

# Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

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## LEGISLATIVE CHANGES IN LABOR LAW

There have been several changes in the laws affecting employers and employees in this year's legislative session in Texas. Though many labor and employment bills were filed, only a handful made it to Governor Perry's desk. It is important for employers to keep abreast of changes as they occur in order to minimize exposure to litigation. Although the changes in the law may seem obscure and immaterial, it is often the smallest changes by the legislature that create the most significant liability within courts.

Below you will find an overview of some of the legislative measure that will affect employers in the future. Some of the issues discussed may assist an employer in conducting daily employee activities, while others may require an employer to implement more procedures and regulations to prevent litigation.

### Texas House Bill 481

(Unemployment Benefits for Disabled – Effective June 17, 2005)

House Bill 481 allows certain disabled individuals to receive unemployment benefits even though they are not able to work full-time. To be eligible, these workers must receive Social Security Disability Insurance, have worked part-time in their base period, be unable to work full-time, and be seeking work consistent with their disability. Employers may be able to protect their accounts if the employee cannot perform the work as a result of the disability.

### Texas House Bill 1745

(Three Day Grace Period for Temporary Help Firms – Effective September 1, 2005)

House Bill 1745 provides a three-day grace period for temporary help firms to find new assignments for their workers upon the conclusion of each prior assignment. TWC will void the unemployment insurance claims of workers who file during this three-day period.



### **Texas House Bill 1939**

(Notice to Employees of Staff Leasing Companies – *Effective September 1, 2005*)

Current law provides that if a staff leasing services company gives written notice to a worker to contact it for reassignment upon conclusion of a current assignment, and yet, the worker files a claim for unemployment benefits before calling in his availability, TWC will disqualify that worker for having voluntarily quit. House Bill 1939 requires that the notice to contact for reassignment be given to the worker at the time the worker's assignment ends, otherwise the notice will not be effective to disqualify the worker from receiving unemployment benefits.

### **Texas House Bill 3250**

(State Unemployment Tax Reform – *Effective September 1, 2005*)

House Bill 3250 prohibits employers from shifting workers from tax account to tax account solely to reduce their company's unemployment taxes. It also imposes criminal and civil liabilities on employers who knowingly engage in these practices as well as on the tax advisors who recommend them.

### **Texas Senate Bill 1342**

(Unemployment Benefits for Spouses of Military Personnel – *Effective May 9, 2005*)

Senate Bill 1342 allows unemployment benefits to a worker whose spouse is a member of the armed forces and who quits to move as a result of the spouse's permanent change of station of 120 days or more, or as a result of the spouse's tour of duty of one year or longer. TWC should protect the account of an employer who lost the employee for this reason.

### **Texas House Bill 2273**

(Unemployment Benefits Capping and Rounding; Fees for Representing Claimants – *Effective September 1, 2005*)

House Bill 2273 caps increases on the maximum and minimum weekly unemployment benefit amounts in order to control large jumps in benefit outlays from year to year, and rounds down weekly benefit amounts, which will result in savings for the unemployment compensation fund. The bill also removes the old requirement that the Texas Workforce Commission approve counsel and agent fees.

### **Texas Senate Bill 1408**

(Commission Review of Pay Day Wage Claims – *Effective September 1, 2005*)

Currently, Hearing Officers have the final administrative authority over wage claims filed under the Texas Pay Day Law. Senate Bill 1408 gives the Commission the authority to hear appeals from those decisions.

### **Texas House Bill 7**

(Worker's Compensation Reform – *Effective September 1, 2005*)

Though House Bill 7 did provide some changes to the Texas workers' compensation system, employers still have the option of not participate in the insurance at all. Additionally, employers will continue to be required to post notice to employees as to whether or not the employer carries workers' compensation insurance. Under House Bill 7, a Division of Workers' Compensation is created within the Department of Insurance, and is administered by the Commissioner of Workers' Compensation - a position appointed by the Governor. The bill also creates an Office of Injured



Employee, Counsel which is led by the Injured Employee Public Counsel, who is also appointed by the Governor. The Counsel provides assistance to individual injured employees through the Division's ombudsman program, and in rulemaking, acts as an advocate for injured employees as a class. The bill strengthens insurance carriers' ability to request second opinions, and provides for the formation of workers' compensation health care networks. The bill also enhances the Division's Return to Work Program and creates a pilot program for small businesses. The pilot program may reimburse eligible employers up to \$2,500 for expenses necessary to modify workplaces for an injured employee's return to work.

