



2777 Allen Parkway, Suite 950
Houston, Texas 77019
tel: (713) 654-3000
fax: (713) 654-3002
www.caldwelleverson.com

WBEA 2013 Annual Conference

Simple Tips for Owners: Workplace Laws and Your Business

E. Lindsey Everson leverson@caldwelleverson.com

Disclaimer

The material presented herein should not be relied upon or construed as legal advice. For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.

Introduction

Small business owners face unique challenges in bringing their services and products to market in a profitable manner.

However, the failure to recognize—and in many cases—comply with the requirements of applicable workplace laws can cripple or destroy an otherwise healthy small business.

The goal must always be to identify that which must be done, that which should be avoided, and balance both in your day-to-day business practices.

Laws in the Workplace

In order to comply with mandatory workplace laws, a business owner must be aware and familiar with their requirements often without any resources, legal or financial, with which to obtain that information.

The following information will give employers a road map for many of the legal and practical issues faced by small businesses.

Legal Primer: At-will employment

In Texas, employment is *at will*, which applies to all phases of the employment relationship. This means that absent a statute or an express agreement to the contrary, either party in an employment relationship may modify any of the terms or conditions of employment, or terminate the relationship altogether, for any reason, or no particular reason at all, with or without advance notice.

- There is a public policy exception to this doctrine, which prevents the firing of an employee for refusing to perform an illegal act.

Employers may therefore develop and change personnel policies, reassign employees, and change schedules, job titles, job descriptions, or compensation at will.

The Statutes

In order to effectively manage their workplace, small businesses must be aware of which laws affect their business, and what they require.

- Those laws include statutes that alter the at-will employment relationship by prohibiting discriminatory practices.

These laws can be generally lumped into two categories:

A. Equal Employment Opportunity (EEO) laws.

- These laws prohibit discriminatory practices in the workplace.
- Small businesses must be aware of these laws.
- However, some of these laws may not apply to the workplaces of small businesses, for a variety of reasons (e.g., number of employees).

B. Laws governing pay, benefits, and other aspects of the employment relationship.

- Many of these laws apply to employers regardless of the number of employees in their workforce.
- However, some statutes apply only to larger employers.

EEO Laws: Knowing is Key

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
 - The Pregnancy Discrimination Act of 1975 revised Title VII to prohibit sex discrimination based on pregnancy and childbirth.
- The Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- The Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990, as amended (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;

EEO Laws continued

- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government;
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about an applicant, employee, or former employee; and the
- The Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

Which EEO Laws Apply to Your Business

- Title VII, the ADA, and GINA cover all private employers, state and local governments, and education institutions that employ 15 or more individuals.
- The ADEA covers all private employers with 20 or more employees, state and local governments (including school districts), employment agencies and labor organizations.
- The EPA covers all employers who are covered by the Federal Wage and Hour Law (the Fair Labor Standards Act).
- Federal EEO laws are enforced by the Equal Employment Opportunity Commission (EEOC).



Texas Commission on Human Rights Act

- State counterpart to Title VII, ADEA, and ADA.
- Applies to employers with 15 or more employees.
- Enforced by the Texas Workforce Commission's (TWC) Civil Rights Division.

Federal Pay and Benefits Laws

- The Fair Labor Standards Act (FLSA).
 - Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.
- Family Medical Leave Act (FMLA).
 - Provides unpaid leave for qualifying employees with serious health conditions.
 - The FMLA applies to any employer in the private sector who has 50 or more employees each working day during at least 20 calendar weeks in the current or preceding calendar year.

Federal Pay and Benefits Laws

- The Consolidated Omnibus Budget Reconciliation Act (COBRA).
 - Gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.
- Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.
 - Grants employees who have served in the military the right to be reinstated to their employment without losing benefits.
- The Employee Retirement Income Security Act (ERISA).
 - Covers retirement and other benefit plans.

Texas Pay and Benefit Laws

- The Texas Payday Act.
 - Provides rules for the payment of compensation, commissions, and certain fringe benefits to Texas employees.
- Texas Unemployment Compensation Act.
 - Provides Unemployment Insurance benefits to employees who are unemployed through no fault of their own.
- The Texas Workers' Compensation Act.
 - Workers' compensation is a state-regulated insurance system that provides covered employees with income and medical benefits if they are injured on the job or have a work-related injury or illness.
 - Texas is one of the only states that allows employers to choose whether or not to carry workers' compensation insurance coverage.

