BASIC EMPLOYMENT ISSUES FOR THE SMALL EMPLOYER

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OVERVIEW

Stewart is a commercial litigator and employment lawyer. He has appeared as counsel for numerous publicly traded and privately held companies in many different industries in courts not only in his home state of Texas, but also in Florida, New Mexico, Nevada, Maine, Michigan, Nebraska and New York. Some of Stewart's recent accomplishments include:

- After successfully securing a preliminary injunction against a client's former employee who had posted the client's trade secrets on various Internet blog sites and convincing the Internet sites to voluntarily remove the offensive postings, Stewart secured a $6.5 million judgment in January 2009 against the former employee.
- After a two day evidentiary hearing in December 2008, Stewart and his co-counsel obtained a directed verdict following a two day evidentiary hearing in which the plaintiff, alleging a corporate raiding of employees and theft of trade secrets, sought a temporary injunction to severely curtail or eliminate the clients' rights to perform services for their existing and potential clients.
- In August 2008, Stewart convinced a Harris County District Court Judge to deny entry of a temporary injunction in a trade secrets case that, if entered, would have effectively shut down the client's nationwide construction operation pending trial, which would have caused the client to lose millions of dollars in revenue.
- In October 2006, Stewart served as lead trial counsel in New Mexico for a successful mass tort lawyer accused of legal malpractice and obtained a complete defense verdict for his client.

Prior to joining Munsch Hardt, Stewart worked at a law firm that he founded, at a national labor and employment firm and at a business litigation boutique. Before that, Stewart was a law clerk to the Honorable Hayden W. Head, Jr., who is currently the Chief Judge of the United States District Court for the Southern District of Texas.

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- United States Courts of Appeals for the Fifth and Ninth Circuits
- United States District Court for the Eastern District of Michigan
- United States District Courts for the Eastern, Northern, Southern and Western Districts of Texas

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A. Introduction

Employment related lawsuits have increased substantially. Employment discrimination lawsuits now constitute more than 20% of all civil lawsuits. With the number of employment related lawsuits increasing annually in Texas, certain trends have become noticeable. It appears that the increase in litigation may be the result of employers making many of the same type of mistakes over and over again. The following is a list of the author's view of the top 10 mistakes repeatedly made by Texas employers. During preparation for this presentation, however, the author uncovered yet another mistake that can be costly to Texas businesses, hence another point for review.

1. Failure to conduct background checks on prospective employees and/or conducting inadequate background checks.

The best way to avoid problem employees is not to hire one in the first place. It is indeed surprising how often the problem employee who turns into the litigious employee has a history of such behavior with prior employees. Publicly available information, such as criminal history and litigation history, is available for all to see. Most employers, however, fail to look, and this mistake can be costly.**1**

Criminal history checks are relatively easy to perform, and there are many agencies who perform this service (as well as other background check services) for a nominal fee of $25-50 per employee. There are several websites where criminal history can be checked. I always advocate background checks on prospective hires, especially for those positions where the individual will be in a position of trust, such as dealing with money, employer checking accounts or the employer's customers.

These checks, however, must be done in accordance with the law. First, there should be a written policy in place that sets forth the procedure by which such checks will occur. The policy should be neutrally applied to all applicants, or all applicants who are under serious consideration for employment, to avoid any claims that the policy is being disparately applied to any one category of applicants. Finally, employers are often not aware that employment background checks fall under the purview of the Fair Credit Reporting Act ("FCRA"), a federal statute that sets forth specific procedures by which such checks must occur. Recent amendments to the FCRA impose specific requirements on persons utilizing consumer report information for employment-related purposes, the details of which are beyond the scope of this paper. Any employer considering employment background checks as a tool should consult with experienced labor and employment counsel to implement a program that complies with the FCRA and any other applicable laws.

Another important reason to conduct background checks is to provide evidence to combat an increasing number of employment law cases alleging negligent hiring of employees. Under this theory of liability, one of the employer's employees, or some other third party, alleges that the employer created an unreasonable risk of harm to the employee or third party by hiring a person whom the employer knew or, through reasonable inquiry or investigation, should have known, posed a risk of harm to the employee or third party. Typically, negligent hiring suits arise after one of the employer's workers somehow harms or injures one of his co-workers or one of the employer's customers and that person sues the employer for the injury. Basically, the employee or third party who has been somehow injured by one of the employer's workers argues that "if you, the Employer, had checked out this person's background, then you never would have hired the individual and, consequently, he never would have been able to come into contact with me and hurt me." A case that demonstrates this theory of liability well, and why it is important for employers to conduct adequate background investigations on prospective employees, is an unreported case from Seguin, Texas, where a woman claimed that she was raped in her home by a salesman for a vacuum cleaner company. A jury awarded the woman $1.7 million after finding that the employer was negligent in hiring a man, who was reportedly on probation for conviction of indecency with a child, for one of its salesperson positions. According to the woman, the employer hired the ex-convict without conducting a criminal background check on him or even calling any of his previous employers. In another case, a jury awarded actual and punitive damages against a nursing home that hired an unlicensed nurse with 56 criminal offenses who assaulted an elderly visitor to the nursing home. *Deering West Nursing Center v. Scott*, 787 S.W.2d 494 (Tex. App. -- El Paso 1990, writ denied).

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1 Despite this point, the author is not advocating that an employer refuse to hire any individual who has sued for employment discrimination in the past, as a failure to hire on this basis can be an illegal employment practice under federal and Texas anti-discrimination laws. A refusal to hire an individual based on prior worker's compensation activity, while not technically illegal, can provide helpful evidence for the wary plaintiff's lawyer in another employee's case who claims they were terminated or otherwise discriminated against for filing a worker's compensation claim.

In upholding the verdict on appeal, the court noted that the nursing home had made no effort to verify whether the employee was a licensed nurse or to check the employee's criminal record.

While it cannot be said with certainty that incidents like these will not occur if employers conduct adequate background checks and hire only those persons whom the background investigations reveal are "clean," employers stand a better chance of escaping liability if they can show that they did conduct a reasonable investigation on their prospective employees and they had no reason to know or believe that the persons they hire would cause harm to their co-workers or third parties.

2. Failing to Pay Overtime/Misclassifying Employees.

Many employers pay employees a salary regardless of the number of hours they work or the type of work they do. This is the problem of misclassifying an employee. Unless an employee is truly "exempt" from overtime obligations under federal and state wage and hour laws, the employer must pay at least time and one half their regular hourly wage for each hour a nonexempt employee works over forty hours in a work week. When in doubt about whether an employee should be classified as exempt, the employer should pay them hourly wages, and pay overtime for those instances when the employee works more than forty hours in a work week.

3. Not following progressive discipline policies and not properly documenting employees' files.

One of the single-most frustrating pieces of information that can be discovered during the course of employment litigation is that an employee who is now suing an employer for some type of discrimination should have been discharged, or at least disciplined, long before the incident giving rise to the lawsuit occurred, but the employer failed to do so. In far too many cases, during the course of his investigation of the facts of a case, the employer's attorneys discover information about the employee which should have resulted in some type of disciplinary action against the employee (*i.e.*, the employee had a history of absenteeism or failing to show up for work as scheduled, or had been the subject of three sexual harassment complaints, or had been clocking in at work and then leaving the facility), yet, when the attorneys review the employee's personnel file, there is no mention or notation of any of those incidents or problems. In the worst case scenario, the only documents in the employee's file are an acknowledgement form that the employee signed upon being hired by the company which states that he is subject to immediate discharge for any of those violations and a three-year old performance evaluation which commends the employee for his hard work and overtime hours and his ability to get along and work well with his co-workers. The mere recitation of such facts should indicate the awful, and probably unnecessary, predicament in which the employer, and its attorneys, have now found themselves. While the fact that evidence of such problems is not contained in the employee's file does not mean that it cannot be used by the employer during the litigation simply because it is not written down, obviously it would have been better, and perhaps more convincing to a jury, if that evidence was presented in hard copy form. That way, the employer would not have to rely on testimony of witnesses who may or may not still be employed by, able to be located by, or loyal to the employer.

4. Not keeping personnel policies and manuals updated.

A bad or out-dated personnel policy or manual may be even worse than not having one at all. Because there are more and more laws effecting the employment relationship as the years pass and interpretations of those laws by the courts are ever-changing, a personnel policy or manual that was "good" at one time, may not be good and/or effective later. Having a relationship with competent labor and employment counsel may be helpful in this respect because counsel may be better able to keep abreast of changes in the law. Additionally, some laws mandate that notice of employees' rights be given to employees in writing. For example, the Family and Medical Leave Act (FMLA) specifically requires that "[i]f an employer has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlement and employee obligations under the FMLA must be included in the handbook or other document." Consequently, a personnel policy or manual that was written prior to the effective date of the FMLA and that has not been updated since then probably does not contain an FMLA policy and may therefore run afoul of the law.

5. Not making informed employment decisions/not coordinating responses to the Texas Workforce Commission, the Texas Commission on Human Rights, the Equal Employment Opportunity Commission and/or the Department of Labor.

Because most employers these days, and especially larger corporations, usually have Human Resources (HR) personnel which are separate and apart from and work independently of managers who do the day-to-day overseeing of employees, it is not uncommon for HR personnel to have information about an employee that his or her immediate supervisor does not have (and vice versa). Moreover, some statutes, such as the Americans with Disabilities Act

(ADA) specifically require that some information about employees be kept confidential and communicated to others only on a need-to know-type basis. As a result of these situations, it is likely that supervisors may not have all the information that they should have to evaluate problems with an employee's performance and to make informed employment decisions. This is not to say that employees are (or should be) excused from informing either or both their employer's HR personnel and their immediate supervisors of information which may explain a perceived performance problem (*e.g.*, like missing work because of an on-the-job injury); however, HR and management personnel should recognize the possibility of not knowing all the information which may be relevant to making employment decisions.

