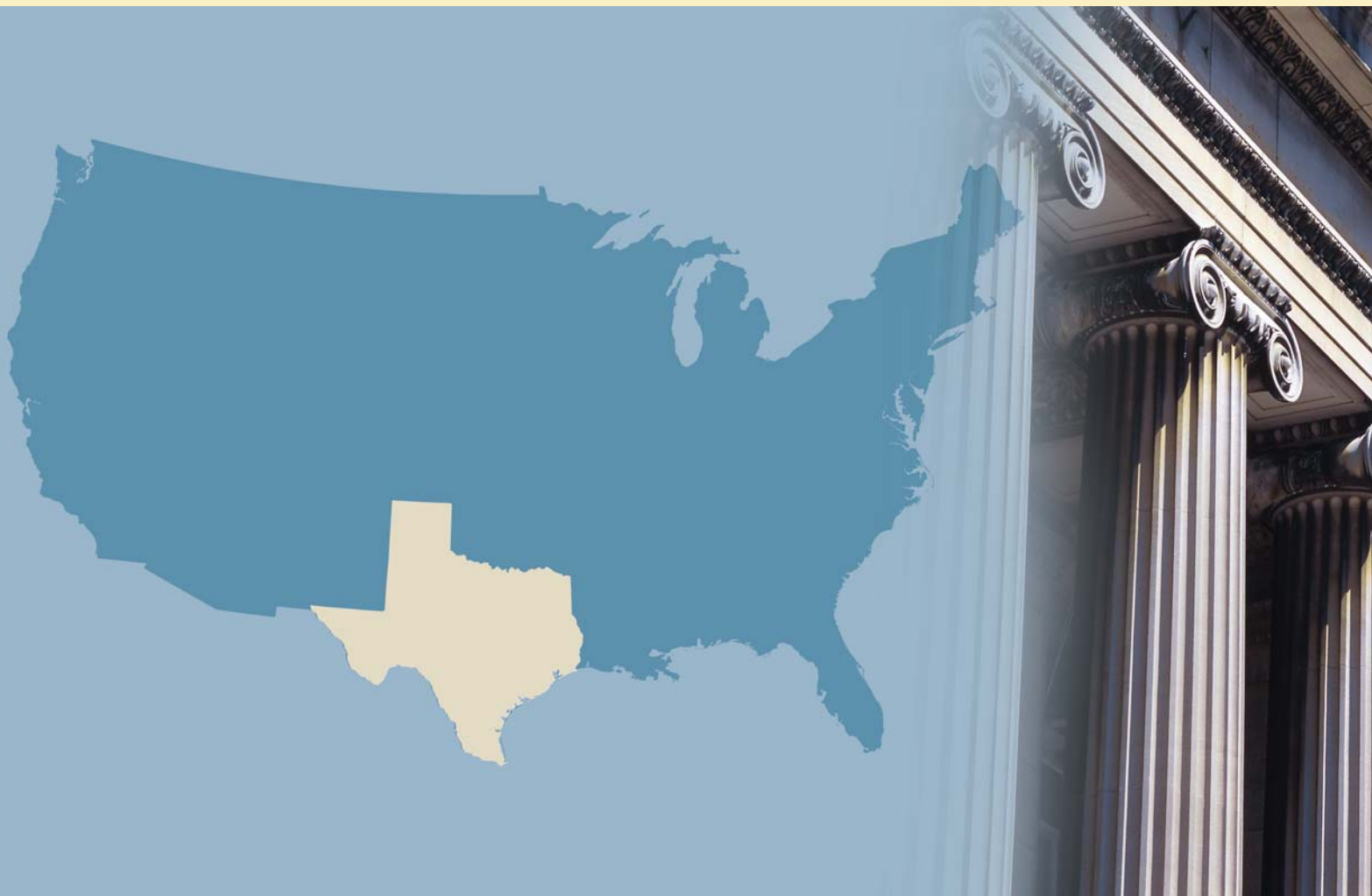


Labor and Employment Laws in the State of Texas



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This booklet is intended to provide an overview of the most important parts of Texas state employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.

I. INTRODUCTION

The number and scope of laws regulating employment has grown steadily over the past several decades. While some areas of labor and employment law are governed exclusively by federal law, others are covered by supplemental (or overlapping) state laws, and a handful are exclusively of state or even local concern.

This booklet provides a basic overview of Texas employment laws. It is organized into four primary sections: 1) the employment relationship; 2) wages and hours; 3) employment discrimination; and 4) workplace safety. Citations to the Texas Labor Code are provided for each law discussed, if applicable.

Bear in mind that this booklet is not meant to be an exhaustive treatment of Texas employment law in any particular area. Neither does it review applicable federal law, other than to briefly point out areas of difference where the two overlap, or to indicate when federal law substantially governs an entire area.

Always remember that, when state and federal laws differ and an employer is covered by both, the stricter standard must be followed. This booklet should be considered as a supplement to federal law, which extensively regulates employment relationships. Additional information about federal employment issues is available in various other booklets published by Fisher & Phillips LLP.

II. THE EMPLOYMENT RELATIONSHIP

A. Employment At-Will

In Texas, the general rule is that every employment relationship is “at-will,” or terminable at the will of either party. This means that either the employer or the employee may terminate the employment relationship for any reason and at any time. There are, of course, legal limits to “at-will” status. Employers may not discharge employees for any legally prohibited reason, such as race, color, religion, national origin, gender, disability or age. Neither may employees be discharged in retaliation for exercising legal rights, performing legal duties, or refusing to perform an illegal act at the request of an employer. Further, a collective bargaining agreement or other form of employment contract may impose additional limits on the permissible grounds and processes for dismissal.

Employers and employees may agree that an employee may only be terminated for good cause, but they must do so expressly and unequivocally. Generally, written representations in employee handbooks do not give rise to contractual obligations, with the exception of promises to pay accrued vacation or sick leave (see wage and hour section). A handbook or policy manual may also be found to have created a binding contract if it contains detailed procedures for discipline and termination for good cause.

B. Labor Organizations And Relations, Tex. Lab. Code Ann. § 3.101, et seq.

1. Federal Law, National Labor Relations Act, 29 U.S.C. § 151, et seq.

Labor regulations in the private sector are primarily regulated by federal law, particularly the National Labor Relations Act (NLRA). Most employers are covered by this law. The NLRA guarantees employees the right to 1) form, assist, or belong to labor organizations; 2) bargain collectively through representatives of their choice; 3) engage in other concerted activities; and 4) refrain from any of these activities. Employers are prohibited from 1) interfering with, restraining, or coercing employees with respect to their rights under the NLRA; 2) interfering with the formation or administration of any labor organization or contributing funds to it; 3) refusing to hire, firing, or discriminating in regard to the terms of a person's employment because of his membership or non-membership in a union; and 4) refusing to bargain collectively with employees' representatives.

2. Texas Law, Tex. Lab. Code § 101.001 et seq.

Texas does not have a comprehensive set of traditional labor laws (those dealing, for example, with union labor matters). But employers not covered by federal law, such as small businesses, may be covered by Texas laws that afford workers the right to associate together, to form trade unions, and to organize, in general, to protect their rights at work. Additionally, Texas workers have the right to attempt by lawful means to persuade others to join unions and to consent in writing to withholding of their salary for payment of union dues. Employers have the right to participate in employer unions for the purpose of collectively bargaining with employees.