Successful Navigation Means Time and Money Saved



FLSA—Federal wage law

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.

- Applies to practically every employer and/or employee engaged in interstate commerce.
- Texas has no minimum wage or overtime provisions.

FLSA—Federal wage law

The FLSA Provides Rules Regarding:

- Minimum wage
 - Currently \$7.25/hr.
 - Every employer of employees subject to the FLSA's minimum wage provisions must post, and keep posted, a notice explaining the Act in a conspicuous place in all of their establishments.
- Overtime
 - Requires employers to compensate non-exempt employees one-and-one-half-times their regular rate of pay, for hours actually worked over 40 in an FLSA work week.
 - Exempt employees are not entitled to receive FLSA overtime.
- Child labor.
- Equal pay.

FLSA—What it does not require.

The FLSA Does Not Require:

- Breaks.
- Premium pay.
- Shift differentials.
- Raises.
- Vacation or sick leave.
- Holiday pay.
- Severance pay.
- Pension benefits.

FLSA—Exempt vs. Nonexempt

Certain employees are exempt from the FLSA's overtime requirements in certain circumstances:

- Meet the Salary Basis Test
 - If the employee paid at least \$455 per week (\$23,600 per annum), not subject to reduction due to variations in quantity/quality of work performed.

**Exceptions for computer professional and outside sales.*

AND

- Job duties fall in one of the following categories:
 - (1) Executive,
 - (2) Administrative,
 - (3) Professional: learned/creative,
 - (4) Computer professional,
 - (5) Outside sales.
- **OR** is highly compensated (\$100,000.00) for non-manual work.

FLSA—Overtime

- Overtime is calculated at one and one-half the employee's regular rate of pay.
- Required for each hour worked in a workweek in excess of the maximum allowable in the given type of employment (usually 40 hours per workweek).
- Workweeks may not be averaged.
- Regular rate computation:
 - It is determined by dividing total earnings for all hours worked in any workweek by the total number of hours worked in the week.
 - Includes all remuneration for employment except: gifts, vacation pay, discretionary bonuses, profit sharing plans, talent fees, premium payments, or stock options.

FLSA—Records

Employers must keep time records for each non-exempt employee.

- There is no particular form for the records.

Employers may use any timekeeping method they choose as long as it is complete and accurate.

Length of time records must be kept:

- 3 years: Payroll records, collective bargaining agreements, sales and purchase records.
- 2 years: Time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wage.

FLSA—Record Keeping

In general, the basic records employers must keep include:

- Employee's full name, as used for Social Security purposes, and on the same record,
- the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records
- Address, including zip code
- Birth date, if younger than 19
- Sex and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day and total hours worked each workweek
- Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

FLSA Tips for Your Business

1. Do not confuse “salaried” with exempt status under the FLSA.

Job titles and/or a salary do not confer “exempt” status. Similarly, a job description alone does not confer “exempt” status under the FLSA.

An employee is only exempt if he or she qualifies as a “highly-compensated” worker or is employed in executive, administrative, professional/creative, computer professional, or outside sales positions.

FLSA Tips for Your Business

2. **If you are unsure, get help calculating overtime pay.**

Overtime is calculated at time and one-half the employee's regular rate of pay.

- An employee's regular rate of pay includes such things as hazard pay and premiums for special certifications.
- Therefore, non-exempt employees occasionally working jobs or locations providing for additional hazard pay would be earning a higher regular rate for weeks worked at that job or location.

Overtime must be paid for each hour worked in a workweek in excess of the maximum allowable in the given type of employment (usually 40 hours per workweek).

FLSA Tips for Your Business

3. Keep accurate time records for your non-exempt employees.

Payroll records should be kept for three years.

Under the FLSA, there is a presumption against the employer when the employer fails to maintain proper records.

- If your company is sued for overtime or wage violations, there is a rebuttable presumption that the employee's evidence of his or her hours of work are accurate.