A situation in which a lack of knowledge may result in litigation often arises following an on-the job injury. Under Chapter 451 of the Texas Labor Code, formerly Article 8307c, it is illegal for an employer to discharge or otherwise discriminate against an employee for filing a workers' compensation claim or otherwise exercising his rights under the Workers' Compensation Act. In a few cases, employers have been successful in arguing that because the person making the decision to discharge an employee who has filed a workers' compensation claim was unaware that the employee had filed such a claim, then the employee cannot establish that discrimination under the statute. *See, e.g., Palmer v. Miller Brewing Co*., 852 S.W. 2d 57, 61 (Tex. App. -- Fort Worth 1993, writ denied). However, other employers have not been so lucky. *See, e.g., Mid-South Bottling Co. v. Cigainero*, 799 S.W. 2d 385 (Tex. App. -- Texarkana 1990, writ denied). Thus, before making any employment decisions, and specifically a decision to terminate an employee, management and HR personnel should discuss the situation to determine whether there are any extenuating circumstances or mitigating factors which could influence the decision. In addition, whenever an employer is asked to respond to a formal charge of discrimination -- or even just questions from the various governmental agencies charged with enforcement of the employment statutes (*i.e.*, the Texas Workforce Commission (TWC), the Texas Commission on Human Rights (TCHR), the Equal Employment Opportunity Commission (EEOC) and/or the Department of Labor (DOL)), employers should thoroughly investigate the facts regarding the allegations made by the employee. Inquire about such allegations from its HR personnel, its supervisory personnel, and even the employee's co-workers; and prepare factually correct responses to the questions and/or allegations.

Moreover, employers should also make sure that all responses made to the various agencies are consistent. For example, an employer should not tell the TWC that an employee was discharged for rudeness to a customer, and then tell the EEOC that the employee was discharged for excessive absenteeism. Inconsistencies in such responses, while perhaps capable of being explained, may result in the employer being unable to obtain summary judgment dismissal of a case and may ultimately make the employer look dishonest to a jury. *See Wal-Mart Stores, Inc. v. Kee*, 743 S.W. 2d 296 (Tex. App. -- Tyler 1988, no writ) (upholding jury verdict against the employer based in part on the fact that the personnel manager had given three different reasons for the worker's discharge).

6. Permitting too many "stray comments" in the workplace.

Employers have benefited greatly from court holdings that "stray comments" in the workplace do not constitute evidence of discrimination. *See, e.g., Waggoner v. City of Garland*, 987 F.2d 1160, 1167 (5th Cir. 1993); *McCray v. DPC Industries, Inc*., No. 3-94CV45 (E. D. Tex. April 12, 1996) (despite allegations of racial jokes and being called a "goddamned nig_____, the court found that "[t]he racial jokes and comments were sporadic and merely part of casual conversation, and racial comments that are merely part of casual conversation, are accidental, or are sporadic do not trigger Title VII's sanctions."). These cases notwithstanding, employers should attempt to prohibit comments which may be viewed as disparaging (and especially those which may appear to be based on a protected category such as race, sex, national origin, disability, etc.). As the country has attempted to become more "politically correct," words that may have been viewed as harmless or even funny in times past, may not be given such characterization any more. After a while, "stray comments" appear to be less and less "stray," and instead become "smoking gun" evidence of discrimination. *Sylvester v. Callon Energy Svcs., Inc.*, 791 F.2d 520 (5th Cir. 1986) (evidence that the employer "wasn't sleeping with no nig__" mandated reversal of judgment in favor of employer). This is especially true now, because the courts seem to be denying employer's summary judgments more and more as the decisions of the United States Supreme Court have been friendlier to employees.

7. Making promises that cannot be and/or that are not intended to be kept.

Texas employers are fortunate to be covered by the employment-at-will doctrine. Under that doctrine, an employer may discharge an employee at any time and for any reason or for no reason at all -- even a bad, stupid, unfair or arbitrary reason -- provided that the employee's discharge is not for any one of the few recognized exceptions to the at-will doctrine. Nonetheless, the at-will doctrine is often called into

question because of verbal promises made by an employer's managers or supervisors. While perhaps made with the best of intentions, supervisors and managers should be careful not to make statements which may be interpreted as promising employees employment for any definite length of time or guaranteeing them any particular rights, unless the employer actually intends to do so. Along these same lines, employers should also make sure that their written employment policies and/or manuals do not create rights for employees that are not intended. Any and all written policies should contain a disclaimer which specifically advises employees that the policies do not alter the at-will relationship or otherwise create rights in favor of employees which are not already established by law. The Texas Supreme Court has stated that a proper disclaimer in a personnel policy or manual will defeat an arguments by an employee that the at-will nature of her employment was altered by such policies. *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993).

8. Not taking complaints of sexual harassment seriously.

Employers who take prompt and effective remedial action upon being advised of allegations of sexual harassment are often able to obtain a dismissal of such claims via summary judgment. *See, e.g., Gearhart v. Eye Care Centers of America, Inc*., 888 F. Supp. 814 (S.D. Tex. 1995) (granting summary judgment in favor of employer). Employers should take all complaints of sexual harassment seriously. This is not to say that employers should hire any of the various "experts" who offer sensitivity and other types of training which purportedly teach people how to appropriately interact with each other every time a complaint of "sexual harassment" is made. However, one need only be reminded of the $50 million verdict recently awarded against Wal-Mart to a woman who claimed that she was sexually harassed and that her complaints to management about the conduct were ignored, to understand the importance of taking such complaints seriously. This includes documenting the facts surrounding the complaint, conducting a prompt, thorough, impartial and confidential internal investigation, communicating the results of that investigation only with those who have a legitimate need to know (including the complainant) and meting out any discipline necessary to stop any conduct found to have violated the employer's sexual harassment policy.**2** It might also be a wise idea to ask the complainant what discipline the complainant would view as being effective and get that answer in writing. This will later help in eliminating a common complaint from would-be sexual harassment plaintiffs – *i.e.*, the discipline meted out was not effective.

9. Not complying with the various record-keeping requirements/not having the required EEOC, OSHA, DOL and other posters in the workplace.

Typically, after an employee has filed a charge of discrimination with the any one of the various enforcement agencies, a request for information and documents follows. Unfortunately, it is often at this time that employers find out they have not been complying with the various record-keeping requirements mandated by law. Although non-compliance with such requirements should not mean that the agencies will issue a finding against the employer with respect to the particular charge filed by the employee, the agency may issue its own charge or citation against the employer for not complying with the record-keeping rules. Although each federal employment statute has different record retention requirements, as a rule of thumb, employers should generally retain employment records for three years. For example, under Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act, employers must retain any personnel or employment records made or kept by the employer for one year from the date the record was made or the personnel action taken, whichever is later. Payroll records and other records containing each employee's name, address, date of birth, occupation, rate of pay, and compensation earned per week, however, must be retained by three years under the ADEA. The Fair Labor Standards Act also requires that basic records containing employee information, payrolls, individual

[2] A note here about this point. Many times, an employer will create a document after an investigation which concludes that an employee engaged in harassment which "violates the law." Sometimes, an employer will even air a TV spot (*i.e.*, Texaco race discrimination case) and state that certain conduct "violates the law and will not be tolerated." This is EXTREMELY bad idea. Many times, especially in the "gray areas" in which lawyers make their livings, certain behavior that a lay person believes to violate the law actually does not. Whether certain facts rise to the level of a violation of law is a touchy matter that cannot always be determined. However, when an employer writes that certain conduct is "illegal" or that an employee's behavior was in violation of law and justified termination, it drastically reduces the opportunity for the employer's lawyer to argue that certain conduct, although in violation of company policy, is not illegal and cannot be the basis for a lawsuit. One can only imagine what Exhibit A would be if an employer creates a document that admits that certain conduct violated the law. If the employer is going to mete out discipline for an employee's wrongdoing, it is most always preferable to state that the employee's conduct "violated **company policy**" and therefore justifies the discipline.

contracts or collective bargaining agreements, applicable certificates and notices of the wage-hour administrator, and sales and purchase records be retained for three years. Under the Family and Medical Leave Act of 1993 ("FMLA"), all records pertaining to an employer's compliance with the FMLA including payroll records of FMLA leave taken, copies of employer notices, documents describing employee leave benefits and policies, premium payments of employee benefits and records of disputes with employer over FMLA benefits must be retained for three years. Finally, I-9 Employment Eligibility Verification Forms should be retained for three years after an employee's date of hire or one year after the date of the employee's termination, whichever is later.

In addition to record retention requirements, many government agencies have specific rules or regulations requiring that they, when on an employer's premises, check to be sure that the employer is complying with the posting requirements. For example, the EEOC's Compliance Manual expressly states that investigators should "determine during the tour [of the employer's facility] whether the [employer] has complied with the posting requirements." Moreover, experience from on-site investigations conducted by the EEOC establishes that before even interviewing witnesses during an on-site investigation, EEOC investigators generally ask for a tour of the employer's facility, and specifically the employee break-room, to determine whether the employer has posted the required signs. While complying the various record-keeping and posting requirements may appear to be a small matter, it is one which may make all the difference in the mind of an investigator who is trying to decide whether to issue a finding in a particular case.

10. Not deciding what kind of client to be in litigation/changing types in the middle.

Probably the single largest mistake repeatedly made by Texas employers is not deciding what kind of client to be in litigation and/or changing client types in the middle of litigation. Experience shows that there are basically three types of clients in employment cases. Unfortunately, while those three types of clients should be mutually exclusive, often times they are not.

