

# A View from the Texas Workforce Commission

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# Texas Bills for 2015 – Unemployment

HB 931 – effective 090115:

- change in waiting-week provision: waiting week is paid if unemployment lasted at least 7 days and claimant has received at least two weeks of benefits and returned to full-time work, or else claimant has exhausted all other available UI benefits for the benefit year

HB 1251 – effective 090115:

- major changes in partial transfers of compensation experience: “substantially common ownership” not established merely by existence of a reversionary interest for default; two years to apply for partial transfer, instead of one; four years of wage records, instead of five; TWC mandated to notify all employers of the partial transfer provisions



# Unemployment - 2

HB 2732 – effective 090115:

- TWC is authorized to participate in the Treasury Offset Program of the IRS in order to collect overpayments
- that would greatly reduce reimbursing employers' liability for reimbursements

HB 3150 – effective 090115:

- wage credits taxed to PEO's client or predecessor count toward taxable wage base of PEO in that same year.



# Unemployment - 3

HB 3373 – effective 090115:

- protects reimbursing employers from reimbursement liability if the work separation was for misconduct connected with the work or was voluntary without good cause connected with the work
- extra cost will be passed on to private taxed employers



# Texas Bills for 2015 – Civil Rights

HB 1151 – effective 090115:

- Added a new Section 21.1065 to prohibit sexual harassment against unpaid interns
- uses the six-part U.S. Department of Labor test for trainees to define “unpaid intern” – no word on whether or how that might be influenced by the newer *Glatt* seven-factor test (see 811 F.3d 528, 536-537)
- other forms of discrimination against unpaid interns are not addressed (amendments in future years are certainly possible)



# TWC Enforcement of Federal Actions

- FLSA – new \$913/week salary level for exempt employees starting December 1, 2016
- FLSA – new companionship and domestic employee regulations
- EEOC – TWC’s Civil Rights Division generally enforces Chapter 21 according to EEOC standards (not quite exact match)
- NLRB – recent NLRB developments have begun to be reflected in unemployment appeal rulings
- OSHA – same as for NLRB – unsafe working conditions may affect the outcome of UI appeal hearings
- In general, an employer’s compliance with federal standards can make a real difference in an unemployment claim



# How UI Claims Affect Private Taxed Employers

- Chargebacks affect a private taxed employer's state UI tax rate for three years
- Employers may use the “voluntary contribution” procedure to buy down the chargeback amount and obtain a lower tax rate



# How UI Claims Affect Public Employers

- Reimbursing employers do not have tax rates and do not pay quarterly taxes, but are billed quarterly for benefits paid out that are based on wages reported by them during the base periods of claims
- Taxed governmental employers are in a group that has a pooled tax rate – for 2016, that rate was 1.90% (applied to the first \$9000 of each employee's wages during the calendar year)
- Election to be a reimbursing employer is good for two years
- Limited chargeback protection for either group





# Base Period

Base Period Quarter 1 ✓	Base Period Quarter 2 ✓	Base Period Quarter 3 ✓	Base Period Quarter 4 ✓	Lag Quarter ✗	Quarter In Progress When Claim Is Filed ✗
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## Benefit Amount

- weekly benefit amount is the high quarter wage amount divided by 25
- min. WBA = \$66 (maximum benefit amount would be \$1716); max. WBA = \$493 (MBA would be \$12818)



# Handle UI Claims Properly

- Respond adequately and on time
- Adequate response = factual basis for the work separation, including relevant adverse facts
- Return investigators' phone calls
- Furnish relevant information:
  - Firsthand witnesses are critically important
  - Documentation (policies, warnings, logs, etc.)
- Be specific as to the circumstances of the work separation
- Appeal on time at all levels of the process



# Types of Work Separations

## Voluntary

- Resignation
- Walking off the job
- Job abandonment
- Retirement
- Suspension w/o pay for 3 days or less

## – Involuntary

- Layoff / RIF
- Temporary assignment / PRN / on-call, as-needed
- Discharge / termination
- Mutual agreement
- Resignation in lieu of discharge
- Unpaid suspension of four days or more



# Qualification

- the claimant must be out of work through no fault of his or her own
- the burden of proof is on the party who initiates the work separation
  - if the claimant quit, the claimant must prove good cause connected with the work for quitting
  - if the claimant was fired or laid off, the employer must prove that the work separation resulted from misconduct connected with the work on the claimant's part



