

Employment Law Digest

An Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C. Employment Law Department

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THE LEGISLATIVE CHANGES IN LABOR LAW

There have been several changes in the laws affecting employers and employees in this years legislative sessions in Texas and Washington D.C. It is important for employers to keep abreast of these changes when they happen, so that exposure to litigation can be minimized. Although the changes in the law may seem obscure and immaterial, often the smallest change by the legislature can create enormous liability within courts.

Below you will find a detailed summary of some legislative measures that will affect employers in the future. Some of the issues discussed may ease an employers ability to conduct daily employee activities, while others may require an employer to implement more procedures and regulations to prevent litigation. Hopefully, this discussion of issues that may affect your business will help you to better prepare for the potential perils and risks in today's business world.

Texas House Bill 4

(Labor Issues in the Reform of Certain Procedures and Remedies in Civil Actions - *Effective September 1, 2003*)

The passage of House Bill 4 brought about the biggest changes in civil litigation in Texas since the Reconstruction Era. These changes to procedures and causes of action in Texas will be felt throughout the legal community for decades. Within the complex restructuring of laws in this bill, there are several changes that will effect labor issues in this state.

The first change involves employees and volunteers of a governmental unit. Under this new law, employees and volunteers of a governmental unit will not be liable for damages in excess of \$100,000 for claims against the employee or volunteer arising out of acts or omissions by the public servant in the course and scope of the public servant's office. This is a limit of liability for persons working on behalf of the government. However, such persons must be covered by indemnity from the

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governmental unit or error and omissions insurance for the limit to apply. Therefore, if a governmental unit wishes to protect public servants, they must insure that the public servant is covered by indemnity under Texas Statutes and local laws, or the governmental unit must provide errors and omissions insurance for the public servant.

The second change involving labor issues in this bill affects professional employees of a school district. Now, all professional employees of a school district, which includes superintendents, principals, teachers, teacher's aides, counselors, nurses, student teachers, bus drivers and more, are no longer personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of discretion. This exempts employees of a school district from liability from damages claimed by action taken within the course and scope of their employment. However, there is an exception in circumstances in which a professional employee uses excessive force in the discipline of students or for negligence which results in bodily injury to students.

The final change seen in House Bill 4 involving labor related issues pertains to charitable organizations. The alteration of the law has made a volunteer of a charitable organization immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of the volunteer's duties or functions, including as an officer, director, or trustee within the organization. In essence, a volunteer of a charitable organization will not have personal liability, if they act within the course and scope of their duties for the charitable organization. Even so, there are some minor exceptions for health care services volunteers, due to licensing and patient concerns, of which persons within the health care field should inquire. 

Texas House Bill 705

(Liability of In-Home Service Companies and Residential Delivery Companies for Negligent Hiring - Effective September 1, 2003)

House Bill 705 now requires companies that perform services within another person's home or

deliver goods to a another person's home to obtain from the Department of Public Safety (or a private vendor approved by the department) all criminal history record information relating to an officer, employee, or prospective employee of the company whose job duties require or will require entry into another person's residence. Under this law, the company will not be held liable for negligent hiring in an action arising out of a criminal act or omission by an officer or employee of the company that was required to obtain the criminal history record information and brought on behalf of a parson whose home the officer or employee entered while in performance of the employee's job duties (regardless of where the criminal act or omission occurred); if the company obtained the criminal history record information and the criminal history record shows:


In the 20 years preceding the date the information was obtained for a felony or in the 10 years preceding the date the information was obtained for a misdemeanor, the officer or employee had not been convicted of an offense in this state classified as:

- a) an offense against the person or the family;
- b) an offense against property; or
- c) public indecency; or
- d) an offense in another jurisdiction that would be classified as one of the offenses listed above.

This law provides a shield against liability for in-home service and home delivery companies, if they follow these procedures. Further, under this bill a company that contracts with an in-home service or home delivery company to perform work in another person's residence can protect themselves from similar liability for negligent hiring by inquiring into the compliance of the residential delivery or in-home service company and requesting the company obtain a criminal history background check on any employee of the company being sent to deliver, place, assemble, repair, or install an item. This request must be made in writing and delivered to the company prior to the company's employee being sent.


Any company that falls within the parameters set out above must comply with the new rule, or liability will surely follow. The Texas Department of Public



Safety has set up a website that will allow a qualifying company to obtain criminal background checks on officers, employees, and prospective employees to comply with this law. If you believe that your company falls within this category, you can apply for an account at: <http://records.txdps.state.tx.us> 


Texas Senate Bill 374

(Payment of Wages by a Staff Leasing Services Company - *Effective September 1, 2003*)

In an amendment to the Staff Leasing Services Act, the law now exempts employers utilizing staff leasing companies from liability in paying excess wages to leased employees. An employer is solely obligated to pay wages to a leased employee for which there is an agreement, contract, plan, or policy between the client company and the assigned employee, and the staff leasing services company has not contracted to pay. All other wages accumulated by a leased employee are the sole responsibility of the staff leasing company. 