The first type of client, and the type whom management attorneys most often confront when it is their client's first time being sued, consists of those employers who say, "we haven't done anything wrong and we want to fight this all the way, no matter what the cost." For those employers who really believe in their actions and think that the employee who is suing them is just trying to make some easy money, this is a just and understandable position to take.

The second type of client consists of those employers who say, "we want to fight his thing if it makes sense dollars-wise to do so, but not if it is going to cost too much." For this type of client, the handling of a case is purely an economic matter. If a case can be settled for less that it would cost to take the case to trial (and to win it), then this type of client wants to settle the case. Conversely, if the employee's settlement demand is more than he can ever reasonably expect to get at trial, then this type of client is ready to head to the courthouse.

The third type of client, strangely enough, is a combination of the first two. In short, this type of client starts out as the first type of client, but some time during the pendency of the case, and usually after it has incurred substantial legal fees, it wants to be the second type of client. Employers should attempt to avoid being this third type of client. While the decision to either try or settle a case is always the client's choice, and not choice of its attorneys, the third type of client creates a problem for its attorneys in terms of strategy, approach, and overall efficiency. If an attorney is advised at the beginning of the case that his client wants to fight the case "all the way, no matter what the cost," then it is likely that the attorney is going to put in a great amount of time and research into investigation of the facts, interviewing and/or deposing witnesses, and gearing up for trial. This type of preparation is **not cheap**. It is the author's experience that taking an employment discrimination case to trial involving one plaintiff can easily run from $60,000 to $150,000 in legal fees alone – not including the liability exposure at trial, the opposing side's legal fees if victorious, and the costs of an appeal. Conversely, if the attorney is told that the client wants to get rid of the case and settle the matter as economically as possible, then the attorney is more likely to conduct discovery in a more limited fashion and one which is tailored to putting his client in a good position to negotiate the terms of a settlement as quickly as possible, so as to reduce the overall costs of litigation. A client who starts off saying that it is the first type of client, but halfway through litigation says it wants to be the second type of client, puts itself and its attorney in a precarious situation. Chances are that by the time the client decides that it just wants out of the case, the attorney has already spent more money in discovery and legal fees than it would have cost to settle the case early. Moreover, the client would not have had to expend so much of its own time and/or emotional energies in preparing for trial.

11. Failing to Protect Your Trade Secrets!

Get To Know Your Trade Secrets. Companies are often unaware that their business information may constitute "trade secrets" entitled to legal protection. Contrary to popular belief, it is not necessary to obtain a copyright, trademark, or patent to have a "trade secret," nor do you have to have a nondisclosure or noncompetition contract with employees to protect

them. The confidential information that gives your business a competitive advantage will often constitute a trade secret entitling you to effective legal protection. Unfortunately, the old adage "you never know what you've got until it's gone" holds true for many businesses when departing employees go into competition using the companies' trade secrets against them. It has been estimated that trade secret theft is a $2 to 24 billion a year problem in the United States. Recognizing and zealously protecting the "trade secret" status of your confidential information will prevent your company from also becoming a statistic.

The Law Of Trade Secrets In A Nutshell. A "trade secret" is any information used in the operation of a business that is both sufficiently valuable and secret to afford the business a competitive advantage over others. *Hyde Corp. v. Huffines*, 158 Tex. 566, 585-86, 314 S.W.2d 763, 776, *cert denied*, 358 U.S. 898 (1958). Neither novelty or invention is a prerequisite. Like mom's coveted recipe, a combination of commonly known and available information or components can constitute a trade secret -- if the unified process, design, operation or other combination affords a competitive advantage.

One of the best known examples of a trade secret is the recipe for Coke® - a beverage consisting of no more than a combination of water, corn syrup and other ingredients readily available to the public, but which are uniquely combined using Coke's confidential recipe, affording it a competitive advantage over others. Although the Coca-Cola Company has a trademark on the Coke® logo, and a copyright on its familiar art work and other written media, it does not have a copyright, trademark or patent on its secret recipe -- and for good reason -- these protections only give the creator a legal monopoly for a limited period of time. A trade secret can last forever, *if zealously guarded*.

The following types of information compilations have been held by courts to constitute "trade secrets" in particular circumstances:

- customer and client lists
- customer order information
- buyer contacts
- vendor information
- blue prints, design manuals and drawings
- product sketches
- bidding systems
- combinations of software modules
- computer programs
- computer clustering technology
- manufacturing processes
- business forms
- marketing plans and strategies
- design specifications
- testing data
- training and service manuals
- pricing information
- "lead books" containing potential licensees
- fudge recipes
- *"Negative Knowledge" - Knowing What Doesn't Work.* A trade secret need not be comprised of only *positive* information (such as successful formulas or specifications), but can also include *negative*, inconclusive, or suggestive research data that would give those skilled in the art a competitive advantage they would not otherwise enjoy (often referred to as "negative knowledge").

Factors To Determine Trade Secret Status. A number of factors are considered by courts to determine if the information constitutes a trade secret - the extent to which the information:

- is known outside the business, (*i.e.*, is it "secret"?),
- is known throughout and within the company,
- is guarded by the business from disclosure,
- gives the business a "competitive advantage" over others, (*i.e.*, what value does it have to the business and to competitors?),
- has been developed by the business through effort and expense, and
- is difficult to acquire or duplicate by others.

The "secrecy" factor is worthy of further explanation, because it is here where many employers get burned. As the word "secret" implies, the information compilation must not be generally known or readily available, and reasonable steps must be taken to protect its secrecy. Trade secret protection will not exist where the compilation has been publicly disclosed. Although the information must be "secret," *absolute secrecy* is not a prerequisite -- only "*substantial secrecy*." In fact, it may be permissible under particular circumstances to make limited disclosures of confidential information without waiving trade secret status, such as where a product lists its raw materials, but without the exact proportions of such ingredients (*e.g.*, the ingredients listed on every can of Coke®).

Duties Of Confidentiality Arising From The Employment Relationship. Employees have a duty to refrain from using confidential or proprietary information acquired during the employer/employee relationship in a manner adverse to the employer. This duty arises from the formation of the employment relationship -- regardless of whether a written employment contract exists. *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App. - Amarillo 1995, no writ). This obligation also survives

the termination of employment. *Id*. Although an employee may use his or her general knowledge, skill, and experience, the employee may not use confidential information or trade secrets acquired during the course of employment. *American Precision Vibrator Co. v. National Air Vibrator Co*., 764 S.W.2d 274, 278 (Tex. App. - Houston [1st Dist.] 1988, *no writ*).

Misappropriation. Trade secret misappropriation occurs when:

(1) the plaintiff's "trade secret,"
(2) is obtained by another's breach of a confidential relationship (such as an employer/employee relationship), or through improper means ("means which fall below the generally accepted standards of commercial morality and reasonable conduct"),
(3) is commercially used, and
(4) s a result, causes the plaintiff to sustain damages.

Taco Cabana Intern. Inc. v. Two Pesos Inc., 932 F.2d 1113 (5th Cir. 1991).

Generally, the goal of trade secret protection is to prevent an ex-employee or other competitor from appropriating, by unfair means or as the beneficiary of a broken promise, confidential information without paying the price in money, equipment, or labor. *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 314 S.W.2d 782, 791 (Tex. 1958). Thus, employers should take appropriate steps to ensure that whatever information they wish to shield from competitors remains secret. These steps can include computer security measures, building security measures, policies that require shredding of any documents that contain confidential information, and required contracts with employees that requires nondisclosure of confidential information and, if necessary, a covenant not to compete.[3]

B. Conclusion

With the ever-increasing number of employment discrimination lawsuits being filed today, employers should learn from their own mistakes and those of other employers. While some employment lawsuits are inevitable, employers who avoid making common mistakes may reduce their exposure to employment litigation.

II. CHAPTER 2: CONDUCTING AN EFFECTIVE WORKPLACE INVESTIGATION[4]

This summary is intended to provide you with an overview of important issues surrounding in-house investigations and to outline the steps to a complete, effective, and thorough workplace investigation. This outline will focus on how to handle complaints of sexual harassment and discrimination, as such complaints tend to be the most common trigger for workplace investigations. The guidelines and suggestions in this presentation do, however, largely apply to all kinds of employer-initiated investigations.

A. Impact on Employer Liability

Conducting thorough, careful in-house investigations can dramatically reduce an employer's exposure to liability in employment litigation. Investigations present unique issues and risks for employers – there are several considerations employers must be mindful of prior to conducting an investigation.

B. A Few General Pre-Investigation Considerations

The following are examples of the issues that employers should familiarize themselves with and take care to avoid when conducting investigations:

1. <u>Avoid Discriminatory Behavior During the Investigation Itself</u>

A workplace investigation, just like many other employer actions, can give rise to allegations of discrimination. For example, in *Bernstein v. Oak Park-River Forest High School*, 191 F.3d 455 (7th Cir. 1999), an employee sued for religious discrimination based on her employer's failure to conduct an adequate investigation. The plaintiff was a Jewish teacher who received hate email at home, allegedly from a co-worker. (The 7th Circuit required the trial court to proceed with jury trial of the plaintiff's claims, but the outcome is unknown). The next year, a Burger King employee accused his employer of discriminating against him on the basis of his race during the course of an embezzlement investigation. *See EEOC v. E.J. Sacco, Inc.*, 102 F.Supp.2d 413 (E.D. Mich. 2000). While the court ultimately penalized the EEOC for pursuing this "wholly illusory" race discrimination claim, the employer nonetheless had to deal with the accusations and related litigation.

The lesson: Be sensitive to issues involving gender, race, religion, etc. when conducting

[3] This too is an important aspect to employment law, but is beyond the scope of this presentation.