Texas is a "right to work" state, which means that employment cannot be conditioned upon membership in a labor union. "Agency shops," or workplaces in which all non-supervisory employees must pay union dues (even if they do not belong to the union) also violate the Texas "right to work" law. Further, if an employer enters into a contract to use only union or non-union labor, such a contract is null and void. This is true even if an employer's home office, other operations, or some of the employee's work duties are located or performed in other states that allow agency shops, so long as employees perform the duties of their employment primarily in Texas.

a. Picketing, Tex. Lab. Code §§ 101.151-56, §§ 101.201-05, §§ 101.251-52, §§ 101.301-02

Peaceful picketing by employees or their unions is protected by the First Amendment to the United States Constitution. Nonetheless, Texas imposes restrictions on picketing to protect employers, customers, and non-union employees. Mass picketing, or picketing during labor disputes that blocks entrances or exits to an employer's premises, is prohibited. No one may picket with the purpose of persuading others to disregard or breach a valid labor agreement. It is also illegal to use threatening, obscene, or insulting language while picketing with the purpose of intimidating people from entering a business premises.

Secondary picketing (picketing at the site of an employer with whom there is no labor dispute) is also prohibited. An employer or the Attorney General may bring suit against persons

who violate these restrictions. Violation of these rules may be redressed through civil suits, and requests for damages and injunctive relief.

b. Arbitration, Tex. Lab. Code § 102.001 et seq.

Texas law establishes a Labor Arbitration Board, which is available for arbitrating disputes not covered by the NLRA. Both the employer and the employee must agree in writing to submit labor disputes to the Arbitration Board. During arbitration, both sides must maintain the status quo: employers may not terminate employees involved in an arbitration, except for inefficiency, unlawful activity, neglect of duty, or need for a reduction in workforce, and unions may not boycott or strike during an arbitration. Decisions made by the Labor Arbitration Board may be appealed to a district court, though only matters of law, apparent on the face of the arbitration record, may be contested.

c. Continued Health And Accident Insurance Coverage, Tex. Ins. Code Art. 3.51-8

Group health or accident insurance for which an employer is obligated to pay any portion of the premiums under a collective bargaining agreement, may not be suspended during a strike for a period of six months if premiums are timely paid by the employee. Employees must continue to make their own premium payments, *as well as* the employer's contribution to the premium. Under some circumstances, the employees' union may be responsible for collecting individual employees' contributions to the insurance policy.

Insurance companies are permitted to include a provision in the policy allowing for a premium rate increase of up to 20% (or higher if approved by the Commissioner of Insurance) during a strike to allow the insurer to cover increased administrative costs and increased morbidity and mortality. The insurer may also decrease or increase premium rates before, during, or after a strike if it would have been permitted to adjust rates in that manner had there been no strike.

C. Pre-Employment Screening

1. Drug And Alcohol Testing, 41 U.S.C. §§ 701-707, 42 U.S.C. § 12114

Texas employers in contracts with the federal government worth more than \$100,000, as well as most federal agencies, are subject to the drug-free workplace requirements of the Drug-Free Workplace Act of 1988 (the Act). While the Act does not require that employers perform drug testing on employees, it does impose numerous requirements on covered employers, including publishing of drug-free policies, preparing a drug-free awareness program, informing employees of the availability of counseling and rehabilitation, informing employees of penalties for drug use, and disciplining employees convicted of drug activity.

The Texas Workers' Compensation Act no longer requires all employers with workers' compensation insurance and employing more than fifteen people to adopt a drug and alcohol policy. Texas law, similar to federal law, does not *require* drug or alcohol testing.

Texas courts have uniformly held that an employer may require an applicant to undergo drug testing as a condition of employment, provided that the testing reasonably accommodates an employee's basic interest in privacy. The Americans with Disabilities Act (ADA), which covers employers with more than 15 employees who work at least 20 calendar weeks per year, however, prohibits alcohol testing at the pre-offer stage of screening applicants. After an offer of employment has been made, alcohol tests are permitted if those tests are required for all applicants with the same job title. The ADA does not prohibit use of drug testing in making employment decisions; however, alcoholism and drug addiction (including former drug addiction) are regarded as protected disabilities under the ADA. The ADA does not protect individuals currently using drugs and employers are certainly permitted to prohibit the use of alcohol and drugs in the workplace.

2. Medical And Genetic Testing, Tex. Lab. Code § 21.402, Tex. Ins. Code § 546.052

Employers may not insist on a medical examination, other than drug testing, as a prerequisite to an offer of employment, with few exceptions. The ADA and the Equal Employment Opportunity Commission (EEOC) prohibit such examinations or medical inquiries at the initial stage of the hiring process. However, employers may conduct medical examinations after an offer of employment has been made. If an offer is made conditional on the results of a medical exam, the offer must not depend on anything but the results of the medical exam, and all entering employees must be subject to the same conditions and examinations. If an employer withdraws an offer of employment based on medical information, it must be able to show that its decision is both job-related and consistent with business necessity. The employer must also be able to show that the individual could not perform the job with reasonable accommodations.

Under Texas law, employers may not discriminate against an applicant or new hire based on that individual's refusal to submit to genetic screening or on the results of such a screening. Genetic information is confidential and may not be revealed to an employer or insurer without the consent of the person tested. If an employer or insurer obtains this information, the insurer may not use it to discriminate against an individual with respect to the employer's group health care policy.

3. Criminal Background Checks, Tex. Health & Safety Code § 765.001, et seq., Tex. Educ. Code § 22.0834

Texas law permits employers to obtain information regarding a prospective employee's criminal history. In fact, this information is readily available for a small fee from the Texas Department of Public Safety. Federal law, however, curtails employers' use of such information. The EEOC prohibits inquiring about an applicant's criminal arrest history or using arrest records to disqualify an applicant unless the employer can show that the disqualification or inquiry is to further a "business necessity." If an employer can show a business necessity for using arrest records, it must give applicants a chance to explain a prior arrest.

With a few exceptions, records of prior criminal convictions may not be used to disqualify an applicant unless the number or nature of convictions demonstrates that the applicant is not suited for the position. If an employer inquires into an applicant's prior

convictions, the employer must also state that the fact of a prior conviction will not necessarily disqualify the applicant for employment.

a. Workers At Residential Dwelling Projects, Tex. Health & Safety Code, § 765.001 *et seq.*

Texas law expressly provides that employers who operate residential dwellings, and whose employees will have access to individual dwellings, may request that job applicants disclose their criminal history either before or after submitting an application for employment. If the applicant has provided such written authorization, an employer may verify that the worker has provided truthful information by obtaining the applicant's criminal history record from the Texas Department of Public Safety. Disclosure of this information to anyone but an officer, employee, or agent of the employer (for the purpose of determining whether the applicant will be a suitable employee) without a court order or written consent of the applicant is a Class A misdemeanor. An employer is authorized to terminate an employee if it discovers that the employee submitted false information about his criminal background either before or during employment.

b. School Workers, Tex. Educ. Code § 22.0834

School districts, private schools, regional educational service centers, or shared services arrangements are also permitted to obtain criminal background reports on anyone who has applied for employment after January 1, 2008, who has expressed in writing the desire to volunteer, who currently volunteers, or an employee or prospective employee of a person who contracts with the district, school, or center to provide services. The superintendent of a school district or the director of a private school or other educational center must notify the State Board of Educator Certification in writing if the superintendent discovers that an applicant has a reported criminal history.

c. Mandatory Criminal History Background Checks

i. Health Care Workers, Tex. Health & Safety Code § 250.001, *et seq.*

Texas requires nursing homes, daycare centers, agencies providing home health care, and similar facilities to conduct criminal background checks of any prospective or current employee serving elderly or disabled adults. If an applicant is a nurse aide, the employer must also verify whether the applicant is designated in the nurse aide registry as having a finding on abuse, neglect, mistreatment, or misappropriation of a facility consumer's personal property. In an emergency situation requiring immediate employment, a facility may employ a nurse aide without this requisite background check as long as an application for the check is submitted within 72 hours of employment.

