishes to be an interested party and will file more information as soon as possible.


Failing to prove the case against the claimant

Remember, in a discharge case, the burden of proving misconduct is on the employer. The employer must show that the separation resulted from a specific act of misconduct connected with the work that happened close in time to the discharge and that the claimant either knew or should have known she would lose her job for such a reason. Whatever the allegation against the claimant is, it must be proven with documentation and testimony from people with direct, personal knowledge of the circumstances. Generally, the evidence needed will be a copy of whatever rule or policy the claimant violated, proof that the claimant knew about the policy, copies of prior warnings (if applicable), and firsthand testimony from witnesses who saw the misconduct occur. The exact form of documentation will vary from case to case. For example, if the claimant was terminated for attendance violations, a copy of the attendance records will be needed.

Unemployment claims can be difficult to win. Some are unwinnable. Many cases, however, can be won, and it would be a shame to lose a winnable case unnecessarily.

Failing to present firsthand testimony from eyewitnesses

Most people have heard the adage “an accused has the right to face his accusers.” That happens to be a fundamental principle of the American system of justice, which is in turn derived from the English legal system. This principle applies to UI claims as well. A claimant who is accused of something by the employer has the right to face the ones making the accusations. That is why firsthand testimony from witnesses with direct, personal knowledge of the situation leading to discharge is given the greatest evidentiary weight in a case. Such testimony outweighs anything else, including notarized affidavits. The only exception is in the area of drug testing, where the result of a Gas Chromatography/Mass Spectrometry (GC/MS) confirmation test indicating the presence of prohibited substances in the system of the claimant is accepted over the sworn firsthand denial of drug use by the claimant. While it is true that employers sometimes win with secondhand testimony that is only based on reports from others, that is the case only when the claimant fails to participate in the hearing at all. If the claimant denies the misconduct alleged, and the employer is unable to present firsthand testimony to prove its allegations, the employer will lose. For this reason, employers should make every effort to determine who the best witnesses are and ensure that they are available to testify at a hearing.

Unemployment claims can be difficult to win. Some are unwinnable. Many cases, however, can be won, and it would be a shame to lose a winnable case unnecessarily. Keeping the above pitfalls in mind can reduce the chance of losing a case that can be won. Common sense and following TWC instructions will go a long way. In problem cases, do not hesitate to consult an attorney experienced in employment law matters, and always remember that your UI taxes already pay for attorneys in the employer commissioner’s office at TWC - a major part of their job is helping employers deal with UI claims and appeals from an employer’s standpoint. The number for that office is 1-800-832-9394. 

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