[4] I wish to thank Drew Tipton at Baker Hostetler LLP for allowing me to indiscriminately "borrow" from his materials on this topic.

investigations of any nature, just as you would with any other employer action.

2. Invasion of Privacy/Defamation

The common-law tort of invasion of privacy consists of the disclosure of private facts about an individual. A person claiming this tort must show 1) that the information contains highly sensitive/intimate/embarrassing facts about his or her private affairs that any reasonable person would strongly object to, and 2) the information is not of legitimate concern or relevance to the third party recipient.

During investigations, particularly those involving sexual harassment, you will likely have to explore sensitive and delicate issues regarding personal conduct with employees. If the inquiry is not appropriately limited to the employee's job performance, conduct at work, or relations with the accused, the inquiry may constitute an unjustified invasion of privacy.

The danger of a defamation claim in connection with an investigation is fairly obvious – in these kinds of cases, typically, the accused is claiming that his or her reputation was damaged by false public allegations or information arising out of an investigation. Managers should be trained to never say or write anything about an employee if it cannot be proven with reliable documentation or firsthand testimony.

These privacy concerns can be diffused and avoided through effective privacy policies and written consents. Evaluate your handbook and employment policies to ensure that you are taking the appropriate preventative steps. Claims of invasion of privacy or defamation can come from the accused or the accuser. In addition to establishing appropriate policies and consent forms, employers should also do the following: 1) initiate investigations only on the basis of well documented factual allegations that objectively warrant investigation; 2) keep the scope of any investigations narrow and specifically tailored to the allegations at issue and the employer's legitimate interests; and 3) keep the information confidential, disclosing only on a strict need-to-know basis.

3. False Imprisonment

This is a cause of action that may be brought against an employer if an employee feels that he or she was restrained or confined during the course of an investigation to the point of being "imprisoned." Generally, while an employer has the right to question employees about conduct connected with work, the employer cannot physically detain an employee against his or her will – either physically forcibly or through verbal threat. To avoid allegations of false imprisonment, the employee being interviewed should usually be positioned between the investigator and the door, such that nothing physically prevents the employee from leaving. It also helps to advise the employee that while the employer intends to complete the investigation, the employee should feel free to advise the employer if he wishes to leave the interview.

4. Polygraphs

Simple rule for the use of a polygraph test in connection with an employment investigation: Do not use them. While there are very limited exceptions, the federal Employee Polygraph Protection Act, 29 U.S.C. § 2001 *et seq*., bans the use of polygraph testing in virtually all private employment settings.

5. FCRA Considerations

If employers are confronting highly sensitive or complex issues in connection with an investigation, they may wish to involve lawyers, private investigators, or independent consultants to conduct all or part of the investigation. When employers involve third parties, employers must be mindful of their obligations under the Fair Credit Reporting Act (FCRA). The most common situation in which this arises is in connection with an applicant's pre-employment background check. The FCRA has several applicable requirements in this situation, including written authorization from the employee, notice to the employee regarding his or her FCRA rights, and providing the employee with a copy of the third party report.

6. Legal Counsel as Investigators

As a general rule, it may be appropriate to involve legal counsel in an investigation as an advisor and consultant, but not as an investigator. As indicated above, the use of outside legal counsel may implicate the FCRA. Additionally, an attorney who becomes directly involved in fact/evidence-gathering may turn into a fact witness and be subsequently disqualified from acting as the employer's attorney. Finally, while the use of attorney on an advisory level may result in the application of privilege to certain sensitive information, attorney involvement in actual interviews or fact gathering may result in the forced disclosure of the attorney's notes and communications concerning the investigation.

C. Policies, Training, and Pre-Investigation Planning

The United States Supreme Court's landmark 1998 decisions in Burlington Industries, Inc. v. Ellerth, 188 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) created the standard in place today for an employer's affirmative defense to claims of sexual harassment. Under this new standard, employers continue to be vicariously liable for quid pro quo sexual harassment. Employers will also be

vicariously liable for hostile environment sexual harassment unless the employer can prove 1) that the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. These standards are not limited to sexual harassment cases, but apply also to harassment cases based on race, color, religion, national origin, age, disability, or protected activity.

Practically speaking, this means that employers should establish comprehensive discrimination and harassment policies that clearly outline prohibited conduct and clearly outline complaint procedures. Employers should also provide thorough training to all employees to advise them of these policies and procedures.

D. How to Do it Right the First Time

1. Triggering Events

It may be advisable or necessary to conduct an investigation even under circumstances that do not strictly fall under an employer's established complaint procedure – the managers and supervisors within any given company should be regarded as the "eyes and ears" of the company. Employers should always assume that they will be responsible for any harassment or discrimination that is known to a supervisor or which the employer could have discovered through reasonable diligence. Thus, if any of the following occur, prompt investigation and/or remedial action may be necessary:

1. Any employee complains to any manager or supervisor about conduct the employee has allegedly personally experienced that is discriminatory, retaliatory, or harassing.
2. Any person (employee or non-employee) brings a supervisor's attention to allegations that any employee has been subjected to discriminatory, retaliatory, or harassing conduct.
3. Any supervisor personally observes conduct that could be construed to be discriminatory, retaliatory, or harassing in nature.
4. An employee's morale, behavior, or performance declines unexpectedly and for no apparent reason.
5. An employee is suspected of misconduct or violates a rule/policy.
6. Upon receipt of an EEOC Charge, even where no complaint was made to the employer prior to the filing of the Charge.

2. Goals of an Effective Investigation

There are a number of goals underlying workplace investigations. The main goal of any kind of investigation is typically to establish a sound, factual basis for any employment-related decisions or management actions. This ultimately serves the employer's interest in avoiding or minimizing its exposure in any subsequent litigation that might arise. Other goals of workplace investigations are to reveal whether misconduct has occurred, identify or exonerate specific employees, and deter future misconduct or inappropriate behavior. In meeting these goals, there are many things to consider once a triggering event occurs. An employer must decide what kind of investigation should be done, who should be involved (and to what extent), and how to utilize the results of the investigation to facilitate the best outcome under the particular circumstances.

3. What Kind of Investigation Should Be Done?

Before initiating any investigation, and immediately after the occurrence of a triggering event, the employer should consider whether the question or problem is one that can be resolved quickly and informally (no investigation) or whether a formal investigation is necessary. Factors to be considered include: the complexity of the issues, the number of employees involved or implicated in the complaint, the number of incidents implicated in the complaint, the nature of the alleged behavior (minor or significant), and whether all of the facts necessary for resolution of the complaint are known.

4. The Formal Investigation

The following steps outline a comprehensive, fair, objective investigation technique that can be adapted to fit the needs and interests of the employer in most situations. Remember that every investigation necessarily maintains some flexibility (e.g. if criminal behavior comes to light, or additional allegations arise during the course of an investigation, new people may need to be brought in and the scope of the investigation may change).

a. Select Your Team

Selecting the right investigator or investigation team is critical – it should be someone or a group of persons who will be credible and regarded as objective. Additionally, the investigator or team should be knowledgeable about the company policies, have good interviewing skills, be well-organized, and be able to communicate well with all of the potential interviewees. It is a good idea to consider how well the selected investigator or investigators will present in court for the purpose of giving testimony. Of course, the employer should also consider the potential investigator's or group of investigators' trustworthiness with confidential and sensitive information.

It can be helpful to consider additional factors as well. For example, a female sexual harassment complainant might be more comfortable speaking to a

female about her allegations. Additionally, while it is not necessary (and often not possible) to have the same person or persons conducting all workplace investigations, it may be advisable to designate one or more persons (typically a Human Resources Director or similar position) as a standard member of an investigative team.

b. Assemble Relevant, Known Information and Documents

All of the relevant documents and information known before the commencement of the investigation should be identified, gathered, and reviewed promptly following the complaint. Keep in mind that waiting too long may mean that witnesses are no longer employed, documents are no longer in existence or easy to find, and witnesses may become intimidated or forget important details. Once a complaint is made, or a triggering event is identified, steps should immediately be taken to preserve any potentially relevant documents or items.

c. Create Investigation File

The investigator or team should prepare a file as soon as possible, containing the following:

- all of the relevant documents (emails, letters, etc)
- company policies
- appropriate documents from relevant personnel files (the accused, co-workers, the complaining employee)
- prior complaints by the complainant
- prior complaints against the accused
- written plan identifying who will be interviewed (this should be continuously updated as necessary throughout the investigation)

As the investigation progresses, the file should be constantly updated with any new relevant information, including witness interview notes, signed statements from witnesses as appropriate, and ultimately a copy of the investigator's or team's final report and recommendation.

d. Identify the Persons to Be Interviewed

In the majority of situations, the primary interview with the complaining employee occurs at the time the employee makes a complaint – nonetheless, follow-up interviews should be scheduled and conducted as needed in order to ensure that all of the appropriate information is gathered. This is particularly true when the supervisor or manager receiving the complaint is not the person who ultimately conducts the investigation.

In a "typical" investigation, employers should also interview:

- the alleged offender
- anyone who directly observed an incident
- any other witnesses identified by the complaining party or the accused
- anyone who created any relevant documents
- the complaining party's supervisor
- the accused's supervisor

Be cautious about expanding the interview beyond what is necessary to gather the appropriate and relevant information (no "fishing expeditions").

e. Explore Interim Preventative Measures

If the complaint giving rise to the investigation is one that presents a risk to the health or safety of any employee, or compromises the integrity of the company's policies or the investigation, consider taking interim action. For example, it may be appropriate to discuss suspending or re-assigning the accused (if the allegations are serious enough) pending completion of the investigation.

f. Interviewing Tips

For interviews conducted in connection with a workplace investigation, there is no substitute for thorough preparation. For each interviewee, the investigator should think about the where, what, and how of the interview process before it takes place.