If a facility later discovers that an applicant was convicted of a crime that disqualifies the applicant from employment, either legally or under the facility's own policies, or if the applicant's employee misconduct registry check reveals other disqualifying information, the facility must immediately fire the employee. If the facility discovers other information that it believes disqualifies an individual from employment, it must so inform the individual and offer

the employee the opportunity to contest the accuracy of the information before the Texas Department of Public Safety. All criminal records, reports, and other information received about an applicant under this section are privileged and may be used only by the regulatory agency issuing them, the requesting facility, a private agency acting on behalf of the requesting facility, and the applicant. This information may not be disclosed to any other individuals without the written consent of the applicant. Improper release of this information may result in a criminal penalty.

ii. School Bus Drivers, Tex. Educ. Code § 22.084

Public, private, and charter schools, school districts and regional education service centers are required to conduct criminal background checks on any current or prospective school bus driver. If a commercial transportation company supplies transportation services for schools, the law permits the company to conduct its own background check on prospective and current bus drivers, monitors, or aides, and the school or school district is not required to conduct another check. No person who has been convicted of a crime of moral turpitude may be employed as a school bus driver, monitor, or aide without permission of the trustees of the school district or service center, the governing board of the charter school, or the chief executive officer of the private school or shared services arrangement. Open enrollment charter schools are also required to obtain all criminal history information about any applicant for employment or volunteer work.

4. Lie Detector Tests, 29 U.S.C. §§ 2001-09, Tex. Gov. Code § 411.0074

Federal law greatly restricts the ability of employers to rely on the results of polygraph (lie detector) tests when making employment decisions. Most employers may not ask prospective employees to submit to a polygraph test under any circumstances and may ask current employees only under very limited circumstances. Employers who may request that their employees submit to polygraph tests include 1) government employers; 2) employers conducting an investigation involving economic loss or injury to their business; 3) private purveyors of various security services; and 4) manufacturers and distributors of controlled substances. Employers must inform employees that they are not required to take a lie detector test. Employers may not make any employment decision based solely on the results of lie detector tests. Violation of this law may subject an employer to a fine of up to \$10,000. Texas law also requires that polygraph tests be administered only by licensed polygraph examiners.

5. Credit Reports, 15 U.S.C. § 1681-1681

Employers may obtain credit reports on prospective or current employees; however, these reports are solely and extensively regulated by federal law.

D. Insurance And Benefits

1. Health Insurance

Neither federal nor Texas law requires employers to provide health insurance to their employees, however, if employers provide this benefit, there are a number of state and federal laws that control the types of benefits that must be offered and the administration of health benefit plans. The Texas Insurance Commissioner monitors compliance with these laws. Each

covered employee must be issued a certificate of coverage by the insurance carrier that summarizes the policy. Texas requires that insurers write health benefit policies for small businesses employing two to fifty employees, regardless of the health histories of the employees.

Continuation of health care benefits for former employees of businesses employing more than twenty workers is covered by federal law. For businesses employing fewer than twenty people, if a former employee was employed for longer than three months and was not terminated involuntarily for cause, Texas state law requires continuation of health care after termination of employment. Continued coverage must be offered for at least six months after termination, but the employee must choose to continue coverage within 31 days of receiving notice of his right to do so.

Employers may not discriminate in the offering of their health insurance with respect to race, color, religion, sex/pregnancy, or physical or mental disability that cannot be reasonably accommodated. In essence, employers may not refuse to cover certain conditions that disproportionately affect one race, sex, or religion, unless the refusal is based on a neutral standard and medical evidence. For example, an employer must not refuse to offer coverage for certain “experimental” breast cancer treatments unless it can show that its standard was neutrally applied and based on generally accepted medical evidence. An employer may offer fewer life, health or disability benefits to older employees, as long as the amount it pays for the benefits is the same as what it pays to provide benefits to younger workers.

Texas courts may order employers to provide health insurance for an employee’s child as part of a general child support order. An insurer is then obligated to include the child in a group plan, even if the child has a preexisting condition, was born out of wedlock, is not claimed as a dependent on the parent’s federal income tax return, does not reside with the parent or in the insurer’s service area, or is or has been an applicant for or recipient of medical assistance. The insurer must also permit the parent to enroll the child without regard to any enrollment period restrictions usually imposed.

If the parent subject to the court order does not request that the insurer enroll the child, the insurer must do so on application of the custodial parent, a child support agency having a duty to collect or enforce support for the child, or the child. An insurer may not cancel or refuse to renew insurance coverage for a child recipient of court-ordered support unless it receives written evidence that 1) the court or administrative order requiring coverage is no longer in effect; 2) the child is or will be enrolled in comparable health insurance coverage; 3) the parent is no longer eligible for health insurance; or 4) the employer has terminated insurance coverage for all dependents.

2. Retirement Benefits, 29 U.S.C. § 1101-1461

All state laws that “relate to” retirement benefits are pre-empted by federal law, the Employee Retirement Income Security Act (ERISA). Most retirement benefit plans offered by employers are subject to regulation under ERISA, thus, this is an area almost entirely governed by federal, rather than state, law. As ERISA is very complex, far-reaching, and carries draconian penalties for non-compliance, employers must consult with an employee benefits specialist before creating or implementing retirement benefit plans.

3. Life Insurance

a. Individual Employee

An employer may purchase a life insurance policy for an employee that names the employer as the beneficiary if the employer has an “insurable interest” in an employee, or, the employee’s death would cause the employer a substantial financial hardship. This would typically be the case with a high-ranking executive employee. Employers may not insure the life of a low-ranking or retired employee and keep the proceeds from a life insurance policy, however.

b. Group Plan, Tex. Ins. Code § 1131.051, et seq.

Group life insurance plans may be issued to employers or unions for the benefit of their employees and employees’ spouses and children. Any such policy issued in the state of Texas must comply with standards issued by the Insurance Commissioner.

4. Mandatory Time Off/Day Of Rest, Tex. Lab. Code § 52.001

Employees of retail establishments may not be required to work seven consecutive days. Additionally, employees are entitled to at least 24 consecutive hours off for rest or worship in a seven-day period. An employer may not require an employee to work during a period of time the employee requests to be off to attend one regular worship service a week. Time off provisions do not apply to part-time employees working 30 hours or less in a calendar week.

E. Employment Of Minors

1. Federal Law, 29 U.S.C. §§ 206, 213; 29 C.F.R. §§ 570.50-570.68; 29 C.F.R. § 519.4; 29 C.F.R. § 570.33

There are numerous restrictions on the employment of children under 18, primarily designed to limit the exposure to occupations detrimental to a child’s health or well-being. Employers may pay employees under the age of 20 \$4.25 an hour, rather than the federally-mandated minimum of \$7.25 an hour, for the first 90 days of employment. To do so, an employer must obtain an authorization from the Wage and Hour Division of the Department of Labor.