FLSA Tips for Your Business

4. Do not deduct pay from an exempt employee for missing part of a work day due to sickness.

An employer may make a deduction from an exempt employee's salary for the employee's full day absences due to sickness *provided* the deduction is made in accordance with a bona fide plan, policy or practice of providing wage replacement benefits for such absences.

- Deductions may be made for the exempt employee's full day absences due to sickness before the employee has qualified for the plan.
- Deductions may be made for the exempt employee's full day absences after the employee has exhausted the leave allowance under the plan.

Texas Payday Act

- Provides rules for paying Texas workers.
- Covers all Texas business entities.
 - Excluding public employers.
 - Close relatives and independent contractors are not considered employees.
- Sets rules for when to pay employees
 - Depends on FLSA status:
 - Exempt employees: Must be paid once a month.
 - Nonexempt employees: Must be paid at least twice a month.

Texas Payday Act—Wages

Considered wages under the Payday Act:

- Compensation for services
- Commissions and bonuses
- Certain fringe benefits

Not covered by the Payday Act:

- Expense reimbursement
- Gratuities
- Gifts

Texas Payday Act—Payment Methods

Delivery of wages:

- Deliver to employee at regular place of work during working hours.
- Registered mail to be received by employee no later than payday.
- To any person authorized in writing by the employee.
- Any other reasonable means.
 - Payment by EFT must be authorized by employee in writing.

If final pay:

- Employee quits: Must be paid in full at the next regular pay day.
- Employee terminated: Must be paid in full within 6 days.

Texas Payday Act--Withholding

Withholding wages without written authorization.

- An employer may only make deductions when:
 - ordered to do so by a court of competent jurisdiction;
 - specifically authorized to do so by state or federal law; or
 - authorized in writing by the employee.
 - But only for a lawful purpose.

Authorizations that are too broad or too general may not be given effect.

What does the Texas Payday Law NOT require?

- **Employment benefits . . .**
 - UNLESS PROVIDED IN WRITING.
 - If an employer offers these benefits in writing, the employer would be obligated to comply with their own policy or employment agreement.
 - The employer has the right to establish policy on how these benefits are earned, accrued, used and if they are paid out when not used, barring any policy which might be considered discriminatory as defined by law.
- **Breaks**
- **Raises**

TWC Wage Claims

Any employee who feels he or she has not been paid all wages earned may file a complaint with the TWC.

- Complaint forms may be obtained by request through phone, internet, or mail.
- Wage claim must be filed within 180 days of the date the claims wages became due.
 - Claims that are not filed within 180 days are barred.

The Employer's Response

- TWC notifies employer upon receipt of wage claim.
- Employer is provided copy of claim and an opportunity to respond (within 14 days).
- An investigator from the TWC's Labor Law Department, using the information obtained by the employee and employer, will issue a written decision.

Appeal of Preliminary Wage Determination Order

- Either party may appeal the Investigator's Preliminary Wage Determination Order (PWDO).
- Requests for an appeal to the Special Hearings Department must be made within 21 days of the PWDO.
- Appeal hearings are usually held by teleconference, under oath, and are recorded.
- Evidence may be presented at the hearing.

Appeal to the Commission and Judicial Review

- Any party may appeal the written decision of the Hearing Officer to the Commission (within 14 days).
- The Commission will review the record and issue its own written decision.
- Within 30 days of Commission's written decision, either party may appeal to district court.
- Lawsuit must be brought in county of claimant's residence.

Causes of Wage Claims

- Employer refuses to pay accrued benefits promised in writing.
- Employer withholds or deducts money from paycheck without specific, written authorization.
- Failure to pay non-exempt employees time and one-half for overtime.
- Salary cuts without notifying employees.

Causes of Wage Claims

- Withholding earned commissions or charging employees for unearned commissions without employee's written authorization.
- Giving paycheck to person other than employee without prior written authorization.
- Requires payment of compensation to employee by EFT despite employee's objection.