1. Where

The investigator should take care to protect privacy and confidentiality. Choose a location that is neutral, fairly private, and unimposing.

2. What

What you say (and what you ask) is the most important part of the investigation process. With each employee, begin the interview with an "opening statement" of sorts, in which you explain the reasons for the interview and your expectations for the employee (honesty, cooperation, etc). In general, you should address the following things at the outset of each interview:

- your appreciation for the employee's time and cooperation
- a brief explanation of the matter you are investigating
- the reason for this interviewee's participation in the process
- emphasize the company's commitment to a complete evaluation of the complaint
- emphasize confidentiality/need to know basis
- emphasize anti-retaliation policy

Additionally, do not give the impression that there is any kind of time limit on the interview – particularly with the complainant or the accused. This could give the impression that the issues are not being taken seriously enough.

The tone and atmosphere of the interview is important – try to allow the employee to do the majority of the talking. Avoid interrupting the employee, cutting off information, or supplying a conclusion to the employee's statements. Pay attention to the employee's body language and non-verbal messages as well. Signs of nervousness, avoidance, evasiveness, etc., can be just as informative as a direct answer.

Sample interview questions for the complaining employee:

- What is the problem? What happened?
- Who was involved?
- When and where did the incident take place?
- Did anyone see this? Who?
- Has this ever happened before? Anything similar?
- Have you talked to anyone else about this? Who?
- Have you talked with any managers or supervisors about this? Who?
- What was their reaction?
- Are you aware of any notes, documents, etc, that are relevant?
- Have you kept or made any notes or documents about this?
- Do you know of any other employees with similar concerns/issues?
- What do you think the accused might say about the allegations?
- Do you think you can work with or around the alleged offender?
- If so, what can the employer do to help?
- If not, why not?
- Do you have any suggestions or preferred resolutions? What would you like to see in terms of the outcome of your complaint?
- If an investigation is warranted, do you have any additional facts or information that would be helpful to the investigator?

Sample interview questions for the accused employee:

- What positions have you held? When?
- Who have you supervised/worked with?
- Are you aware of the allegations?
- What is your response?
- What is your view of the complaining employee's conduct?
- Did the complaining employee ever complain to you directly? If so, what did he or she say?
- Do you have any documents you think are relevant to the issues involved?
- Do you have any witnesses you want me to talk with?
- Do you know why the complainant would falsify these allegations (if accused says that the allegations are untrue)
- Has anyone spoken to you before this about these allegations? If so, who? When? What was the outcome?
- Have you ever made (racial, sexual, etc) comments toward any co-workers?
- Have you ever spent time with employees outside of work? If so, when, who, why, how often?
- What are your relationships like with the complainant/co-workers?
- Have you ever commented on the (race, sex, gender, etc-based) attributes of the complainant? Have you ever seen anyone else do it?

The scope and nature of the specific questions directed at each interviewee will vary depending upon the specific allegations and issues involved, but typically it is best to ask open ended questions that encourage the interviewee to tell their story in their own words.

3. How (Documenting)

It is important to document each interview as thoroughly as possible so that the employer has a record of the information gathered. It is a good idea to get employee statements, signed by the employee, and consisting of a record of the issues raised, the employee's version of what happened, and a statement of any and all knowledge the employee has concerning the allegations at issue. Tape recording the interviews might be appropriate in some circumstances – it is advisable to obtain consent first, even though Texas does not require consent.

g. Analysis & Conclusions

After completion of all the interviews in the investigation process, the investigator should take steps to ensure quality control, assess interviewee credibility, reach a conclusion, communicate the outcome to the complainant and the accused, and take appropriate action.

1. Quality Control

Review all notes, documents, etc. from the interviews and check everything for completeness, accuracy, and proper documentation. Go back to the initial investigation plan and ensure that nothing was omitted. If possible, consult with someone else (appropriately) concerning their impressions regarding the completeness and scope of the investigation to make sure there are no significant outstanding questions before a conclusion is reached.

2. Credibility Assessment

Reaching the appropriate conclusion in an investigation sometimes necessarily requires that the investigator engage in credibility assessment – there are almost always at least two sides to every story. Consider, for each interviewee, the following factors:

- Body language
- Reactions to allegations or questions – argumentative? Defensive? Hostile?
- Logic and consistency of the interviewee's story
- Whether or not the person was forthcoming with information
- To what extent are individual accounts independently corroborated by others?

3. Reaching a Conclusion

Despite the fact that many situations involve interpreting various shades of grey instead of unearthing a black and white picture, it is critical to reach a conclusion in the investigation. The conclusion should be supported by the documents, interviews, and the investigator's impressions.

4. Credibility Assessment

In order to communicate that the employer takes concerns and complaints seriously, the results of an investigation should be shared with the complaining employee and the accused. Particularly in complicated or very serious incidents, the employer should consider making this communication in writing – especially where the communication is accompanied by an employment action. It is typically not advisable to reveal any information concerning the outcome of an investigation to other employees – even those interviewed as witnesses. It is generally best to advise any inquiring employees that while their assistance was appreciated, the outcome of an investigation is confidential under employer policy.

5. Taking Appropriate Action

Finally, if the outcome of the investigation warrants corrective action, employers should consider the following factors in making the appropriate determination:

- Were any policies violated?
- How has the employer reacted to similar incidents in the past?
- Is the employer obligated under law to take any action?

As much as possible, employers should take action consistent with anything that has been done in similar prior situations.

After reaching a conclusion and taking the appropriate action, the employer should update the investigative file with documentation reflecting the final steps taken. For every document placed in the investigative file (or created during the process) remember that it could become an exhibit someday. An employer has conduced an effective workplace investigation if a jury or EEOC investigator would conclude, upon reviewing the file, that the employer took the situation seriously and responded quickly and appropriately.

III. CHAPTER 3: RESPONDING TO EEOC CHARGES

Dealing with any government agency may be time-consuming and frustrating for an employer, especially smaller employers. For some employers, dealing with the U.S. Equal Employment Opportunity Commission (EEOC), in particular, can be a real nightmare. However, once you understand the process, you can make the situation go more smoothly.

A. Get Competent Counsel Involved Early.

The key to diffusing potential liabilities caused by governmental investigations is to bring in competent counsel at the earliest possible opportunity. Employment counsel deal with the EEOC/DOL on a day to day basis, and are highly equipped not only to know the applicable law, but can more quickly assess the situation and determine the most cost-effective strategy for the small employer. More often than not, seasoned employment lawyers are very familiar with the staff who conduct the investigations for the EEOC or the Department of Labor, and over time have developed a relationship with them. Like appearances in court, credibility with a governmental investigator can go a long way to resolving any employment claim being investigated by the governmental agency.

B. Do They Even Have The Right?

One aspect of a governmental investigation that is especially applicable to smaller employers is the jurisdiction of the agency involved. It has been the author's experience that some federal and state

agencies often forget that their power is circumscribed by various statues and administrative regulations, and many times, the lower level bureaucrats are not even aware of them. For instance, the Texas statutes that prohibit employment discrimination and retaliation, like their federal counterparts, do not apply to employers unless the employer: (a) is engaged in an industry affecting commerce; (b) has employed at least fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Tex. Labor Code Ann. § 21.002(8). Because these statutes do not reach employers that are outside the standard definition, a smaller employer might be able to head off any investigation by politely pointing out these jurisdictional limitations.

Another area to check when dealing with Department of Labor investigations is to study the Code of Federal Regulations that sets forth the scope of investigative powers that the agency has. One should keep in mind, however, that most agencies have subpoena power, so it is far more beneficial to voluntarily cooperate with an investigation rather than force subpoenas to be issued, unless, of course, you are dealing with an unreasonable investigator who has decided that his or her sole purpose in life is to make your client miserable through burdensome subpoenas. At that point, sometimes the only voice of reason can be found in a courtroom, where the agency must file an administrative proceeding to attempt to enforce their subpoenas.

C. Investigate Carefully and Review Documents

Once the employer has received the charge, the next step is to investigate. It is my preference that the employer's own internal staff conduct the investigation, rather than outside counsel, as this may transform you from lawyer may become a witness. Another reason it makes sense to investigate internally is because any outside investigation can raise the specter of the Fair Credit Reporting Act (FCRA), and all of its administrative hurdles. Even when the employer decides to conduct the investigation internally, outside counsel should always write and or review the position statement before the employer submits it, because whatever is in the statement is going to be the document that the agency, the aggrieved employee, and/or a private plaintiff's lawyer hangs around the employer's neck from that point forward.

D. The Less Said, The Better

And because the employer is often held to account for the accuracy of the statements set forth in the position statement, it is often best that the employer offer as little information as possible. Although the tight-lipped approach might irritate the government investigator, the approach offers other advantages that I believe far outweigh the risk. One must remember that the vast majority of employee complaints to federal agencies never go beyond the administrative stage. For instance, while federal agencies have the ability to sue an employer on behalf of the aggrieved employee, the sheer numbers of complaints they receive and review, coupled with the practical limitations of budgetary constraints and the change in policy interests that occur with each new political appointment, make that risk negligible. For instance, in 2007, the EEOC reports that it had 82,792 charges filed nationwide, but its legal department only filed 362 lawsuits that year. While there is not an exact correlation (given the time that elapses between charge filing and suit filing), the rudimentary math shows a .0043 percent chance that the EEOC will accept the claim against your client as meritorious and file suit on the aggrieved employee's behalf. Thus, for the cases in which lawsuits are eventually filed after the EEOC administrative process concludes, approximately 99.57% of them are filed by private lawyers who would like nothing more than a nicely prepared position statement full of sworn affidavits, internal employment documents and personnel files with which to plan their case and to cross examine the employer's decisionmakers about during depositions and trial. Remember, once a lawsuit is filed, the litigants can obtain most of the information in the EEOC's file under the Freedom of Information Act. In addition, during the administrative process, the EEOC routinely shares the position statement and its attachments with the complaining employee and seeks the employee's rebuttal. Thus, the employee will have early access to your position statement that will enable the employee to shop his or her case around town looking for a lawyer to sue their employer or former employer. There is a reason why gun safety experts advise storing ammunition away from the gun – guns cannot kill without ammunition, and neither can a half-cocked, angry former employee.