Texas Senate Bill 280

(Unemployment Benefits to Employees that Quit - *Effective September 1, 2003*)

With this addition to the Texas Labor Code, the legislature has provided more protection for employers against charges to their unemployment compensation benefits account. Employers will not be charged back on their accounts when employees or former employees quit due to circumstances involving family violence or stalking. Senate Bill 280 provides that unemployment insurance benefits received by an employee or former employee will not be charged to the last employing unit (including situations in which there is a separation period from the same employer) if an employee quits a job on the advice of a law enforcement officer, a licensed medical practitioner, or a licensed counselor because of family violence or stalking. The employee will still be provided with benefits; however, the employer will not bear the burden on their account for the unfortunate and unforeseen loss of an employee. 


Texas House Bill 3308

(Payment of Wages through Direct Deposit *Effective September 1, 2003*)

The passage of this bill allows more flexibility to employers in instituting a direct deposit payment system for all employee wages. Under the former law, an employer could only pay an employee by direct deposit if the employer obtained authorization from the employee in writing to pay wages in this manner. With these changes, an employer may institute direct deposit payment of wages to all employees who maintain an account at a financial institution that accepts electronic fund transfers, if: 1) the employer notifies each affected employee in writing, at least 60 days before the date on which the direct deposit payroll system is scheduled to begin, that the employer is adopting a direct deposit payroll system, and 2) obtain from the employee any information required by the financial institution that maintains the employee's account. This change should help employers combat difficulties with employees who refuse to move into the 21st Century by allowing the employer to force the switch to a complete direct deposit payroll system. 

Texas Senate Bill 1282

(Employee Notice to Entities that Self-Insure for Workers' Compensation - *Effective September 1, 2003*)


In an effort to ensure employers who self-insure for workers' compensation receive actual notice of an employee's claims under the Workers' Compensation Statutes, the legislature has revised the law to require written notice to the contractor servicing the claims for the employer. The new law now explains that "written notice" to a certified self-insurer occurs *only* on written notice to the qualified claims servicing contractor designated by the certified self-insurer. The change was made to facilitate more efficient handling of claims for employees and to provide protection to the employer against claims of notice by employees to other employees or entities associated with the company. 

Texas House Bill 1020

(Promoting Dependent Care Benefits for Employees - *Effective September 1, 2003*)

The State has provided this new piece of legislation to encourage employers to provide




employees dependent care benefits. The Texas Work & Family Policies Clearinghouse, which provides information and resources to employers and employees on job related issues, will now promote the economic benefits realized by employers in providing dependent care benefits. The benefits touted include decreased absenteeism and turnover rates, greater productivity, and federal and state tax incentives. If an employer desires to begin a dependent care program, the Texas Work & Family Policies Clearinghouse will provide technical assistance, including assistance in obtaining federal and state tax incentives. 

United States House of Representatives Bill 2660

(Update on Changes to Overtime Compensation - Senate Amendment 1580 - *In Conference Committee for Both Houses*)

On September 10, the United States Senate approved an amendment to the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2004. In this amendment, the Senate struck all language from the bill that was to provide revisions to the “white-collar” overtime regulations under the Fair Labor Standards Act of 1938. As was discussed in our newsletter from the Spring, 2003, the proposed regulations were designed to update and clarify the current regulations, which were last revised in 1954, concerning the executive, administrative, professional, or salesman exemptions from overtime.


Revisions in the overtime laws are long overdue, and much needed to assist employers in clarifying who is exempt from overtime pay. The proposed changes would have raised the minimum salary from \$155 a week to \$425 a week, which would automatically lower the number of eligible exempt workers by approximately 1.3 million. However, a major plus would be the elimination of the rule restricting exempt employees from devoting more than 20% of time in a workweek performing non-exempt duties, as well as revising the duties required under each individual employee classification.

As it stands, it appears that the House of Representatives and the Senate are at odds on this issue, leaving uncertainty in what form the final bill will take in the House-Senate Conference Bill. Further, President George W. Bush has threatened to veto the entire 2004 Appropriations Bill if the amendment killing the Department of Labor’s proposed overtime regulations is attached. If the proposed changes are made to overtime laws, employers can expect that determinations on exempt employees from overtime will be simpler, which will help reduce the risk of lawsuits by employees claiming that employers have failed to pay overtime wages. We will continue to keep you updated on the status of this and other important pieces of employment related legislation. 

United States Senate Bills 20 and 224 & House of Representatives Bill 965

(Increase in the Federal Minimum Wage - *Introduced*)

In the 108th Session of Congress, there were 3 identical bills introduced to provide for an increase in the Federal minimum wage. Although legislation requesting increases in the minimum wage are introduced in virtually every session of Congress dating back 50 years, it is always important to keep abreast of the potential for increased expenses in your business. If a minimum wage increase is passed, employee salaries will jump for everyone, and this may be a large portion of your expenses.