Under federal law, children under 18 may not work in occupations deemed to be “hazardous or detrimental to a child’s health or well-being” by the U.S. Department of Labor. These types of jobs include: logging, most mining occupations, operating large trucks or other vehicles, roofing and roofing-related occupations, manufacturing explosives, occupations in the operation of sawmills, occupations requiring exposure to radioactive substances and to ionizing radiations, occupations requiring the operation of power-hoisting apparatus, occupations involving the operation of bakery machines, occupations involving operation of paper-products machines, manufacturing brick, operating circular, band, and guillotine saws, wrecking, demolition or shipbuilding, and excavation operations. This list of occupations does not, however, apply to agricultural employment.

a. Sixteen And Seventeen-Year-Olds

Employers must obtain a certificate from the Secretary of Labor or a state work permit before employing children between 16 and 17. Most of the restrictions on 16 and 17-year-olds involve hazardous work conditions. Workers under the age of 17 may not drive automobiles or trucks on public roadways as part of their occupation; workers who are 17 may do so only under limited circumstances, including but not limited to driving during daylight hours.

Children under 16 may not: 1) work in manufacturing, mining, or processing goods; 2) work in a non-clerical position in warehousing or storage facilities; 3) operate power-driven machines, other than office machines; 4) work as a public messenger; 5) work in public utilities or communications; 6) work in non-sales or office jobs in the transportation industry; 7) work in non-clerical or sales jobs in the construction industry.

b. Fourteen And Fifteen-Year-Olds, 29 C.F.R. § 570.35

Fourteen and fifteen-year-olds may be employed only with a temporary work permit that can be obtained from the Department of Labor. These workers may only work during hours that will not interfere with attending school. Full-time students may not work more than forty hours a week, or eight hours a day, during school vacations; they may not work more than eighteen hours a week while school is in session. Children under fourteen generally may not be employed except under a limited set of circumstances.

2. Texas Law, Tex. Lab. Code § 51.001 *et seq.*

a. Coverage

Employers not covered by the federal minimum wage and overtime law are also not restricted by federal child labor laws, however, they are subject to the nearly-identical Texas child labor laws. The Texas Workforce Commission (TWC) administers Texas child labor laws. Texas state laws do not apply to children working or participating in: 1) a nonhazardous occupation in a business owned or operated by the child's parent or guardian and under the supervision of the parent or guardian; 2) newspaper delivery, if the child is over 11; 3) school-supervised and school-administered work-study programs approved by the commission; 4) agriculture during school vacations; 5) a rehabilitation program supervised by a county judge; 6) nonhazardous casual employment, to which the child's parent or guardian has consented, that will not endanger the safety, health, or well-being of the child; and 7) 16 years or older engaged in the sale of newspapers to the general public.

b. Motor Vehicles

Texas law does not restrict the employment of children under 18 in occupations requiring the operation of a motor vehicle nearly as much as federal law. Such an occupation is not deemed to be hazardous for purposes of the child labor statutes if the child: 1) has a driver's license and is not required to obtain a commercial license; 2) performs his duties under the supervision of a parent or guardian for a business owned by a parent or guardian; 3) operates a vehicle that has no more than two axles and does not weigh more than 15,000 pounds.

Employers covered by federal and state law, however, must comply with the more restrictive federal guidelines on operation of motor vehicles.

c. Age Restrictions

Under Texas law, no one under the age of fourteen may be employed, with some exceptions made for children working as 1) performers in television, theater, or radio or 2) salespersons for exempt organizations, such as charities or school-fundraising, or businesses owned by the child's parent, with some exceptions. Fourteen- and fifteen-year-olds may be employed in various non-hazardous positions in retail, food service, and gasoline service establishments. The TWC's list of prohibited occupations for sixteen and seventeen-year-olds is quite lengthy but primarily targets potentially dangerous occupations such as mining, working around explosives, radioactive substances, and dangerous machinery. Even this list is subject to exceptions, however, for apprentice or student learners.

d. Hour Restrictions

Texas law prohibits the employment of anyone between fourteen and fifteen years of age for more than eight hours a day or forty-eight hours a week during school vacations. While school is in session, fourteen- and fifteen-year-olds may not work between ten p.m. and five a.m. on the night before a school day, and not between midnight and five a.m. on any night of the week. These time restrictions may be set aside by the Texas Workforce Commission if it determines, upon application for exemption by the child worker, that these hour restrictions pose a hardship to the worker.

e. Inspections And Enforcement

The TWC may inspect the premises of employers who currently employ children or who have employed children during the prior two years. It may also collect information concerning the employment of a child who works or has worked on the premises during the prior two years. If the commission determines that an employer has employed a child in violation of the Texas Labor Code, it may assess a fine of up to \$10,000. A complete defense to the charge of employing a child under the age of fourteen is that the employer relied in good faith on an apparently valid certificate of age, issued by the TWC and presented by the child.

F. Privacy In The Workplace

1. Search And Seizure, Tex. Civ. Prac. & Rem. § 124.001

Private employers are usually not subject to constitutional restrictions on governmental searches and seizure of private property; however, employees may have a cause of action under common law privacy principles. Texas law provides that individuals may recover damages for invasion of privacy. To a certain extent, employers can help shape employees' expectations of privacy by issuing clear policies identifying what kinds of communications and what areas are considered "public" and subject to search at any time by the employer. If an employer reasonably suspects that an employee has stolen or is attempting to steal property, the employer may detain the employee in a reasonable manner and for a reasonable time to allow for investigation.

2. Wire-Tapping, Tex. Civ. Prac. & Rem. § 123.001, et seq.

It is illegal to use information intercepted during a telephone conversation without the consent of one party to the conversation.

G. Employee Personnel Records, Tex. Lab. Code §§ 103.003-05

Unless employer and employee agree in an employment contract or collective bargaining agreement, Texas employees do not have a right to inspect their own personnel records. Employers should be aware, however, that once an employee files a discrimination lawsuit, the court will likely order the employer to turn over the employee's personnel records. The Office of the Federal Register issues a Guide to Record Retention, which summarizes what kinds of documents employers must retain and for how long.

In addition, employers are not required to provide an employment reference to or about a current or former employee.

H. Unfair Competition

1. Trade Secrets and Confidential Information, Tex. Penal Code § 31.05, *Gillen v. Diadrill, Inc.*, 624 S.W.2d 259 (Tex. App. – Corpus Christi, 1981), Writ Dismissed; Restatement 2d Of Torts, § 575

Employers have numerous remedies should a former employee, employee, or competitor misappropriate confidential information or a trade secret. First, it is a criminal felony in Texas to knowingly steal, communicate, transmit, or make a copy of an article representing a trade secret without the owner's effective consent. Texas law defines trade secret as "the whole or part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes."

Employers may also sue an employee, former employee, or competitor who has misappropriated the employer's trade secret. Most courts consider whether the process, formula, etc., presents an opportunity for a business or person to obtain an advantage over competitors who do not have the secret. A number of other factors will also likely influence a court deciding whether information is a trade secret, such as: 1) the extent to which the information is known outside of a business; 2) the extent to which it is known to employees and to others in the same business; 3) the extent of measures to guard its secrecy; 4) the value of the information to an employer and its competitors; 5) the amount of money and effort expended in gaining the information; and 6) the ease or difficulty with which a competitor could replicate the information.