Payday Act Tips for your Business

1. **Obtain specific, written authorization for withholdings from employee paychecks.**

- Even for employer loans to employees, oral agreements to repay out of wages will not be allowed—must be in writing.
- Even with written authorization, the amount of money deducted from a pay check cannot reduce the amount paid below the minimum wage for the number of hours works.
 - E.g., an employer may not zero out an employee’s paycheck to recover a loan payment.
- Also, deducting money from an “exempt” employee’s pay jeopardizes the employee’s exempt status.

Payday Act Tips for your Business

- 2. If you have a vacation policy, carefully draft your policy language to provide for the accrual of vacation credit.**

The Texas Payday Law does not require that Employers pay terminating employees for unused vacation. However, if that is what your vacation policy provides then the Texas Payday Law requires that your company pay it.

Policy One: Employees with more than five years of service will receive twelve (12) days of vacation on January 1 of each calendar year.

Policy Two: Employees with more than five years of service will accrue one-half (.5) a day of vacation during each pay period worked. The use of un-accrued leave must be approved in writing by a supervisor or Human Resources representative.

The Company using Policy One would likely have to pay an employee with five years of service who resigns on January 15 for 10 days of unused vacation.

Payday Act Tips for your Business

- 3. Regardless of the circumstances, do not hold final pay ransom to a terminating employee's return of keys, phone, or laptop computer.**

An employer should attempt to recoup the property by some other means, such as civil remedies (e.g., lawsuit, small claims court or police report) or make arrangements with the employee outside of a wage deduction.

- It is not worth the administrative penalties the TWC may impose against your company for refusing to pay final pay.

Payday Act Tips for your Business

4. **Carefully draft commission agreements to define when commissions are “earned.”**

Employers must carefully draft compensation plans that include commission payments to define when a commission is “earned” by the employee.

- If not done correctly, an employer may have to pay an employee a commission on a sale before it receives payment.
- Additionally, the compensation plan should specifically address whether an employee is entitled to a commission despite subsequently being terminated by the Company.

Texas Unemployment Compensation Act

- The Act created an employer-paid insurance program that provides temporary financial help to qualified unemployed individuals, based on their previous earnings, while they are looking for other work.
- Businesses covered by Act:
 - Must pay as much as \$1,500 in wages in any calendar quarter of the preceding year.
 - Must employ at least one individual for some portion of the day in each of 20 different days, each day being in a different calendar week.
 - Numerous other qualifying conditions.

Examples of Employees not Covered

- Domestic service employees
- Fishing vessel crew members
- Student nurse or intern employed by a hospital
- Employee of immediate family member
- Employee of church or religious organization
- Students working for schools, colleges, and universities
- Seasonal farm or ranch workers

UI Benefits—Requirements

- There are three primary requirements for eligibility:
 - Past wages.
 - Separation from work.
 - On going availability and work search.

UI Benefits—Determination

- Determined by “base period.”
 - First 4 of last 5 calendar quarters prior to separation.
- Have been paid past wages.
 - Claimant must have earned at least 37 times the weekly benefit amount during the base period.
- The claimant’s weekly benefit amount (WBA) is determined by dividing the wage total of the highest calendar quarter during his base period and dividing that total by 25.
 - If an employee qualified and received benefits on a prior claim, he must have earned six times his current computed WBA since then.

UI Benefits—Limit on Taxable Wages

- Only the only the first \$9,000.00 ("taxable wages") of an employee's earnings is subject to the state UI tax in Texas.
- Only \$7,000.00 of that is subject to the federal UI tax.
- Included in the definition of "taxable wages" are:
 - ❑ All pay for personal services;
 - ❑ The cash value of pay in a medium other than cash (meals, lodging, and other facilities, furnished as part of the job); and
 - ❑ Tips that are considered wages under the Federal Unemployment Tax Act—which is most.

Taxable Wages do not Include

- pay in excess of \$9,000.00 in a calendar year;
- retirement plan contributions or payments;
- sickness/accident disability plan payments or benefits;
- death-related expenses; and
- other non-work-related payments by employer.

Employee Eligibility

- The claimant must be out of work through no fault of his or her own.
- The employee must be actively looking for, and able to perform, suitable work.
- 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.