### **Texas House Bill 982**

(Warning Sign About Identity Theft for Restaurant or Bar Owners – Effective *September 1, 2005*)

In an effort to address credit card skimming in restaurants and bars, House Bill 982 requires bars and restaurants that accept credit cards to post a sign warning wait staff of criminal penalties for this illegal activity. The sign must be displayed in a prominent place on the premises of the restaurant or bar, and the letters must be at least 1/2 inch high and state "UNDER SECTION 32.51, PENAL CODE, IT IS A STATE JAIL FELONY (PUNISHABLE BY CONFINEMENT IN A STATE JAIL FOR NOT MORE THAN TWO YEARS) TO OBTAIN, POSSESS, TRANSFER, OR USE A CUSTOMER'S DEBIT CARD OR CREDIT CARD NUMBER WITHOUT THE CUSTOMER'S CONSENT." Failure to post the sign can subject the owners to a misdemeanor with a fine no greater than \$25, however, the charge would be dropped if the owner demonstrates that a sign was posted within 48 hours of the citation.

### **Texas Senate Bill 1525**

(Safe Patient Handling and Moving Practices – Effective *January 1, 2005*)

Senate Bill 1525 requires residential care facilities to adopt detailed procedures for safe handling of patients to prevent or reduce the risk of injury to employees.

### **Texas House Bill 2677**

(Work Separations Involving Law Enforcement Personnel – Effective *September 1, 2005*)

House Bill 2677 establishes detailed requirements for reporting work separations of and obtaining background information relating to law enforcement personnel.

### **Texas House Bill 639**

(Public Complaints Against Law Enforcement Officers – Effective *September 1, 2005*)

House Bill 639 restricts the power of local and state government agencies to take disciplinary action against law enforcement or firefighter personnel based upon public complaints.

### **Texas Senate Bill 387**

(School District Job Postings – Effective *June 17, 2005*)

Senate Bill 387 establishes strict requirements for job postings within school districts.

### **Texas Senate Bill 863**

(Promotional Exams for Active Duty Military – Effective *June 17, 2005*)

Senate Bill 863 allows military personnel on active duty extra rights with respect to promotional exams for law enforcement and firefighter positions.






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### For Your Information


#### **\$24 Million FLSA Settlement**

A technology company, Computer Science Corporation (CSC), has agreed to pay \$24 million to settle allegations that it misclassified 30,000 technical support workers and failed to pay them overtime in violation of state and federal laws. The workers alleged that CSC classified “systems administrators” and “technical staff” employees as being exempt from the FLSA’s overtime provisions when, in actuality, those workers met none of the law’s descriptions of exempt employees. The workers charged that they were required to work at least 45 hours a week, some routinely worked 60 hours or more a week, without overtime compensation. Under the agreement, class members will split \$17.2 million for lost wages and damages with an additional \$180,000 going to the 17 named plaintiffs. The attorneys will receive \$6 million plus \$490,000 in expenses. The agreement covers violations of the FLSA as well as state wage and hour laws in 13 states. The settlement is yet another illustration of the fact that the new overtime regulations do not necessarily make it easier to establish which employees are exempt from overtime pay. This continues to be a tricky and dangerous area for human resources and caution is advised when deciding whether employees are exempt or not. 

#### **USERRA’s New Posting Requirements**

The Veterans Benefits Improvement Act, passed in December 2004, require employers to inform employees who are called into military service of their rights and benefits under the Uniformed

Services Employment and Reemployment Rights Act (USERRA). USERRA establishes reemployment and health plan continuation coverage rights and other benefits for employees who serve or have served in the uniformed services.

On March 10, 2005, U.S. Secretary of Labor Elaine L. Chao announced that the U.S. Department of Labor had posted on its website a poster explaining employees’ rights under USERRA. The poster must be displayed where such notices for employees are customarily placed. Notice can also be provided in other ways, including handing out, mailing, or e-mailing it to employees. The poster is available at [www.dol.gov/vets/programs/userra/poster.pdf](http://www.dol.gov/vets/programs/userra/poster.pdf). 

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### Trends In The Law

#### **Employee Misconduct’s Affect on FMLA Leave Rights**

The Federal Family and Medical Leave Act entitles employees to job-protected leave for serious health conditions, including mental disorders. But do those rights extend to someone whose mental instability has caused severe performance issues and workplace disruption?