# What Does An Employer Need to Show?

- Voluntary work separation
  - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
  - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, **and**
  - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses



# Final Warning

- Do not give a final warning until and unless the company is truly ready to sever ties
- A real final warning lets the employee know:
  - that it is the employee's last chance,
  - that no further chances will be given,
  - and that if the complained-of problem occurs even one more time, the employee will be subject to immediate discharge
- Have the employee sign it (or a witness in the employee's place), and give the employee a copy



# Final Straw?

- If the circumstances allow, consider asking the employee to explain the final incident in his or her own words and handwriting on a blank piece of paper
- This allows both sides one last opportunity to stave off a final work separation
- If the employee supplies what amounts to a written admission of misconduct, that would be relevant in any response to an unemployment claim



# Excessive Absences

- Excessive absenteeism for avoidable reasons is misconduct
- Medical absences can go either way, depending upon other rules involved, such as giving advance notice of absence
- If the sole problem was excessive medical absences (of the claimant or the claimant's minor child), claimant will most likely not be disqualified, but if the claimant is medically unable to work, that would be an eligibility issue





# Poor Performance Cases

- Inability and incompetence are not misconduct
- Failing to do one's best is misconduct
- Best argument for claimant: "I tried my best – it just wasn't good enough."
- Best tactics for employer: documentation, firsthand testimony, past satisfactory performance, claimant passed up training opportunities, work was too simple to mess up (dishwashing precedent)



# Poor Performance Cases 2

- Employer has to show how the poor performance was within the claimant's power to control
- Too many breaks / breaks too long
- Excessive visiting and other time-wasting with coworkers
- Excessive personal phone calls
- Too much Internet surfing
- Failing to double-check the work for negligent or avoidable mistakes
- Not enough time devoted to job because of avoidable absences or tardiness



# Poor Performance Cases 3

- TWC precedent case:  
MC 300.05, Case No. 177177: The claimant's failure to pass a state-required certification test was misconduct.



# Poor Attitude

- That's not in my job description.
- Why doesn't Joe have to do that?
- Why do you always ask me?
- That's Linda's job.
- You told me to do the other thing first.



# How to Handle a Poor Attitude Case

- Don't start off accusing the claimant of having a "bad attitude".
- Be specific about behavior or conduct that violated a rule or interfered with the work of others.
- Document the warnings that were given.
- Present firsthand testimony from those affected.
- Let the hearing officer independently arrive at the conclusion that the claimant had a bad attitude.



# Independent Contractors – Main Ideas

- An independent contractor is effectively a ***self-employed independent business entity*** who is in a position to make a profit or loss based upon how he or she manages their own ***independent enterprise*** while fulfilling the ***contract***.



# TWC Test

- TWC uses the common law “direction and control” test
- all work and services are presumed to be in “employment”, unless the employer proves that the work is free from the employer’s direction and control, both under the contract of hire **and in fact**
- TWC’s 20-factor test is adapted from the old IRS 20-factor test:  
<http://www.texasworkforce.org/ui/tax/forms/c8.pdf>



# What It Boils Down To

- Employer seeks the contractor out, not vice versa
- Employer has to negotiate terms with the contractor
- Training is not an issue – contractors are experts and should not need training
- Employer is buying a finished project or completed service
- Integration of services = presumption of control
- Non-competition agreement → *no*
- Non-solicitation agreement → *maybe*
- Non-disclosure agreement → *usually OK, but be careful*





# Seeking Agency Input

- In a questionable situation, before anyone is hired, ask TWC or IRS for advice
- Usually, they'll give informal opinions if you are ♥ *nice* 🎵 to them
- Agencies will give letter rulings in selected cases, but only after the worker is hired
- Forms to request rulings: C-12 for TWC; SS-8 for IRS



# How Audits Get Started

- Former employee files unemployment claim – TWC finds no wages reported and disallows the claim – claimant appeals – this is the highest priority Tax Department investigation – TWC may end up notifying IRS
- “Tattle-tale” letter from employees or competitors
- Random audit – TWC tries to do 1% of all employers each year (DOL guideline)
- Program audit – targeted industries or regions – example: hair salon industry in the late 1980s, landscape and construction firms in past decade