Non-disclosure agreements (which prohibit employees from revealing information learned from an employer after employment has ended) are usually enforced by courts. Such agreements may be broader than other remedies, as they may protect information not otherwise protectible as a trade secret.

2. Covenant Not To Compete, Tex. Bus. & Com. Code §§ 15.50-52, *Alex Sheshunoff Mgmt. v. Johnson*, 209 S.W.3d 644 (Tex. 2006)

Covenants not to compete are relatively disfavored in Texas, as they are regarded as restraints to free trade and enterprise. These agreements must satisfy several requirements to be enforceable.

An enforceable covenant must be “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.” The primary purpose of the agreement to which a covenant not to compete is ancillary may be employment.

Prior to 2006, the Supreme Court of Texas had ruled that the agreement containing the covenant not to compete must be enforceable the instant the agreement is made. As a result, Texas courts often struck down covenants not to compete for at-will employees conditioned upon continued employment or a promise to provide consideration in the future (*e.g.*, a promise to provide confidential information during the course of employment) as illusory. But the Supreme Court of Texas reversed course in a 2006 landmark opinion making covenants not to compete easier to enforce for at-will employees. This ruling made clear that a unilateral contract can support a covenant not to compete in Texas as long as the covenant is “ancillary to or part of” the agreement at the time the agreement is made. Thus Texas courts may now enforce a covenant not to compete supported by a promise to provide confidential information (or other valid consideration) at some point during the employment relationship, provided that the covenant’s other limitations are reasonable.

If the covenant not to compete is ancillary to another valid agreement, it must also be reasonable as to time, geographical area, or scope of activity that it restricts. Courts will not necessarily refuse to enforce an agreement that is overly restrictive, but may reform the judgment to make it “reasonable.” If the agreement must be reformed to be rendered reasonable, the court will not award damages, but may award the promisee an injunction.

I. Retaliation

1. Whistleblower Protection

The Texas Whistleblower Protection Act (which provides that public employees may not be retaliated against for reporting suspicious or illegal activities of their employers) does not apply to private sector employers. Private sector employees, however, are protected from retaliation for refusing to perform an illegal act for an employer. Several employment discrimination statutes also prohibit retaliation against an employee who has filed a claim for a violation of these statutes or participated in such a claim, such as by acting as a witness on behalf of an employee plaintiff.

2. Blacklisting, Tex. Lab. Code § 52.031, § 103.001-05

No one may “blacklist” an employee, cause an employee to be blacklisted, or otherwise conspire in any way to prevent a former employee from getting another job. Blacklisting means to place on a list, book, or other publication an employee’s name after that employee has been discharged or voluntarily ceased working at the employer’s place of business, with the intention of preventing the employee from securing employment with another employer. An employer who illegally blacklists a former employee may be subject to fines and even imprisonment.

Former employers may, however, furnish a written, truthful explanation of a former employee’s reason for leaving, upon request of the former employee or a prospective new employer. This written statement may not be used as the basis of a libel or slander action against the former employer, unless the employer knowingly disclosed false information or disclosed in reckless disregard of the truth or falsity of the information. Employers are not *required* to provide an employment reference at all.

III. WAGE AND HOUR LAWS

A. Wage Payment

1. Minimum Wage

a. Amount, 29 U.S.C. § 206(a), Tex. Lab. Code § 62.051

The current federal minimum wage for adults is \$7.25 per hour. Federal law does permit an employee under the age of 20 to be paid \$4.25 an hour for the first ninety days of employment. The Texas minimum wage is the same as the federal minimum wage.

b. Covered Employers, Tex. Lab. Code § 62.001, *et seq.*

The Federal Fair Labor Standards Act (FLSA) applies to employers that do at least \$500,000 in business each year or to smaller employers who are engaged in interstate commerce or in the production of goods for interstate commerce, such as transportation or communications firms, or firms regularly using interstate transportation or communication. The FLSA also applies to schools, hospitals, domestic workers who earned at least \$1,400 in 2004 from one employer or who work at least eight hours a week, and federal, state, and local agencies. Employers not covered by the FLSA are subject to the Texas Minimum Wage Act (TMWA).

The TMWA itself exempts employers who employ: 1) workers or volunteers for religious or charitable organizations; 2) certain professionals, salespersons, and public officials; 3) domestic workers, including babysitters and live-in caretakers; 4) children under the age of eighteen, or under the age of twenty if they are full-time students, other than agricultural workers; 5) inmates in a Texas state or local jail; 6) close family members; 7) workers at certain seasonal amusement and recreational facilities; 8) persons involved in dairy farming or livestock production. Employers who are not liable for paying unemployment insurance premiums or who are nonprofit charitable organizations involved in evaluating, training, and employment services for clients with disabilities are also exempt from the TMWA.

c. Pay Requirements, Tex. Lab. Code § 62.001 et seq.

The TMWA requires employers to pay a minimum wage set by the FLSA, thus, the standards for employers covered by the TMWA rather than the FLSA are mostly identical. The Texas Labor Code permits an employer to pay an individual a wage as low as 60% of the state minimum wage if the person's earning capacity is impaired by age, physical or mental deficiency, injury, or the person is over the age of 65. Agricultural employers may pay hand harvest laborers by the piece, at a rate established by the Commissioner of Agriculture, but may not pay workers less than the minimum hourly wage established by federal law.

Under the FLSA and the TMWA, employers may pay a "tipped employee" less than minimum wage. A tipped employee customarily receives at least \$20/week in tips, and some of this income may be counted towards his weekly minimum wage. Employers may also, under certain circumstances, deduct from an employee's wages for lodging and food provided as part of an employee's job. An employer may include the reasonable cost of furnishing meals, lodging, or both to an employee so long as meals or lodging are customarily supplied by the employer and the cost of the meals or lodging is separately identified and stated in the earnings statement furnished to employees.

d. Overtime

For most professions, the FLSA and the TMWA require that for every hour a non-exempt, hourly employee works over forty hours per week, that employee must be paid at a rate of one and one-half times the employee's regular hourly rate. Overtime is calculated on a two-week basis for health care professionals, or for every hour worked over eighty hours in a two-week period. Salaried professionals, or those who are paid a guaranteed salary no matter the number of hours worked, subject only to deductions for full days of work missed, are not eligible for overtime pay. Employees engaged in executive, administrative, or professional capacities are exempt from the overtime requirement.

2. Definition Of Wages, Tex. Lab. Code § 61.001

Wages include compensation owed by employers for labor or services rendered by employees, however earned. An employer obligated to pay wages must include not only payments in exchange for services rendered, but also vacation, holiday, sick leave, parental leave, or severance pay owed to an employee because of a prior written agreement with the employer or according to a written policy of the employer. Although no law requires employers to provide workers with paid time off, if an employer agrees in writing to provide these benefits and to compensate employees at termination with payment for accrued time-off, this agreement will be enforceable.

3. Form And Frequency Of Payment, Tex. Lab. Code §§ 61.011, et seq.; Tex. Prop. Code § 74.103, Tex. Labor Code §§ 21.301, 21.002

Texas law requires that employees who are exempt from the overtime provisions of the FLSA be paid at least once a month, and that non-exempt employees be paid at least twice a month. If wages are paid twice a month, the employer must ensure that the pay periods cover an equal number of days as nearly as possible. Employers must designate paydays in accordance

with this rule and post notices indicating paydays in a conspicuous place in the workplace. If an employer fails to affirmatively designate paydays, the paydays will fall on the first and the fifteenth of the month. Wages paid as commissions and bonuses are due according to the terms of any agreement between the employer and employee or an applicable collective bargaining agreement; these wages must, however, be paid in a timely manner. After discharging an employee, an employer must pay the employee his wages no later than six days after termination of employment. An employer must pay employees who have left work voluntarily no later than one day after the last day of employment.