Rulings from the 10th and 8th circuits now paint a bright line for employers faced with misbehaving employees who qualify for FMLA leave. If an employer can show that an employee’s misconduct warrants discharge, the employer can fire the worker without fear of violating FMLA. It’s when employees are disciplined to deter or retaliate against their exercise of FMLA rights that employer risks liability. To build a defensible case, employers must




have well-publicized, and uniformly administered discipline policies. Discharging an employee on FMLA leave for misconduct that usually results in a simple reprimand likely will leave an employer liable for FMLA violations. Employers should also consider the potential for claims under the Americans with Disabilities Act when an employee's mental illness may generate the need for accommodation. 

### **Are Punitive Damages Getting Harder To Recover?**

It appears that the Texas Supreme Court decided to make the imposition of punitive damages the rare exception rather than the rule in employment cases. In *Southwestern Bell Telephone Co. v. Garza*, an employee sued his employer for an on-the-job accident with another employee when a cherry-picker bucket hit him on the head causing him a sprained neck. The employee subsequently sought medical treatment and filed a workers' compensation claim. The employee sued his employer claiming he was fired for filing the worker's compensation claim.

Under the old rule, if there was clear and convincing evidence that an employer acted with malice or evil motive in its treatment of an employee, then the jury could award punitive damages, and the appeals courts would find that it was in the province of the jury to do so. However under the new rule implemented by the Texas Supreme Court in this case, even if there are some indications that an employer acted with malice or evil motive, an award of punitive damages will be set aside so long as there is also some evidence that the employer did not act with malice or evil intent.

In this case there was some evidence to support punitive damages, and thus, under the old rule, punitive damages would have been awarded.

The court found that many of the supervisor's actions were malicious, the discipline imposed on the employee was not required by the company, the co-worker involved in the accident was not disciplined, and the work assigned to the employee after the accident was demeaning and humiliated him in front of his co-workers. But now under the new rule, the court looked at evidence that was contrary to a finding of malice and determined that while there might be some evidence of actual malice, it was far from clear and convincing, and the employee is not entitled to any punitive damages. Specifically, the court found that the employee had an overall poor safety record, the employee had been warned that any further incidents of poor safety could result in termination, the company did conduct an investigation into the accident, and the company gave the employee three months to find an alternative job before firing him. Therefore, the evidence was found to be far from clear and convincing because the employer had demonstrated good conduct along with the bad. The rule to remember is that you get points for a good try, even if you come up short, and you might not get tagged with punitive damages, even if a jury finds you guilty of the underlying discrimination. 


### **Another One Bites the Dust**

Earlier this year the Texas Supreme Court, in a unanimous decision, rejected another employee's attempt to sue for intentional infliction of emotional distress in the workplace.

In *Creditwatch, Inc. and Quant v. Jackson*, an employee sued a Fort Worth based company and its CEO claiming that the CEO subjected her to lewd advances and retaliated by firing her when she rebuffed him. The employee also claimed that the employer retaliated against her after her termination



by allegedly getting her evicted from her living quarters. The employee also claimed that after she was fired, the employer sent out a company-wide e-mail forbidding employees from contacting ex-employees such as herself. Assuming that all of this is true, it was callous, meddlesome, mean-spirited, officious, overbearing, and vindictive – but not “so outrageous in character, in so extreme a degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

This case exemplifies the downfall of the tort of intentional infliction of emotional distress. Obviously the conduct of the employer in this case (if true) will lead to a viable claim other than this dead tort and should never be condoned under any circumstances. 

### NEW DOMAIN NAME

Please note that the firm’s internet URL address and our email domain name have changed:

Old URL      [www.thorntonsummers.com](http://www.thorntonsummers.com)  
**New URL      [www.thorntonfirm.com](http://www.thorntonfirm.com)**

All email addresses have been changed:

**Example:**

Old: [mholland@thorntonsummers.com](mailto:mholland@thorntonsummers.com)  
**New: [mholland@thorntonfirm.com](mailto:mholland@thorntonfirm.com)**

Email addressed to the old domain will not be delivered to the recipient.

### UPCOMING SEMINARS

- 11-22-05      Setting Up Your HR Department, sponsored by Lorman Educational Services
- 02-16-06      Employment related seminar, sponsored by San Antonio Manufacturers Association
- 04-19-06      Employee Discharge and Documentation, sponsored by Lorman Educational Services
- 04-19-07      Employee Discharge and Documentation, sponsored by Lorman Educational Services



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our website at:

**[www.thorntonfirm.com](http://www.thorntonfirm.com)**

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

*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.*

The employment law section of the Thornton law firm 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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(210) 342-5555, extension 227.*

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