# Dealing with Audits

- Don't panic!
- Read the audit notice carefully
- Organize your records – get them all located and ready to show
- Determine who can speak for the employer
- If there's a time conflict, notify agency immediately and get it rescheduled
- Call 1-800-832-9394 (TWC help line for employers)
- Consider hiring legal counsel with appropriate expertise if the case is more involved
- File appeal under Rule 13 (40 TAC § 815.113)



# Dealing with Audits - 2

## During the audit itself:

- Answer only the questions asked
- Show only the documentation requested
- Do not initiate “chatting”
- Do not volunteer information that has not been requested
- Practice the four "Cs": **c**omply with requests, be **c**alm and **c**ivil, and **c**ontrol any urges to do the examiner's job



# Records for an Audit

- All cancelled checks
- Time cards
- Cash vouchers
- Cash disbursement journal
- Petty cash
- Individual earnings records
- Check register
- Payroll journal
- TWC tax reports
- IRS Forms 940, W-3, and W-2
- General ledger
- IRS Forms 1099, 1096, W-9
- Master vendor files
- Chart of accounts
- Profit and loss statement
- Corporate minutes
- Corporate charter
- Federal tax return (1040, 1120, 1120S, etc...)
- Any other records that may reflect services



# TWC-IRS Interaction

- Every November, TWC sends IRS a list of all employer accounts with wages reported and taxes paid
- Every January, IRS reciprocates
- If the cross-match produces “hits”, TWC will fully investigate and assess delinquent taxes accordingly
- For its “hits”, IRS simply assesses federal taxes based upon TWC’s wage reports
- IRS assesses full 6.0% FUTA tax when a liable employer fails to pay the state UI tax (only 0.6% with full and timely payment of state UI tax)



# Independent Contractors - Red Flags

- Terms such as “1099 employees” or “contract labor”
- Having contractors fill out job applications
- Having contractors sign company policy handbooks
- Giving contractors company benefits or wage advances
- Having contractors wear company badges or uniforms, or carry company business cards, indicating their affiliation with the company
- Giving contractors a company e-mail address
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees
- Non-competition agreements



# Do You Have These To Show for Contractors?

- Contractors' business cards
- Contractors' invoices to your company on their own stationery
- Copies or printouts of any advertisements or website pages they use for their own businesses
- Written contracts for provision of services or performance of a project
- E-mails, letters, or other documentation relating to negotiating the parameters of the work





# Subcontractors / Independent Contractors

## – What's In Their Wallets?

- Commission looks for some kind of corporate status
- FEIN
- Registration as an entity with the Texas Secretary of State
- TWC tax account number
- Reporting wages of their own employees, including corporate officers or LLC members who perform services for pay



# Corporate Officers / Members of LLCs

- Corporate officers and members of LLCs who perform services for pay for their entities are employees of those entities.
- *Texas Carbonate v. Phinney*, 307 F.2d 289 (5th Cir. 1962), cert. denied, 371 U.S. 940 (1962): a corporate officer is employed by his or her own corporate entity.
- Legal presumption: a corporate officer who performs services for his or her corporation for compensation does so for the benefit of the corporation he or she serves, and each such officer directs and controls his own work on behalf of the corporation.
- LLCs: <http://www.twc.state.tx.us/tax-law-manual-chapter-1-employing-unit-3#1.5.3>



# Typical Rule 13 Decisions

- Employees:
  - Any clerical staff
  - Temporary staff
  - Drivers of company vehicles / equipment
  - Sales staff
  - General laborers
  - Helpers of all types
  - Nurses and medical aides
  - Caregivers
- Independent contractors:
  - Outside professionals
  - Owner-operator truck drivers
  - Business owners with their own clients and paid helpers



# New Tax Precedent Case

- New company came in and took over existing custodial service contracts at two large retail locations and hired some of the prior contractor's workers
- New contractor was completely separate from the prior contractors and had no prior relationship or interaction with them
- Tax Department imposed prior contractors' UI tax debts on the new contractor, due to an "acquisition" of those companies
- Commission's Rule 13 decision: hiring prior contractors' staff is insufficient by itself to constitute an "acquisition" for purposes of Section 204.086(a) of the TUCA; no tax debt inherited simply by hiring non-key staff