Another reason to be tight lipped is the fact that one usually has never performed a full and complete investigation by the time the administrative process runs its course. Witnesses are unavailable, back up email has not yet been retrieved and studied, and an employer's staff might not be so forthcoming during the initial investigation. In short, there could be ticking time bombs in the employer's files or computers that won't detonate until much later during the case. Thus, it makes strategic sense not to pin the employer down if at all possible. Finally, the position statement is being submitted to a governmental agency and submission of a false position statement could subject the employer, and their counsel, to criminal sanctions. For these reasons, risking the ire of a federal

investigator by being tight lipped is, in my view, well worth the benefits an employer gains by doing so.

E. Diffuse The Bombs – Settle Early If Possible/Offer Unconditional Reinstatement

Let's face it. There are some employment cases that really have merit, and there are some employers out there who really have exposure from time to time. In my view, the best way to resolve those matters is, like most troublesome cases, to resolve them early. The EEOC offers a mediation program that is free, and attendance at these sessions can sometimes enable an employer to head off an expensive, time consuming fight down the road. Don't allow your client's egos and "sense of right and wrong" get in the way of making a sound, cost effective business judgment to cut their losses early. If an early settlement is not possible, then the employer should consider making to the employee an unconditional offer of reinstatement to a position equivalent in duties, pay, and benefits to the one the employee had before termination. An unconditional offer is not based on the employee withdrawing the claim or settling the case, but is merely offering an open position with no strings attached. If the employee rejects the offer, the employer has just cut off any liability for back pay, and provided itself with a strong argument to avoid any front pay, should the case proceed forward.

IV. CHAPTER 4: TEXAS PAYDAY ACT

The Texas Payday Law (the "Act") governs the payment of wages, commissions and bonuses to any individual who is employed by an employer for compensation. TEX. LAB. CODE § 61.001 et seq. The purpose of the Act is to deter employers from withholding wages by providing employees with an avenue for enforcement of wage claims, many of which would be too small to justify an expensive civil lawsuit. Holmans v. Transource Polymers, Inc., 914 S.W.2d 189 (Tex. App. – Fort Worth 1995, writ denied). The Texas Workforce Commission ("TWC") exercises jurisdiction over work performed in Texas, by a Texas resident who worked outside of Texas for a Texas employer, or for a non-resident employer over whom Texas exercises jurisdiction. 40 Tex. Admin. Code § 821.3. Also, wages reported to Texas for unemployment insurance purposes will bring an employer within the grasp of the TWC. Id.

An "employer" means any person who employs one or more employees or who acts directly or indirectly in the interest of an employer in relation to an employee. Tex. Lab. Code § 61.001(4). The term "employee" under the Act means an individual who is employed by an employer for compensation. Tex. Lab. Code § 61.001(3). An employee is not (a) a person related to the employer or the employer's spouse within the first or second degree by consanguinity or affinity or (b) an independent contractor. Id.

Wages are specifically defined by the Act as compensation owed by the employer for (a) labor or services by an employee, whether computed on a time, task, piece, commission or other basis; and (b) vacation pay, holiday pay, sick leave, parental leave pay or severance pay owed to an employee under a written *agreement* with the employer or under a *written policy* of the employer. Tex. Lab. Code § 61.001(7).

The TWC adds that an employer has not paid wages if the employee returns the check or refuses it because he has reason to believe the check will be dishonored. 40 Tex. Admin. Code § 821.21. Also, an employer is considered to have not paid wages if the employee does not agree with the amount of the paycheck and believes that an endorsement of the check will release the employer from liability. Id.

Wages due on commissions or bonuses are governed by "an agreement" or collective bargaining agreement. Tex. Lab. Code § 61.015. Note that the latter section does not require that the agreement be written. However, the TWC will almost always rule according to the written terms of an agreement to pay commissions or bonuses. In fact, commissions are deemed earned when the employee has met all the required conditions set forth in the applicable agreement. 40 Tex. Admin. Code § 821.26(a)(1). To change the agreement, there must be prior notice as to the nature and effective date of the changes. Id. Payment of the commissions are to be timely and in accordance with the agreement, which terms should specify the time intervals or circumstances that would cause commissions to become payable, i.e., weekly, monthly, recorded sales, collected sales, 90 days past collections, etc. 40 Tex. Admin. Code § 821.26(a)(2). An employer must pay commissions earned as of the time of separation after a separation from employment; however, draws against commission may be recovered from the current or any subsequent pay period until fully recovered. 40 Tex. Admin. Code § 821.26(b) & (d).

As for vacation and sick leave pay, such are payable to an employee upon separation from employment only if a written agreement with the employer or a written policy of the employer provides for payment. 40 Tex. Admin. Code § 821.25(a). Therefore, handbooks and policy manuals need to be clear regarding payment of unused paid vacation/sick days upon termination.

Posting

Like other state and federal laws, the Act has posting requirements. Under the Act, employers must post in conspicuous places notices detailing with when pay days are. TEX. LAB. CODE § 61.012(c). Sample postings may be obtained from the TWC upon request.

There is no indication of any penalties for failing to make such postings. The TWC can, however, assess a $1,000.00 fine if it finds the employer acted in bad faith. Tex. Lab. Code § 61.053. The TWC further interprets bad faith as when an employer has knowledge that the failure to pay wages is in violation of the Act or the employer has reckless disregard for the requirements of the Act. 40 Tex. Admin. Code § 821.44. There are also criminal penalties, a felony in the third degree, if the employer intends to avoid payment of wages to his employees, and fails to make such payments after a demand is made. Tex. Lab. Code § 61.019. Thus, an employer's failure to make such postings may be evidence of his bad faith to intentionally avoid paying wages to his employees.

Claims For Minimum Wage and Overtime

Note that the Act does not discuss payment or recovery of "minimum wage" or "overtime." The TWC, however, takes the position that it has jurisdiction over claims for unpaid minimum wage and overtime pay. 40 Tex. Admin. Code § 821.6. The TWC will consider any "applicable minimum wage and overtime requirement" to see if wages are due and unpaid. *Id.* When determining whether an employee is entitled to federal minimum wage or overtime, the TWC will look at the Fair Labor Standards Act ("FLSA") and the Department of Labor regulations. *Id.* In determining state minimum wage, the TWC will look to the Texas Minimum Wage Act. *Id.*

Pay Days

The Act sets some parameters on when wages are to be paid. If an employee is exempt from the overtime provision of the FLSA, the employee must be paid at least once each month. TEX. LAB. CODE § 61.011(a). All other employees (non-exempt employees) must be paid wages at least twice each month. TEX. LAB. CODE § 61.011(b). Each pay period must consist of an equal numbers of days, if possible. Tex. Lab. Code § 61.011(c). Failure to designate pay days forces an employer to pay wages on the first and fifteenth of each month. TEX. LAB. CODE § 61.012(b). If, for some reason, an employee is not paid on a regular pay day, the employee must be paid on the next regular business day on the employee's request. Tex. Lab. Code § 61.013. This is true even if the employee missed the regular pay day due to his own absence. *Id.*

If an employee is discharged, an employer owes the employee all wages due and owing not later than the sixth day after the discharge. TEX. LAB. CODE § 61.014(a). Employers must pay employees who leave by means other than discharge (*i.e.*, resignation) not later than the next regularly scheduled pay day. TEX. LAB. CODE § 61.014(b). If an employee quits on a payday, then his last pay is due, in full, the next scheduled payday. 40 Tex. Admin. Code § 821.22(b).

Manner of Pay

Employers must pay wages (1) in United States currency, (2) by a written instrument negotiable on demand at full face value for United States currency, or (3) by electronic transfer of funds. Tex. Lab. Code § 61.016. Although the Act allows for direct deposit as a means of paying employees, it also places restrictions on the ability to mandate that employees accept direct deposit as a means of payment of wages. Both the Act and the FLSA require that employees receive the minimum wage for hours worked and that deductions not be made without authorization.**5** An employer may not force an employee to incur expenses, which would bring the employee's wages below the applicable minimum wage for the hours worked (time and one-half for overtime hours). In addition, the Payday Law prohibits an employer from making deductions from an employee's pay without written authorization to deduct part of the wages for a lawful purpose. The Act specifically provides that an employer may not divert or withhold any part of the employee's wages unless: (1) the employer is ordered to do so by a court, (2) is authorized to do so by state or federal law, or (3) has written authorization from the employee to deduct part of the wages for a lawful purpose. Tex. Lab. Code § 61.018. Banks usually charge a fee for an account. The requirement of direct deposit, being for the convenience to the employer, necessitates the requirement of a bank account, and the fee to maintain the account could bring the employee's wages below the minimum wage.