Primary Reasons for Disqualification

- Voluntary quit for personal reasons.
- Discharge for misconduct connected with the work.
- Refusal of suitable work without good cause.
- Work stoppage resulting from participation in a labor dispute.
- Receipt of wages in lieu of notice, workers' compensation payments, or retirement/pension.

UI Benefits—Discharge for Misconduct

In any case involving alleged misconduct, an employer must prove two primary things:

- That the discharge occurred as the direct result of a final incident that happened close in time to the discharge.
- That the claimant either knew or should have known that he could be fired for such a reason.

In circumstances in which a termination decision is made in the “heat of the moment,” employers often do not consider whether

- They can prove the misconduct occurred, and
- The claimant had been previously warned.

UI Benefits—Voluntary Quit

In any voluntary quit case, an employer must show three main things:

- Continued work was available at the time of resignation;
- Claimant left for personal reasons unrelated to the work, or if she left for work-connected reasons, a reasonable employee would not have quit for such a reason; and
- Claimant left without giving the employer a reasonable opportunity to resolve whatever grievance she may have had.

UI Benefits— Claim and Appeal Process

- Initial claim determination
 - No evidentiary hearing (14-day response deadline)
- Appeal to the Appeals Tribunal
 - Evidentiary hearing “de novo” by teleconference
- Appeal to the TWC
 - No hearing, the Commission examines the record
- Appeal to Court
 - “Substantial evidence on the TWC record as a whole”
by trial *de novo*

UI and Relationship to Other Laws

Workers' Compensation.

- Receipt of temporary or lifetime worker's compensation benefits prevents a "double dip."

Labor Disputes.

- Strikers don't receive unemployment compensation unless otherwise qualified, e.g., lockout or resignation for good cause.

UI Claims Tips for your Business

- 1. The TWC likes to see documentation of “progressive discipline” and a written “progressive discipline” policy in “for cause” discharge.**

TWC investigators and hearing officers expect to see a written progressive discipline policy and documented warnings to the terminated employee supporting the for-cause termination.

- Except in certain instances, e.g., gross safety violations endangering workplace safety, terminations for single instances of misconduct often do not result in disqualification.

UI Claims Tips for your Business

2. In your response to the TWC's Notice of Application for UI Benefits, be precise regarding the exact reason for discharge.

As part of your response, include information regarding the policy violated, length of the employee's performance improvement plan, and/or number of documented disciplinary actions taken prior to termination for cause.

- In addition to detailing the precise grounds for termination, it is critical that the basis for the employee's termination for cause be consistent. In situations in which the employee disputes an employer's for-cause termination, TWC investigators and hearing officers discount the credibility of employers that change or add additional grounds for the termination.

UI Claims Tips for your Business

3. Pay attention to deadlines in responding to Notices of UI Benefit Applications or appealing TWC benefit decisions.

Failing to timely protest an initial claim waives all rights an employer has to such claim.

- Similarly, a failure to timely appeal a benefit determination deprives the TWC's Appeals Tribunal of jurisdiction to hear the appeal.
- Only in extreme instances and upon a showing of good cause for the employer's failure, will an untimely protest or appeal be allowed to proceed.

UI Claims Tips for your Business

- 4. Do not rely upon affidavit testimony in appeals hearings.**

The TWC's internal evidentiary rules require that live testimony be given greater weight than affidavit testimony, regardless of the number of witnesses testifying by affidavit.

- 5. Do not disregard your own workplace policies when terminating an employee.**

This typically results in an adverse result for employers.

Texas Workers' Compensation Act

Basics of Workers' Compensation.

- Temporary income replacement for covered employees who have job-related injuries or other medical problems.
- Retaliation or job discrimination is prohibited against employees who are involved in workers' compensation claims.
- Injured employee is limited to statutory caps on compensation for covered medical conditions.

Coverage of Workers' Compensation.

- Employees of companies that have workers' compensation insurance
- Employees of independent contractors – “borrowed servants” – if under first employer's direction and control.
- Job-related injuries and illnesses.

Prohibited Actions under Workers' Compensation.

- Interfering with an employee's right to file a workers' compensation claim.
- Discharging or otherwise discriminating against a person who has filed a workers' compensation claim.