# Independent Contractor Court Case

- *Critical Health Connection, Inc. v. Texas Workforce Commission*, 338 S.W.3d 758 (Tex. App. - Austin, April 27, 2011)
- Nurse staffing company – providers/nurses were treated as independent contractors
- ★ Their work was directly integrated into the only service provided by the employer → presumption of control
- Also, they could not delegate the work, and they had no investment in a business beyond their own time
- Court held that direction and control can be delegated by a staffing company / registry to its clients
- Court even agreed with TWC that the staffing company was a “temporary help firm”



# Minimizing UI Tax Problems

- Report wages and pay all taxes on time - deadlines can be extended for good cause shown - set up a payment plan if necessary - timely payment of taxes enables the wages to be used to compute the tax rate, which serves to keep the tax rate lower.
- Main tax rate component is the **benefit ratio**: three-year chargeback total divided by the three-year taxable wage total
- Take the potential cost of a transfer of compensation experience into account when negotiating the sale or purchase of another business.
- A successor entity is liable for the unemployment tax debt of its predecessor.
- The election to be a reimbursing employer must be timely and is effective for two years.



# Transfers of Compensation Experience

- Successor in an acquisition of one business by another acquires the UI compensation experience of the predecessor, if:
  - the successor acquires all or part of the organization, trade, or business of the predecessor, and
  - there is shared ownership or officer-level management between the two entities.
- Partial transfer is possible within two years of an acquisition if the acquired portion is separately identifiable and segregable, and if:
  - the predecessor and successor jointly apply, and
  - they submit up to four years' worth of wage records.



# Payrolling

- "Common paymaster": separate, related companies establish an entity solely for the purpose of handling personnel and payroll matters for the members of that group, or else allow one of the members of the group to handle payroll matters for the rest of the group's members, either for an administrative fee or as a matter of convenience.
- Section 201.046 of the Act provides that the employer is the employing unit that receives the benefit of the work performed, regardless of whether the employees are hired and paid by the employing unit or its agent.





# Payrolling - 2

- In a payrolling situation involving a common paymaster, each separate employing unit receives the benefit of the services provided by the employees working at each location.
- Employing units with separate identities, i.e., separate corporate charters and the like, are separate business entities and thus separate employing units.
- TWC's position is that "payrolling companies" are not single employing units for the purposes of reporting wages and paying state UI tax.



# Coverage of the Texas Payday Law

- all private employees in Texas
- all private employers in Texas
- governmental employers and employees are not covered
- independent contractors and volunteers are not covered



# Purposes of the Texas Payday Law

- Enforces the wage agreement in effect when the work was performed
- Prohibits illegal wage deductions – only legal if:
  - ordered by a court
  - required or specifically authorized by a law
  - made for a lawful purpose and authorized in writing by the employee
- Requires timely payment of wages due, at least twice/month for non-exempt employees and once/month for exempt employees
- Provides a deadline for final pay
- Provides a claim and appeal process for wage claims



# Deductions Under The Texas Payday Law

- deductions do not have to be authorized in writing by the employee if they are ordered by a court (child support), or else are required or specifically authorized by law (payroll taxes, etc.)
- deductions made for any other reason must be made for a **lawful purpose and authorized by the employee in writing**
- have all employees sign wage deduction authorization forms listing all reasons you are likely to ever need to deduct pay (sample form is in the book online)



# Pay Agreements

- verbal or written – enforceable either way
- any pay method is allowed
- the more complicated the arrangement is, the more important it is to put it in writing
- methods and rates of pay may be changed, but never in such a way that a retroactive pay cut results
- pay whatever the agreement promises



# Methods of Pay

- hand-delivery to employee at work
- hand-delivery at other place agreed to by employee
- registered mail, to arrive no later than payday
- delivery to another person designated by the employee in writing by a method similar to first three methods
- any reasonable method agreed to by employee in writing
- direct deposit if employee has bank account



# Direct Deposit

- Permitted under both FLSA and TPL
- Must be voluntary on employee's part, according to DOL (minimum wage issue)
- Potential EEOC issues as well (minimum wage and disparate impact)
- Texas law doesn't cover issue of forcing employee to have a bank account – CFPB rule under the Electronic Fund Transfer Act prohibits employers from requiring employees to have a specific bank
- 60 days' advance written notice to employees
- Payment by debit card needs written authorization