In fact, the TWC takes the position that an employee may have a valid Payday Law claim against an employer who requires wage payments by electronic fund transfer, specifically if the employee objects. Some employers, however, offer free banking for employees if the employee does direct deposit through a specific financial institution. By providing a free bank account, it is possible to avoid the problem of reducing an employee's pay below the minimum wage. The TWC's position seems to make it abundantly

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[5] Even though the FLSA requires that employees receive the minimum wage free and clear of deductions, the FLSA does not discourage loans to employees; hence, deductions for loans can bring an employee's wages below the minimum wage. *Brennan v. Veteran Cleaning Service, Inc.* 482 F.2d 1362 (5th Cir. 1973). Also, the TWC recognizes the importance of allowing employers to make loans, so it allows for the recouping of any loans to an employee out of a final paycheck as long as it is for the agreed amount. 40 TEX. ADMIN. CODE § 821.27.

clear that the Commission disfavors mandatory direct deposit.

Delivery of Payment

The Act also specifies how an employer shall pay wages. The employer shall deliver them to the employee's regular place of employment during regular employment hours. Tex. Lab. Code § 61.017. Or, it shall deliver them at a time and place agreed upon by the employer and employee. *Id.* Or, it shall send them to the employee by registered mail, but only if the employee received the wages not later than pay day. *Id.* Or, it can also deliver them by any reasonable means authorized by the employee in writing. *Id.* The employer can also deliver the wages to a person designated by the employee in writing. *Id.*

Filing Wage Claims

If an employee believes he is not paid properly under the Texas Payday Law, he *may* file a sworn wage claim with the TWC no later than 180 days after the date on which the wages were due for payment. TEX. LAB. CODE § 61.051. However, as discussed below, a claimant need not always file with the TWC to proceed with a suit for unpaid wages, commissions or bonuses.

The TWC provides that a faxed wage claim will not be considered valid. Also, a copy of the wage claim is not valid unless it has the original signatures of the claimant and witness. 40 Tex. Admin. Code § 821.42. Upon receipt of the wage claim, the TWC will begin its investigation. Part of its investigation includes receiving input from the employer. The employer will fill out a form entitled "Employer Response to Wage Claim," which is to be completed within 14 days after the date the notice of wage claim is mailed to employer. Unlike the time periods for unemployment compensation claims, the time periods under the Payday Law, at least this initial 14 day period, is not strictly enforced. Even if the employer misses the 14 day response time, it should always file a response as it will almost always be accepted by the TWC.

Among the initial documents sent to the employer by the TWC will be the wage claim completed by the employee setting forth the wages, commissions, bonuses and/or fringe benefits sought, along with the reason(s) why the employee believes he or she is entitled to such payments. The employer should always read this form carefully for errors.

Based on this initial investigation, the TWC will make a Preliminary Wage Determination Order. Tex. Lab. Code § 61.052. Either the employer or the employee may contest the preliminary wage determination. Tex. Lab. Code §61.054. This contest must be made not later than the 21st day after the TWC mails the Preliminary Wage Determination Order. Id. Note: the TWC enforces this 21 day period more strictly than the 14-day employer response deadline. Also, the contest must be 21 days after the date the Order is mailed, not received. The TWC has interpreted this provision to provide that when either party files an appeal to an order, the TWC will consider all issues, including the amount of the wages in controversy.

The Preliminary Wage Determination Order may also include any administrative penalty – the lesser of the amount of wages claimed or $1,000.00. Tex. Lab. Code §§ 61.052(b) & 61.053(d). Just as employers can be assessed an administrative penalty for bad faith, so too can employees who acted in bad faith in bringing the wage claim. Tex. Lab. Code § 61.053(b). There is, however, no private right of action by employees to sue their employer for such administrative penalties.

If the Preliminary Wage Determination Order finding wages are owed, is not contested, payment of the amount found in the Order must be paid by the 21st day after the Order is mailed. Tex. Lab. Code § 61.056. When the employer submits proof of payment, the TWC will allow the claimant an opportunity to contest the information. A claimant who submits proof of payment should do so in writing by a signature verifiable by the TWC. 40 Tex. Admin. Code § 821.61. The entry of a final administrative order in favor of the employee becomes a claim on all personal and real property of the employer unless a timely appeal is made. Tex. Lab. Code § 61.081. If a party timely appeals, a hearing is conducted and the Preliminary Wage Determination Order may be modified, affirmed or rescinded.[6]

Payday Claim Hearing

Once the Preliminary Wage Determination Order is contested, a hearing will be scheduled before a hearing officer. The Act provides that a Notice of Hearing will be mailed no later than 21 days after the contest of the Preliminary Wage Determination Order is received by the TWC, and that a hearing will be scheduled for no later than 45 days after the date the Notice is mailed. Tex. Lab. Code § 61.057. The hearings are now conducted by telephone which requires that the parties to forward any exhibits intended to be use to the hearing officer and the other side before the hearing. The parties are also required to call in 30 minutes prior to the hearing to give the hearing officer the telephone number where they can be reached. If a witness is at another location, the hearing office can conference that individual in as well.

[6] The preliminary wage determination order will be void if entered against a non-existent entity. 40 TEX. ADMIN. CODE § 821.46.

Failure to Appear At Hearing

If the employee fails to show, the employer must be prepared to put forth the bare, but essential, elements to prove the case. The hearing officer will still require the presentation of evidence, particularly if it is the employer who is appealing. The TWC also allows timely requests for reopening and grant this if good cause is shown by the petitioner for failure to appear at the prior hearing. 40 Tex. Admin. Code § 821.45.

Continuance of Hearing

It is possible to postpone the hearing upon advance notice to the hearing officer. It is also possible to notify the hearing officer of the unavailability of a witness or party and receive a postponement. Some reasons for a postponement include: (i) illness of a party or material firsthand witness expected to testify; (ii) death in the immediate family of a party; (iii) need for an interpreter; (iv) pending criminal prosecution; or (v) religious observance. The need for an attorney is generally not a good reason for a postponement – nor is the illness of a party's attorney, or a vacation.

If the postponement is denied, the party who requested the postponement, and who receives an adverse decision, may request a "Reopening of the Hearing." The TWC will make a determination of whether there is good cause to reopen the hearing. This will often result in another hearing with the first issue being addressed whether there was good cause to miss, or not put in evidence at, the first hearing. Be prepared to continue with the merits of the wage determination immediately after the "good cause" testimony, as the hearing officer generally takes the whole matter under advisement – unless it is abundantly clear that good cause did not exist.

Rules of Procedure at the Hearings

If there is time before the scheduled hearing, a party might want to request the file through the Texas Open Records Act. Often times there are statements and other documents that had not been provided, which will help a party better prepare for the hearing. The TWC "sort of" follows the rules of civil procedure, *i.e.*, hearsay, *etc*. All testifying witnesses are put under oath, and are subject to perjury. A party's witnesses need to be acutely aware of this fact. This is especially beneficial if the employer is trying to pin the employee down to a position for future use. The whole hearing is recorded and everything said is taken down as part of the record. Since the hearing is conducted by telephone, it is very beneficial for a party to have its witness(es) in the same room, talking into a speaker-phone.

Direct Examination – Generally the party who has appealed the preliminary wage determination will proceed first. It will begin with the hearing officer asking the witness questions, then the representative/attorney, if any, will have the opportunity to conduct any follow-up questions, followed by the opposing party's questions of the witness. It is beneficial to put the witness(es) testimony in through a question and answer type format. It is also extremely beneficial to go over the testimony with the witness(es) beforehand. In this way, everyone on the side will know what will be asked, in what order, and what response will be given and sought.

Cross-Examination – Each party also has a chance to cross-examine the other side, and any witnesses he or she may have. If you have reviewed the file before hand, you will know the position that the claimant will be taking and who may be testifying on his/her behalf. This tactic will better prepare you for the hearing. During the hearing, listen carefully to the opposing party's testimony, and make notes of any inconsistencies or error you will want to point out to the hearing officer. DO NOT GET INTO A SQUABBLE OR BICKERING MATCH WITH THE OTHER SIDE!! This will only back fire against you. Such bickering usually arises when the employee is cross-examining the employer, or the employer is cross-examining the employee. It usually boils down to a "he said" "she said" squabble. Such interaction with the employee will not help the employer win its case.

Exhibits

Employment policies and agreements will be very useful in wage claims to determine whether the employee is entitled to the wages or benefits sought. Most of these policies can be found in handbooks and employment agreements. Payroll histories may also be important to show the background of the pay given to the employee. Remember to forward your exhibits to the hearing officer and the other side well before the hearing.

It is important to have someone with first-hand knowledge identify and "prove-up" the exhibit(s). The hearing officer will take the exhibit(s) as evidence and attach it to the record. Pay attention to how the hearing officer marks/admits the exhibits during the hearing. This will enable you to refer to the exhibit with other witnesses throughout the hearing.

Witnesses

Each party will be allowed to designate one person as a representative. This person will be responsible for presenting the case for its side to the hearing officer, introducing exhibits, examining and cross-examining witnesses, and (possibly) making a closing statement. As stated above, all witnesses are placed under oath.

The employee and the employer have the right to be represented by an attorney. More employees are obtaining the aid of an attorney when attending the hearings, as the back pay amount can be quite large. For an employer, it may not be cost effective to use an attorney to prepare the response and attend the hearings. However, when there are several claims or the claim is for two (2) years of unpaid overtime, the claimed amount may make hiring an attorney worth the added cost. It is also beneficial to hire an attorney if there is a pending, or threatened, litigation, such as an EEOC charge, or the employee received an on-the-job injury. In such cases of possible litigation, the focus should be more on pinning the employee to a position and obtaining admissions, with a secondary emphasis on winning the case.

Appealing the Hearing Decision

The decision of the Appeal Tribunal (hearing officer) will become final unless an appeal is made within 14 days after the date the decision is mailed (not received). The decision will give instructions as to how an appeal may be made. Generally, additional evidence will not be taken. If a party believe a witness was necessary but unavailable or documents were inadvertently misplaced and not admitted, a petition to reopen the hearing can be made. Otherwise, the appeal to the Commission will urge a reversal based upon the record as admitted. On occasion, a letter (brief), setting forth the points of error, may be beneficial depending upon the complexity of the case. If you have time, it may be beneficial to request the file and copies of the taped hearing(s). Many times, this can be done by making a request of the hearing officer.