The TMWA requires employers to provide employees with a written statement of earnings at the end of each pay period. This statement must be signed by the employer, and must include 1) the employee's name; 2) rate of pay; 3) total amount of pay earned by the employee during the pay period; 4) all deductions made from the employee's pay and reasons for the deductions; 5) the amount of pay after all deductions; 6) the total number of hours worked, for employees paid by the hour, or the total number of units produced, if the employees are paid a piece rate. Employers must maintain a record of the name and last known address of each employee for whom an employer is holding unclaimed wages for 10 years from the date the wages became reportable.

4. Enforcement

Employees may file a claim with the Texas Workforce Commission (TWC) for nonpayment of wages no later than 180 days after the date that the claimed wages become due. The TWC may issue an order for payment of wages and assess an administrative penalty against an employer if it determines that the employer acted in bad faith. After an employer's repeated failure to pay its employees properly, the TWC may require the employer to deposit a bond as security for payment of future wages and/or the Attorney General of Texas may bring an injunctive action. Furthermore, an employer who intentionally fails to pay its employees in a timely and proper manner may face third-degree felony charges.

B. Income Withholding Or Garnishment, 20 U.S.C. § 1095a, Tex. Const. Art. 16 § 28, Tex. Fam. Code §§ 158.001, 8.059(e), 158.010, 158.202, 101.010, 101.011., Tex. Ins. Code §§ 3.96-2, 3.96-3

1. Calculating Garnished Wages

Wage garnishment is strictly prohibited by the Texas Constitution and Labor Code, with a few narrow exceptions. Under Texas law, wages may be garnished in satisfaction of court judgments for child or spousal support or after written authorization by the employee. Federal law also permits garnishment for failure to pay student loans. No deductions not required by federal or state law or court order may be made by an employer from an employee's salary unless the employee has authorized the deductions in writing.

A Texas court may order garnishment of up to 50% of the obligor's disposable income for child support or spousal maintenance, however, only 10% of the obligor's disposable income may be garnished for payment of student loans. "Disposable income" for purposes of Texas state law is calculated by deducting the following from an employee's gross income: 1) amounts required to be withheld by state and federal law, such as federal or state income tax; 2) union

dues; 3) nondiscretionary retirement contributions; and 4) medical, hospitalization, and disability insurance coverage for the obligor and the obligor's children. Earnings subject to deductions for child support payments include 1) wages, salary, compensation received as an independent contractor, overtime or severance pay, commission, bonus, and interest income, whether paid periodically or in lump sums; 2) payments made under pension, annuity, workers' compensation, or retirement program; and 3) unemployment compensation.

The same earnings may be garnished for spousal support, with the exception of unemployment benefits. Federal law defines "disposable income" more restrictively, as compensation paid to an individual by his employer after any withholdings required by law, and not including unemployment compensation or voluntary contributions to retirement programs and the like. Regardless of these provisions, an obligor may always agree in writing to allow greater deductions from his paycheck.

An employer receiving more than one order or writ of garnishment for child support for one obligor must comply with all writs to the extent possible. If the total amount due for child support under all writs or orders exceeds 50% of the obligor's disposable income, the employer must pay an equal amount towards current support ordered in each writ until the employer has complied with the writ or order, and then equal amounts towards any arrearages until the employer has complied with that order. If an employer receives writs for both child support and spousal maintenance, it must withhold wages in the following order of priority: 1) current child support; 2) current spousal maintenance; 3) child support arrearages; and 4) spousal maintenance arrearages. If an obligor files a claim for workers' compensation, the employer must send a copy of the income withholding order or writ for child support to the insurance carrier to ensure continuation of the income withholding.

2. Compliance

A writ of garnishment is binding on any employer doing business in Texas, even if the obligor himself does not live or reside in this state. Employers must begin to withhold income in accordance with an order or writ no later than the first pay period following the date on which the order or writ was delivered to the employer and must continue to garnish wages for as long as required by the order or as long as the obligor is employed by the employer.

3. Liability

An employer who withholds wages in compliance with a writ or order of garnishment will not be liable to the obligor for the withheld income. On the other hand, an employer that fails to comply with such an order may be liable to the obligee for the amount not paid and to the obligor for any amount withheld but not paid to the obligee, for an amount equal to the interest accrued on the amount withheld and not paid, and for reasonable attorney's fees and costs. Additionally, any employer who fails to garnish wages for child support payments may be subject to a civil fine.

C. Workers' Compensation, Tex. Lab. Code § 406.001, et seq.

Workers' compensation insurance provides lost wages and medical benefits to employees, or their heirs or legatees, who are injured or killed while performing tasks within the course and scope of their employment or who develop a work-related injury or illness. Texas is the only state to operate a fully voluntary workers' compensation system.

1. Recent Changes

There have been recent significant changes in the Texas Workers' Compensation system, including a 15% higher cap on weekly income benefits for injuries occurring after October 2006 and reduction of the amount of time an employee must be off work to receive benefits from four weeks to two weeks for injuries incurred after September 1, 2005. The Texas Legislature recently abolished the former Texas Workers' Compensation Commission and transferred most of its functions to the Texas Insurance Department's Division of Workers' Compensation (the Division).

This new legislation also created a new, independent state agency, the Office of Injured Employee Counsel (OIEC), to assist injured workers with their complaints and to monitor and comment on workers' compensation rules promulgated by the Division. A pilot return-to-work program will soon disseminate return-to-work information to employers and workers. The program will provide reimbursements of up to \$2,500 per injured employee to small employers with workers' compensation insurance, to assist employers in making workplace modifications that facilitate early returns to work by injured employees.

2. Coverage And Waiver

If an employer purchases workers' compensation insurance, the policy provides the only recourse or remedy for employees injured on the job, subject to the exceptions listed below. This means that a worker may not bring a tort lawsuit against his employer for any injury that would be compensable by the workers' compensation insurance. No private employer is required to purchase workers' compensation insurance, though many do so to protect themselves against unpredictable jury verdicts and court expenses. Smaller employers may group together to purchase a policy; large employers, who pay premiums of more than \$500,000 a year, may self-insure and thereby benefit from the limits on awards under workers' compensation without purchasing the policy from the state. If an employer elects to purchase the insurance, it may not, directly or indirectly, charge the cost of the insurance back to its employees.

If an employer declines workers' compensation insurance coverage, it must notify the Division. Employers must also notify their employees whether or not the employer has elected workers' compensation coverage both at the time of hiring and by posting a notice of coverage in English, Spanish, or any other language common to the employer's workers, in a conspicuous location at the employer's place of business. An employer who terminates workers' compensation insurance coverage must notify its employees within fifteen days and the Division within ten days.

If the employer does purchase workers' compensation insurance, employees have the option of declining coverage. If an employee declines coverage, he retains his common-law and

statutory rights to sue for injury caused by negligence of the employer and occurring in the course and scope of employment. Employees must notify employers of their refusal of coverage within five days of either beginning employment or notification that the employer has elected insurance coverage.