# Texas Payday Law – Miscellaneous Rules

- wage payments in kind must be authorized in writing by the employee (meals, lodging, and other facilities - keep exact records as required by DOL regulation 531.27!)
- fringe benefits are payable only if promised in a written policy or agreement - payable as promised - if policy is silent, benefit is not enforceable under the Payday Law





# Paying on Time

- No specific penalty for paying late
- Employer cannot hold paycheck pending return of items or repayment of loans
- Employer cannot hold paycheck pending submission of timesheets, unless there is no way to calculate pay otherwise
- Excessive late payments may lead to bonding requirement



# Final Pay

- Must include all components of final pay
- Layoff or discharge: within six calendar days of discharge
- Voluntary quit: by next regularly-scheduled payday
- Exception: commissions, bonuses, and fringe benefit payments covered by written contract, policy, or agreement – simply follow the agreement and the timeline in it
- Nature of work separation is determined by TWC's rules on unemployment claims



# Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for PRSD
- 100% return to employee upon work separation if everything is returned in decent shape; offset against PRSD for replacement cost if some items are not returned
- TPL compliance: written authorization for deduction; written policy; the two can be combined into one form for ease of use
- Sample form is in the book online



# Minimum Wage for Final Pay Period

- Two ways to do this legally – otherwise, it looks like a retroactive pay cut, which violates the law
  - as part of a written wage agreement (more difficult and risky)
  - in conjunction with a "resignation notice security deposit" agreement (easier to enforce)



# Minimizing Risk of Wage Claims

- ★ Have clear written wage agreements
  - Best evidence rule: whoever has the best evidence of the wage agreement or of time worked will prevail on those points
  - Written wage agreement and good time records avoid confusion and misunderstandings
- ★ Get written authorization for any deduction that is not ordered by a court or required by a law
- ★ Get receipts for all wage payments, especially cash!



# Drug Testing Evidence

- Appeal No. 97-003744-10-040997. To establish that a claimant's positive drug test result constitutes misconduct, an employer must present:
  - A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
  - Evidence to establish that the claimant has consented to drug testing under the policy;
  - Documentation to establish that the chain of custody of the claimant's sample was maintained;
  - Documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
  - Documentation of the test expressed in terms of a positive result above a stated test threshold.
- Evidence of these five elements is sufficient to overcome a claimant's sworn denial of drug use.



# Advanced Appeal Tribunal Strategies

- Watch out for hearing notice and document packet
- Send additional documentation in advance
- Registered mail w/ return receipt – even better: personal courier with receipt describing delivery attempts
- Refer to documentation packet at start of hearing – ensure the hearing officer received it – offer to fax immediately if not



# Advanced AT Strategies 2

- Have list of witnesses and contact info
- Tell hearing officer at start of hearing about all witnesses
- “Does she know she’ll be called as a witness?” – answer should be “yes”
- “Who will be representing the claimant / employer today?” – “I’ll be the party representative”, says the party’s attorney – otherwise, the attorney or representative can sit there and earn fees for listening helplessly and being unable to help with the client’s case





# Advanced AT Strategies 3

- While testifying, be brief
- Be organized and brief
- Be brief and organized
- Hearing officers appreciate organization and brevity!
- Listen for verbal cues indicating when the hearing officer is ready to move on
- Be ready to signal your witnesses when to stop talking
- Try to keep personality problems out of the case



# Advanced AT Strategies 4

- If an opposing party drops an unanticipated bombshell that would require a response from an unavailable witness, note that fact for the hearing officer and request a continuance
- If continuance is denied, make a brief but clear objection for the record
- That objection may help justify a rehearing at the Commission appeal level



# Advanced Higher-Level Appeal Strategies

- Be brief and to the point
- Supply the Commission with a roadmap to a decision in your favor
- “The Appeal Tribunal decision was wrong for the following reasons” – put reasons in bullet points
- Refer to precedent cases if any are on point
- Ask for rehearing if relevant, and give a compelling reason why one is needed
- In really compelling cases, let Commissioner’s office know about the case – don’t overdo!



Thanks for your attendance  
and  
***Good Luck!***

Remember the toll-free number:  
1-800-832-9394

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