Texas Workers' Compensation Act

Provides employees with income and medical benefits if they are injured on the job or have a work-related injury or illness.

It is the employee's exclusive remedy.

- Exception: Within 5 days of beginning work, the employee notifies his employer that he does not want to be covered by workers' compensation.

Act covers Texas Employers that choose to provide workers' compensation insurance coverage.

- Exception: Public entities must provide workers' compensation insurance.

Obtaining Insurance.

- Purchase from private company.
- Self-Insure (must meet Texas requirements).

Texas Workers' Compensation Act— Reporting Requirements

Employer's First Report of Injury or Illness.

- Must report to insurance carrier within 8 days of the following:
 - Employee misses more than one day of work because of a work-related injury.
 - Employer knows about an occupational disease or illness even if the employee has not missed any work.
 - Employee dies because of a work-related injury or illness.
- Must provide copy to the injured worker as well as a copy of the “Injured Workers’ Rights and Responsibilities.”

Other reports:

- Employer's Wage Statement
- Supplemental Report of Injury

Texas Workers' Compensation Act— Employee Notice Requirements

Notice must inform employees of the following:

- Employer has workers' compensation insurance and the workers' compensation insurance company's name.
- Information regarding the Division's Ombudsman program.
- Division's toll-free telephone number to report unsafe work conditions.
- Must be placed in the employer's personnel office and in a prominent place where employees can see it regularly.

Texas Workers' Compensation Act— Records

Records.

- Records of all work related injuries, illnesses, and fatalities.
- Records must be kept for 5 years from the last date of the year in which the injury occurred or for the period of time required by OSHA, whichever is longer.

Worker's Compensation Retaliation Claim

No person may discharge or otherwise discriminate because employee:

- (1) in good faith files a workers comp claim;
- (2) hired a lawyer;
- (3) instituted a proceeding under workers' compensation law; or
- (4) testified or is about to testify in any such proceeding.

Defenses.

- After acquired evidence doctrine.
 - Only entitled to back pay until uncovered false statements or other misconduct which would have resulted in termination anyway.
- No individual supervisor liability (unlike FMLA).
- Plaintiff cannot establish causal connection between his claim and his termination or Plaintiff cannot rebut employer's non-discriminatory reason for termination.

Workers' Compensation Tips for your Business

1. **Avoid a neutral absence control policy.**

Neutral absence control policies have successfully been used in the past to separate employees injured on the job who are unable to return to work for an extended period of time, such as six months or a year. This was intended to remove the causal link between the workers compensation injury and the employee's subsequent termination.

However, recent developments in the law and EEOC guidance on the subject indicate that the rigid enforcement of such policies may violate the ADA.

Workers' Compensation Tips for your Business

- 2. Ensure that the actual basis for the termination of any employee having filed a workers' compensation claim is well documented.**

Legitimate employment actions are often challenged as retaliatory when taken proximate to the time that an employee makes a workers compensation claim.

In order to overcome such claims, documentation for the basis of the termination should exist supporting the documentation.

Workers' Compensation Tips for your Business

- 3. Do not keep workers' compensation claim information in an employee's personnel file.**

Claim information often contains medical information that must be limited in distribution to business owners or Human Resource personnel.

Claim information is irrelevant to employment status or decisions, and inclusion of that information with other personnel records paints a target on the back of any employer who later takes employment action regarding that employee.

Workers' Compensation Tips for your Business

- 4. Promptly make first reports of an employee injury to your carrier.**

Employers who fail to timely report workplace injuries are often plagued by a perception that they sought to avoid making a claim or were otherwise hostile to the notion.

This perception, even though untrue, often ultimately hurts the employer if the employer later terminates the employee for unrelated work issues.

Applying The Laws in Your Workplace



Workplace Policies

One of a small business owner's best weapons can be its written workplace policies. However, a written policy that is ignored or applied unevenly has hurt of many small, and big, companies.

The three cardinal rules of workplace policies are:

- A. Do not write policies you have no intention of enforcing uniformly and consistently.
- B. Written policies must match actual practices.
- C. Compensation, time off, and disciplinary standards should be explicitly provided.