If an employer refuses to purchase workers' compensation coverage insurance, special rules will apply to tort actions brought by employees for injuries or death occurring during the course and scope of employment. There is no strict liability for on-the-job injuries, thus, employees must show that the employer or an agent of the employer acted negligently. Employers may not defend against liability, however, by arguing that an accident was caused by an employee's contributory negligence, by the negligence of a co-worker, or that an employee assumed the risk of injury.

It is a complete defense to liability to assert that an employee injured himself while he was intoxicated or by an act intended by the employee to cause injury to himself. But if an employee declines coverage that is offered by the employer, the employee's tort action may be countered by any of the common-law defenses, including contributory negligence, assumption of risk, and third-party negligence.

Any pre-injury waiver of liability agreed to by an employer and worker is void, whether the employer is insured or not insured. An employee or his representative may waive his right to sue an uninsured employer post-injury or death if the waiver is 1) voluntary, i.e., not a condition of continued employment, and entered into with an understanding of the waiver's effect; 2) entered into no earlier than 10 business days after the initial report of the employee's injury; 3) signed after the employee has been examined by a non-emergency care physician; 4) in writing and the true intent of the parties is specifically stated in the writing; and 5) conspicuous, on the face of the agreement, and in larger type or in a different color than the surrounding words in the agreement.

An employer is prohibited from discharging or discriminating against an employee because of that employee's good faith filing of a workers' compensation claim, testifying in or requesting a workers' compensation hearing, or hiring an attorney to represent the employee in a claim.

3. Eligibility And Treatment

To receive workers' compensation payments, a worker must have worked for an employer who elected to purchase workers' compensation insurance and been injured in the "course and scope" of his employment. Non-compensable injuries, or those not occurring during the course and scope of employment, include: 1) injuries sustained when the injured employee was intoxicated; 2) injuries caused by a willful act by an employee to hurt himself or another employee; 3) injuries caused by an employee's horseplay; 4) injuries caused by actions by a third party intending to injure the employee for non-work-related reasons; 5) injuries sustained during voluntary participation in sports or recreational activity, even if sponsored by the employer; or 6) injuries caused by an Act of God, such as a hurricane or tornado. Mental injuries not resulting from legitimate personnel actions, such as firing, demoting, or transfer, are compensable. Workers' compensation will cover an employee's medical expenses, physical rehabilitation expenses, lost wages, or a percentage thereof, and death benefits.

If an employer contracts with an insurance carrier operating under a network plan and has provided notice of its participation in the network plan to its employees, an employee must seek non-emergency care from a physician in the employer's insurance network if the employee lives within the network service area. An employee who is dissatisfied with the quality of care provided by a network physician may choose another physician within the network without approval of the insurer. Employees may also choose a physician in the workers' own HMO network in order to be reimbursed for compensable injuries, if the HMO physician agrees to be bound by policies of the workers' compensation insurance carrier.

An insured employer must file a claim with its insurer within eight days from the date an employee is unable to work due to injury or immediately if the injury is an occupational disease or death. The injured employee must be provided a copy of the claim along with a copy of the employee's rights and responsibilities.

An employer may not discharge or otherwise discriminate against an employee who has filed a claim for compensation in good faith. For a library of forms and notices, as well as specific instructions on how to obtain and administer a workers' compensation insurance policy, visit the Division's website at www.tdi.state.tx.us/wc/indexwc.html.

D. Hours Of Work

1. Holidays, Vacation, And Sick Leave, Tex. Lab. Code § 61.001, 29 U.S.C. § 2600 et seq.

Employers are not required to pay their employees for vacation, holiday, or sick time; however, most choose to do so. If an employer has a written policy or written agreement with an employee promising holiday, vacation, or sick leave, this agreement is binding on the employer. If an employee departs employment with accrued vacation, holiday, or sick time, pay for this time must be included in the wages paid to the employee after his departure, if a written policy or agreement between the employer and employee so provides. An employer can draft a policy, however, that requires sick or vacation leave to be taken before termination of employment and that provides no pay for any accrued time at the employee's termination. In calculating overtime, paid holidays on which an employee does not work are not considered in the calculation of weekly hours.

While no Texas or federal law requires employers to offer paid leave to employees, the Family Medical Leave Act (FMLA), requires covered employers, those with more than 50 employees during at least 20 weeks in a calendar year, to provide up to 12 weeks of unpaid leave during a 12-month work period to covered employees for FMLA-covered family and medical situations. A covered employee has worked at least 1,250 hours for at least 12 months immediately preceding the leave. Events covered by the FMLA include: 1) the adoption or birth of a child; 2) caring for a close family member, such as a parent or child, who has a serious medical condition; and 3) the employee's serious medical condition that prevents him or her from working.

On November 17, 2008, the United States Department of Labor published its final rule implementing new regulations interpreting the Family and Medical Leave Act (FMLA). These new regulations are the first significant changes to the FMLA since 1994, and will effect the

majority of this country's employers. Employers must be in compliance with the new regulations by January 16, 2009. The most significant new provisions include the recently enacted Military Caregiver Leave, changes to the newly implemented Qualifying Exigency Leave, and a general updating of the FMLA.

The new regulations provide clarification for the pre-existing Military Caregiver Leave, created in January 2008. They also implement a new category of leave, called Qualifying Exigency Leave. There are two significant distinctions between Military Caregiver Leave and Qualifying Exigency Leave. Military Caregiver Leave provides for up to twenty-six weeks of leave in a twelve-month period, whereas Qualifying Exigency Leave provides for the usual twelve weeks of leave in a twelve-month period. In addition, Military Caregiver Leave provides leave for those employees caring for family members with a serious injury or illness incurred as a result of military duty. In contrast, Qualifying Exigency Leave provides leave for an employee to handle "non-medical" emergencies that may arise from circumstances associated with the employee's spouse, parent or child who is in active military duty or on call to active duty status.

2. Voting, Tex. Election Code § 276.004

Employers must permit employees to be absent from work on election day for the purpose of voting. Employers may not penalize employees for taking time off to vote, such as by a loss or reduction of wages or other benefit of employment. Employers need not allow any time off, however, if the polls are open on election day for two consecutive hours outside of the voter's working hours.

3. Jury And Other Court Duty, Tex. Civ. Prac. & Rem. Code § 122.001–03, 28 U.S.C. § 1875

An employer may not terminate an employee because of that employee's required attendance at jury duty in Texas state court. If an employee is terminated in violation of this rule, the employee may demand that he be returned to his prior position if he gave his employer actual notice that he intended to return as soon as practicable after release from jury service. Federal law provides protection for employees summoned for jury duty in federal court, although employers are prohibited not only from terminating employees, but also from threatening to discharge, coercing, or intimidating an employee with respect to jury duty.

4. Rest And Religious Time Off: Retail Employers, Tex. Lab. Code § 52.001-03

Retail employers may not deny employees at least one period of 24 hours off in each seven-day period. This time off must be in addition to the regular time allotted for rest during each day. Employers must allow employees time off at least once a week to attend a religious worship service, if the employee so requests. This rule does not apply to employees who work less than 30 hours per calendar week.

E. Unemployment Compensation, Tex. Labor Code § 201.001 *et seq.*

The Texas Unemployment Compensation Act (the TUCA) provides that covered employers must pay taxes into a state fund for later disbursement as unemployment benefits to qualifying employees. TUCA is administered by the Texas Workforce Commission.