In the current bills before Congress, the new minimum wage sought is \$5.90 per hour for the first 12 months after the law takes effect, and \$6.65 per hour following the 12 month period. These changes would be a sizable increase over the current Federal minimum wage of \$5.15 per hour. At this time, this legislation has not seen activity on the floors of the House of Representatives or the Senate. However, in business it is always wise to prepare for potential risks to profits, and changes in wage structure can provide a large risk. 




United States House of Representatives Bill 1119

(Providing Compensatory Time for Employees in the Private Sector - *Awaiting Vote by the Committee on Education & the Workforce*)

In a legislative measure that may soon be debated in the House of Representatives, members of Congress have introduced a bill that would provide private employers with the option of offering compensatory time off in lieu of paying monetary overtime compensation. If the bill becomes effective as now written, private employers could offer in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required. This measure does not apply to governmental employers.

However, a private employer may provide compensatory time to employees only if it is in accordance with the provisions of a collective bargaining agreement for employees represented by a labor organization, or in an agreement between the employer and employee for non-union employees. For non-union employees, the employee must choose to receive compensatory time in lieu of monetary overtime compensation. Also, the employee could accrue up to 160 hours of compensatory time, of which the employer would be required to pay all unused compensatory time at the end of the year.

The passage of this legislation would provide both benefits and burdens on an employer. A positive feature of the bill is the ability of employers to spread out over time the payment of overtime wages, instead of having to pay them all in lump sum payments at the end of each pay period; however, there are many negatives, including loss of promotion due to employee time off, accounting for compensatory time, potential liability for miscalculation, and legal action authorized under the bill for interfering with employees' rights to choose the method of compensation and use of such compensatory time. If such a law were to take effect, an employer would have to evaluate these benefits and burdens in determining whether the implementation of such a policy is viable.


All of the changes in the law, whether in effect or under consideration, can have a major impact on the operations of many Texas businesses. It is our hope that the information provided herein will give you an opportunity to learn about these new law, so that adjustments can be made to help stay out of the many potential claims available under these laws. If you would like additional information about how the law will affect you and your business individually, please contact our offices at (210) 342-5555. 

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TRENDS IN THE LAW

Major Changes in COBRA on the Horizon

By early 2004, the Department of Labor will be instituting new regulations in COBRA administration. The biggest proposed changes include new regulations that will create a few strict notification deadlines that did not exist before. For example, an employer will have to send covered employees and spouses a notice within 90 days of the time they become eligible for coverage. Also, employers will have to notify plan administrators within 30 days of a "qualifying event," such as divorce.

In other changes, an employer's summary plan description will have to provide employees with detailed procedures describing their notification obligations, such as how to let a plan administrator know there has been a qualifying event. Employers need to be on the lookout for these changes in regulations, so that compliance with the new rules is followed and litigation is avoided. 

Pregnancy Discrimination

The 5th Circuit Court of Appeals recently reinstated a verdict in favor of an employee for pregnancy discrimination by Gap, Inc. The clothing retailer was hit with a verdict of \$394,000 in damages, because a manager made comments about his displeasure with the employee becoming pregnant.



The employee was then reprimanded with a series of disciplinary actions for what appeared to be minor infractions. Despite Gap's assertions that it abided by rigorous record keeping policies, no criticism of the employee's job performance was ever shown in writing. The Gap argued that the disciplinary actions were separate from the managers comments, but the court found that the employee had rebutted the company's explanations by showing the comments were a key part of a pattern of discrimination. 📖

Asthma Disability

A court ruling out of the 8th Circuit found that an employer who refused to hire an asthmatic job applicant due to fears he would be unable to work around dust or fumes committed an illegal violation of the Americans with Disabilities Act. The applicant applied for a position at a tire manufacturing plant in Iowa. The company reviewed the applicant's medical history, including a doctor's evaluation of his health in making its decision. The evaluation said that the applicant may have difficulty working near dust and fumes. The court found that regardless of this evaluation, the company was not free to interpret that advice as precluding the applicant from working at the tire plant. Only when an employee has actual limitations placed on his working abilities, which make it impossible to perform all of the functions of the job, can an employer rely on a doctor's instructions. In this case, the applicant was awarded in excess of \$45,000 in damages for the discriminatory acts. 📖

- Lance C. Blankenship

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NEW E-MAIL ADDRESS

There has been a change in the email address of Attorney Michael Holland. Please send all email correspondence to:

mholland@thorntonsummers.com

UPCOMING SEMINARS

- 11-5-03 Lorman Education Seminar
Leaves of Absence
- 12-18-03 Sterling Education Seminar
Buying & Selling a Business
- 3-16-04 Sterling Education Seminar Practical
Applications of Employment Law
- 3-18-04 Lorman Education Seminar
Employee Discharge &
Documentation

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.



Be sure to check
our website at:

www.thorntonsummers.com

for the most recent
significant changes
in the law
that affect you.

The employment law section of Thornton & Summers represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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*If you, or anyone in your office, would like a copy
of this newsletter on a quarterly basis, at no cost,
please contact Deanna Jennings at
(210) 342-5555, extension 227.*

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