Policies Tips for your Business

- 1. Ensure that you have a uniform written policy that discusses all forms of harassment and the procedure for filing complaints.**

Your policy should state that:

- The employer will not tolerate harassment based on race, sex, religion, national origin, age, or disability and
- The employer will not tolerate retaliation against anyone who complains of harassment.

Businesses must have effective policies to prevent and correct harassment such as:

- Conducting a prompt, thorough, and impartial investigation of any complaint that arises and
- Undertaking swift and appropriate corrective action.

Workplace Policies

Tips for Your Business

2. **In addition to making written policies accessible to employees, upon hiring new employees ask the new hire to spend time reviewing your Company's workplace policies and/or Employee Handbook. After the new hire has reviewed the policies, have the employee sign an acknowledgement that he or she has read and understands your Company's policies.**
 - This acknowledgement should be placed in the employee's personnel file.
 - This signed acknowledgement evidences the employee's knowledge of policies he or she may later be disciplined for violating.
 - In some cases it may be appropriate to ask employees to re-sign acknowledgments, especially for long term employees or when new policies are published.

Workplace Policies

Tips for your Business

- 3. As already discussed, you should have clear written leave policies if your Company provides employees with paid vacation.**
- 4. Your Company should have a written progressive discipline policy that is provided to all employees.**
- 5. Any policies of which violations may result in discipline must be in writing and provided to employees.**

Trends and Developments

Small businesses face the same societal and legal challenges as big business, only with a fraction of the time and resources available to manage those challenges.

- Some of the biggest emerging challenges posed include:
 - Social media and your employees.
 - Technology in your workplace.

Social Media

Employers of all sizes are being required to confront the intersection of their business and employees' use of social media.

- Social media, whether acknowledged or not, is a resource for employers interviewing applicants.

While Texas is an at-will state, and no law prohibits firing an employee for a posting you find inappropriate, the law is still evolving and issues still exist for employers.

- For example, taking employment action without notifying employees of a formal policy may result in an adverse UI benefit determination.

Social Media Tips for your Business

Your business should have a written policy that provides reasonable rules for conduct that a reasonable person would not find intrusive into an employee's personal life.

Such provisions include:

- Policy addressing the publication of confidential Company information in social media.
- Policy clearly stating that employees may not represent themselves as speaking for the Company in any way—e.g., employees do not speak for the Company in social media.
- Policy prohibiting specific conduct such as discriminatory remarks, harassment of other employees, or threats.
 - This policy may also address employee “bullying.”

Privacy and Technology

- Employees have a limited expectation of privacy in the workplace.
 - Email and telephone calls are normally not considered to be private.
 - Almost universally, if an electronic mail (e-mail) system is used at a Company, the employer owns it and is allowed to review its contents.
- Employees should expect privacy in restrooms and changing facilities.
 - However, in some sectors, employees can be monitored for loss prevention.

Privacy and Technology

Tips for your Business

If your business regularly monitors workplace phone calls and/or computer usage, you should have a written workplace policy notifying employees of this monitoring.

- An employer's policy regarding monitoring need not specify every means of communication subject to the policy.
- Written notice of such a practice is further protection for a Company against privacy claims.

Independent Contractors

One common mistake small businesses make is incorrectly classifying an employee and an independent contractor (IC).

- Employment laws generally apply only to employees, not to IC.
- Companies also do not have to withhold federal, state, and social security taxes or pay unemployment or workers' compensation insurance for IC.

Independent Contractors

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

- Distinction generally depends on the amount of control exercised by the employer over the work being done.
- Courts and administrative agencies will generally tend to find the person to be an employee rather than an independent contractor.

Independent Contractors

If an agency determines that an IC is an employee, the “employer” will be required to pay back employment taxes and UI insurance.

“Employees” improperly classified as an IC may also be entitled to recover benefits paid by the employer to W-2 employees such as paid vacation or matching 401k payments.

An IC who is also actually an employee also presents workers’ compensation risks to a small business, including the waiver of the Act’s statutory bar of negligence claims against the employer.

IC Tips for your Business

Despite the seeming financial incentive in treating a worker as an IC, carefully consider whether that worker is truly an IC or is more appropriately classified as an employee.

- Obtain legal advice if necessary. Typically, it is not a close call.