The Commission will either affirm or reverse the decision of the Appeal Tribunal. On occasion, the Commission may "remand" the proceeding for further evidence.

The TWC will allow the claimant to withdraw a claim before the order becomes final. If the order is final, the claimant may be able to withdraw if the parties agree on a settlement, which includes the claimant agreeing to withdraw. 40 Tex. Admin. Code § 821.43.

Judicial Review

The TWC final order may be appealed in a district court once all administrative remedies have been exhausted. TEX. LAB. CODE § 61.062. Such suit must be filed within 30 days after the final order has been mailed, and must be brought in the county of the claimant's residence, if the claimant is a Texas resident. *See Landbase, Inc. v. Texas Employment Commission*, 885 S.W.2d 499 (Tex. App. – San Antonio 1994, writ denied). Otherwise, suit is proper in the Texas county in which the employer has its principal place of business. TEX. LAB. CODE § 61.062.

Even if the final decision of the TWC is appealed, the Texas Payday Law requires that the wages and/or penalties be paid to the Commission within 30 days after the order becomes final. Tex. Lab. Code § 61.063.[7] Furthermore, the TWC may initiate collection on a final order unless the party complies with Section 61.063. 40 Tex. Admin. Code § 821.62. Pending the judicial review, the amount is put in an interest-bearing escrow account. Unless the appealing party files with the clerk of court an affidavit of inability to pay the amount stated in the TWC order, failure to deposit the amount with the Commission constitutes a waiver of the right to judicial review. *Id.*

Even if an appeal is not taken, in order to enforce the final order, the Commission would still have to bring suit in Travis County. Tex. Lab. Code §61.066. Unless the adverse party prevails, *i.e.* obtains a reversal by a reviewing court, the adverse party shall pay all costs, including attorney's fees, investigation costs, service costs, court costs and other applicable costs. *Id.* Unless the Commission's final order is appealed, it becomes a lien on all the property belonging to the employer. Tex. Lab. Code § 61.081.

If a party protesting a TWC ruling in a Payday Law case chooses to file suit in a district court, that party must properly serve all other parties. For example, an employer's serving the lawsuit on the TWC is not enough; the individual claimant must also be served during the limitations period. *See Instrument Specialties Co., Inc. v TEC*, 924 S.W.2d 420 (Tex. App. — Ft. Worth 1996, writ denied).

The district court reviews a TWC decision by trial *de novo*. See TEX. LAB. CODE § 61.062(e); *Direct Communications, Inc., v. Lunsford*, 906 S.W.2d 537, 541 (Tex. App. — Dallas 1995, no writ). The court is not bound by, and in fact does not consider, the TWC's findings of fact. *See Direct Communications*, 906 S.W.2d at 541. The court's sole task is to determine whether the TWC decision is supported by substantial evidence. *See id.* The party challenging a TWC ruling bears the burden of showing that the ruling is not supported by substantial evidence. *See id; see also, Texas Workers' Compensation Fund v. Texas Employment Commission*, 941 S.W.2d 331, 333 (Tex. App. – Corpus Christi 1997, no writ).

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[7] Section 61.063(b) provides that if a party fails to file an affidavit of inability to pay with the clerk of court, then a failure to send the due amount constitutes a waiver of judicial review. This provision, however, has been ruled unconstitutional. *Hawk Leasing Co. v. TWC*, 971 S.W.2d 598, 601 (Tex. App.—Dallas 1998, no writ).

Criminal Penalties

Employers can also face criminal charges if they hire employees with the intention of avoiding payment of wages, intend to continue to employ the employee, and fail to pay wages after they are demanded. TEX. LAB. CODE §61.019(b). Such offense is a third degree felony. TEX. LAB. CODE § 61.019(d).

Is Filing a Wage Claim Necessary?

A party asserting a claim for unpaid wages under the Act need not first file a complaint with the Texas Workforce Commission. See Bloch v. Dowell Schlumberger, Inc., 925 S.W.2d 301 (Tex. App. — Houston [1st Dist.] 1996, no writ). In fact, an employee claiming unpaid wages need not proceed under the Texas Payday Law at all. Holmans v. Transource Polymers, Inc., 914 S.W.2d 189 (Tex. App. — Ft. Worth 1995, writ denied). The Payday Law stands "as an alternative remedy a wage claimant may seek." Holmans, 914 S.W.2d at 193. However, Holmans does make clear that once a claimant elects to proceed under the Act rather than at common law, he must follow the procedures set forth in the Act, exhausting all administrative remedies before seeking judicial review.

It should be noted that a lawsuit for unpaid compensation is governed by the four year statute of limitations found in Texas Civil Practice and Remedies Code § 16.004. The limitations begin to run from the date the wages are not paid, and not the date of the employee's termination. Sun Medical, Inc. v. Overton, 864 S.W.2d 558 (Tex. App. – Fort Worth 1993, writ denied).

Res Judicata Effect of a TWC Decision

After decisions on both sides of the issue, the Texas Supreme Court finally settled the matter last year. A final order from a TWC administrative Payday Act claim precludes re-litigation of that same issue in a subsequent court proceeding. *Igal v. Brightstar Information Technology Group, Inc*., 250 S.W.3d 78 (Tex. 2008). Thus, employees may not get two bites at the proverbial apple. Once a claimant pursues an administrative claim under the Payday Act to a final decision at the TWC, he forgoes his common law claims to pursue a common law remedy for the same wages as sought in payday claim. To pursue common law claims in a civil lawsuit, a claimant must withdraw his administrative claim before the agency issues a final decision.

Preemption by Other Laws

The Texas Payday Law may be preempted by other laws in certain instances. For example, minimum wages and fringe benefits for government contractors' employees are governed by the Service Contract Act, 41 U.S.C. §§ 351 & 352. In the Service Contract Act, Congress expressed its intention to regulate an entire class of employees and therefore, the wage and benefit provisions of the Service Contract Act would preempt the Texas Payday Law. *See IAM v. DynCorp*, 796 F. Supp. 976, 983 (N.D. Tex. 1991).

Additionally, collective bargaining agreements entered into by employers and unions may set wages, benefits, or conditions of employment that are governed by the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, ("LMRA") to the exclusion of the Texas Payday Law, even though the Act seeks to interpret such agreements. Tex. Lab. Code §61.015(a)(2).

The Act could conceivably be preempted by federal legislation such as the FLSA to the extent that conflict exists between the two, making compliance with both impossible. Courts have held state legislation to be preempted by the FLSA if the legislation frustrates the purpose of the federal act. *See, e.g., Webster v. Bechtel, Inc*., 621 P.2d 890 (Alaska 1980) (determining whether the FLSA preempts the Alaska Act, enacted to establish minimum wage, maximum workweek and overtime compensation standards). Because the Texas Payday Law primarily regulates the procedural responsibilities of payment to employees (when and how to pay) rather than the substantive responsibilities (how much to pay), conflicts between the two should not arise, but they do. For example, because the Texas Payday Law demands "payment in full," which requires employers to properly calculate wages due based on hours worked and the pay rate, the TWC may, and does, assert jurisdiction over minimum wage and overtime pay. Again, nothing in the Act gives the TWC statutory authority or jurisdiction over a claim for unpaid overtime or minimum wage.

The Texas Payday Law, by asserting jurisdiction over fringe benefits may run afoul of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). ERISA provides for federal regulation of employee retirement plans and many other types of employee benefit plans. It preempts many state laws, such as the Texas Payday Law, that would otherwise apply to such plans, regulates the management and control of such plans, and provides for a federal cause of action for plan participants and beneficiaries to enforce their rights with respect to such plans.

Application of the Texas Payday Law

It is crucial that employers make their pay agreements with employees as clear as possible. The TWC places great weight on written pay agreements. Additionally, leave benefits, holiday pay, and severance pay promised in a written policy are enforceable as part of the wage agreement under the

Texas Payday Law. If a worker files a wage claim, the TWC will look to the terms of any written policy.

Practical Advice

On its Internet site at http://twcdirect.tec.state.tx.us, the TWC has issued recommendations for employers to avoid Payday Law claims:

- Get everything in writing before deducting from an employee's pay. The only exceptions are for court-ordered payments and payroll tax deductions. The TWC recommends getting the employee's authorization at the time of hire, but the author has noted instances where the TWC investigators have stated that even those are not valid unless the employee gives written authorization at the time of the deduction for extraordinary events (damage to equipment, theft, etc.). Note: employers can request written approval to deduct from wages at any time.
- If employers make an advance or other loan to employees, to be repaid with wage deductions, be certain a written agreement signed by the employee is in place.
- Keep good time records on employee hours, especially for non-exempt employees. If a non-exempt employee who is eligible for overtime pay files a claim complaining that the employer has failed to pay for all hours worked, the success of the employer's case depends upon its ability to provide accurate time records. As to exempt employees, the TWC emphasizes that it does not violate any state or federal law to keep time records; however, an exempt employee's salary may not be affected on the basis of hours worked during a day.
- Put benefit, holiday, severance, and other agreements in writing, being careful to promise only what the employer is willing to deliver. Such benefits are not required under state or federal law; but if an employer chooses in writing to provide them, they are an enforceable part of the wage agreement under the Act.

Take an aggressive approach to any Payday Law claim. Respond to the wage claim notice in a timely manner. Return all calls from the wage claim examiner or hearing officer. Furnish any requested documentation. Remember to seek notices and rulings, and do not assume "no news is good news".