I-9 Forms

Employers are required to verify the identity and eligibility to work for all new employees. An Employment Eligibility Verification form (I-9 Form) must be completed and kept on file by the employer.

- Form I-9 must be retained by the employer either for three years after the date of hire or for one year after employment is terminated, whichever is later.
 - The form must be presented for inspection by US Government representatives upon request.
- The employer must review the original approved document or some combination of approved documents that establish both identity and employment eligibility.
- Employers may not refuse to accept lawful documentation that establishes the employment eligibility of an employee, or demand additional documentation beyond what is legally required, when verifying employment eligibility.

I-9 Tips for your Business

Do not request or require a job applicant provide you with I-9 documentation prior to his or her acceptance of a job offer.

- The EEOC has taken the position that employment eligibility verification should be conducted after an offer to hire has been made since discrimination on the basis of national origin could affect hiring decisions.
- Since I-9 forms and documents contain national origin information and should be kept separate from personnel files.
- Of course, regardless of national origin information I-9 forms and documents contain sensitive information and it is the employer's obligation to prevent loss or theft of that information.

Requests for References

Giving employee references can pose a difficult situation for employers.

- Texas law protects an employer who releases information about a current or former employee to a prospective new employer from a defamation claim, unless the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.
- Although seemingly helpful, the law still requires caution by employers.

References Requests

Tips for your Business

Develop a standard response to reference requests and uniformly apply the policy.

- One person should be designated as the person to respond to reference requests.
- Provide only what is requested, and never volunteer information.
- If more than factual data is requested, e.g., date of work, last salary or wage rate, eligible for re-hire, request a signed authorization from the former employee.
- You must absolutely apply this practice uniformly and consistently.

Documenting Employment Actions

Other than the delivery of a quality product or service to its customers, hiring and firing employees may be the most important thing a small business does.

In order to develop and maintain the talented team of employees a small business needs to be successful without incurring unnecessary legal and employment-related costs, you absolutely must properly document your employment actions and the basis for them.

Documenting Employment Actions

How good documentation can help you

- Create a timely record
- Provide notice to employees
- Make well-informed decisions
- Evaluate future conduct
- Win lawsuits or other disputes

How documents can hurt your Company

- Limit your options before you know all the facts
- Damage credibility
- Give basis for additional claims
- Appearance of improper motives

What to Document

- Performance evaluations
 - Evaluation should be specific enough to support future action.
 - Evaluation should not include any personal feelings.
- Performance counseling
 - Oral, informal counseling should be noted in personnel file.
 - Written, formal counseling should contain no notes, but should include the date, topic, and goals for improving and placed in employee's personnel file.

What to Document Cont'd

- Investigations
 - Start new page for each interviewee.
 - Write down questions and responses verbatim.
 - Record only facts, not opinions or conclusions.
 - Review the facts with the interviewee.
 - Finalize your notes, type them yourself if necessary.
 - Store notes in file specific to the investigation.
- Disciplinary decisions
- Termination
 - Make a detailed record of the termination meeting.
 - Limit Dissemination of Information.
 - Maintain employee's personnel and other files for sufficient time.

How to Document

The elements of a good document regarding an employment action or decision include:

- ❑ It uses plain, nontechnical language that a jury can understand.
- ❑ It does not use hyperbole, or conclusory, inflammatory language.
- ❑ It is factual and is based upon verified (through other documentation) facts.
- ❑ It tells the whole story.
- ❑ It identifies the author and the date of the document.
- ❑ It has a place for the employee to sign (although the employee may refuse) and date the document.
- ❑ It is treated confidentially.
- ❑ It is supported by signed and dated statements from witnesses, where appropriate.
- ❑ It does not contain casual or shorthand notes.

Conclusion

Small businesses, and their owners, face many challenges in the market. They also face a myriad of workplace issues and laws with little or no dedicated human resources function.

However, with knowledge and understanding of what those laws require of them, and a little advice regarding best practices, small businesses can devote the majority of their valuable resources on the business of their business rather than compliance with workplace laws and regulations.

QUESTIONS



E. Lindsey Everson

leverson@caldwelleverson.com