1. Covered Employers

TUCA defines “employers” very broadly. The term includes, but is not limited to: 1) any employer with a payroll greater than \$1500 or that employs at least one person for a portion of one day during 20 or more weeks in a calendar year; 2) temporary help agencies; 3) employers also covered by the Federal Unemployment Tax Act; 4) employers who elect to participate in the unemployment benefit program; 5) tax-exempt non-profits; 6) a state, or political subdivision or instrumentality thereof; 7) those who pay at least \$1,000 in a calendar year for domestic services in a private home, local college club, or local chapter of a college fraternity or sorority; 8) many employers of farm and ranch laborers, including some seasonal and migrant laborers; 9) staff leasing agencies. Employers who become subject to the TUCA must register with the TWC within ten days. Registration may be done on-line at the TWC internet site.

As a general rule, employment under TUCA means services provided in exchange for wages or under any contract for hire, unless the employee’s service is performed free from control or direction by the employer, i.e., the individual is an independent contractor. The TUCA list of qualifying employment is extremely lengthy and you should consult a Fisher & Phillips attorney with questions regarding a specific occupation.

2. Employers’ Duties

a. Contribution

Employers pay a contribution based on an employee’s wages to the TWC, in an amount determined by the TWC on a yearly basis. The contribution may not be deducted in any manner from a worker’s wages. Labor agents who provide farm or ranch laborers are responsible for paying this contribution, regardless of the degree of control they exercise over the laborer. If an agent fails to pay its contribution, the farm or ranch operator employing the individual may be jointly and severally liable for the contribution.

The amount of benefits paid to a claimant will be charged back to all of the claimant’s employers during the claimant’s “base period,” or the four consecutive calendar quarters in the five consecutive calendar quarters preceding the claimant’s request for benefits. If a claimant worked for more than one employer during this time, the benefits are allocated among accounts in proportion to the amount of time during which the claimant worked for each employer. No benefits will be charged to a former employer’s account if the employee left because: 1) a federal or state statute or municipal ordinance required termination; 2) the employee was discharged for misconduct; or 3) the employee left employment voluntarily and without good cause.

b. Recordkeeping And Notice, Tex. Lab. Code § 208.001

All taxed employers must file quarterly reports with the TWC showing the amount of remuneration and wages paid for employment, the amount of wages for benefit wage credits (those wages used to determine an individual's right to benefits), the name and social security number of each individual to whom wages were paid, and any other information requested that would aid in determining the amount of contributions due. Although an employer pays taxes to the unemployment compensation fund only on the first \$9,000 of wages paid to an employee, it must nonetheless file quarterly tax returns with this information even after it has paid the employee more than \$9,000. An employer must maintain, for a period of four years, information concerning employees and their wages as required by the TWC.

The employer must post and maintain notices explaining unemployment benefits provided by the TWC in places accessible to employees.

3. Hearings And Appeals, Tex. Lab. Code § 208.001, et seq., § 212.001 et seq.

When a former employee files a claim for unemployment benefits, the TWC will notify the employer of the claim by mail. Once the employer has received a notice, it must notify the TWC within fourteen days of any facts that may adversely affect the claimant's right to benefits or that affect a charge to the employer's account.

A claimant or an employer dissatisfied with the TWC examiner's determination of benefits may appeal the denial within 14 calendar days of mailing of the TWC's determination. If the last day to appeal falls on a weekend or state or federal holiday, the deadline is the following day. An appeals tribunal will then review the decision. If the claimant or employer is dissatisfied with the decision of the appeals tribunal, he or she may request a review by the TWC within 14 days of mailing of the appeals tribunal's decision. Either party may file an appeal from the tribunal's decision to a court of competent jurisdiction. A party wishing for judicial review, however, must exhaust all three levels of appeal within the TWC before petitioning a court for relief.

IV. EMPLOYMENT DISCRIMINATION

A. Race, Gender, National Origin, Religion

1. Federal Law, 42 U.S.C. § 2000(e); 42 U.S.C. § 1981

Title VII of the federal Civil Rights Act of 1964, which covers employers with fifteen or more employees, prohibits discrimination on the basis of race, color, religion, gender, and national origin as well as retaliation against employees who oppose unlawful discrimination or participate in Title VII proceedings. Title VII allows plaintiffs to sue for back wages, reinstatement or front pay, and attorney's fees. Plaintiffs may also recover compensatory and punitive damages, the combined amount of which may range up to \$300,000, depending on the size of the employer.

Further, 42 U.S.C. § 1981 prohibits racial discrimination in the making or enforcing of contracts. This law has been interpreted to apply to all aspects of contracting for employment and provides a supplemental remedy to Title VII for employees seeking to bring racial discrimination claims. The reach of § 1981 is broader than Title VII, as it imposes no limit on the size of employers covered or the relationship between the plaintiff and the defendant (e.g., it may also be utilized by independent contractors).

2. Texas Law, Tex. Lab. Code § 21.001, *et seq.*

The Texas Workforce Commission's Civil Rights Division (the Commission) enforces employment rights in the workplace and provides assistance to employers seeking to avoid committing civil rights violations at their places of business. The Commission enforces Texas Civil Rights Statutes, which prohibit discrimination against employees on the basis of race, color, national origin, sex, disability, age (40 or older) or religion by 1) employers with more than 15 employees during 20 or more weeks in the current or preceding year; 2) employment agencies; 3) labor organizations and 4) training programs administered by an employer, labor organization, or joint employer-labor organization committee. Retaliation against an employee for opposing a discriminatory practice or participating in the filing or prosecution of a charge against an employer is also prohibited.

Texas law prohibits approximately the same behavior as federal anti-discrimination laws but extends the class of covered employers. In a departure from federal law, however, the Texas discrimination laws require employees to prove only that an impermissible factor was a motivating factor in an employer's discriminatory decision, not necessarily the most important factor. Texas law does not prohibit the operation of a bona fide seniority or merit system, so long as standards of compensation or benefits are not discriminatory.

3. National Origin: Restrictions On Language And Immigration Status

National origin discrimination includes discrimination against an individual because of the nationality of an ancestor. It also includes practices that disparately impact people of a particular nationality, such as policies restricting the speaking of foreign languages at the workplace or differential treatment of job applicants with respect to checking immigration status.

a. Foreign Language Speakers

Faced with an increasingly multi-lingual workforce, many employers have considered adopting policies that would govern the appropriate times and places for workers to speak languages other than English. These employers must balance the effect of such a policy on employees most comfortable speaking a foreign language among themselves with the possibility of alienating non-bilingual employees and customers.

While Title VII and Texas law do not prohibit "English only" policies, these rules may still amount to prohibited national origin discrimination under certain circumstances. The EEOC has adopted the position that such policies do violate Title VII unless they are justified by a business necessity and the consequences for violating the rule are clearly communicated to employees. Federal courts, however, have reached differing results on this interpretation of Title VII, with some agreeing with the EEOC while others have held that employees must show the

rule's discriminatory effect before the employer must demonstrate the rule's business justification.

Most importantly for Texas employers, however, the Northern District of Texas has held that an employer enforcing an English-only policy did violate its employees' Title VII rights by requiring the employees to speak only English during breaks and other personal time at work. The Northern District concluded, however, that an employer could require employees to speak only English when speaking to customers.

The law does not clearly indicate when "English only" policies will be considered nondiscriminatory. Employers will probably be justified in imposing restrictions on languages that can be spoken to customers but should tread carefully when attempting to impose other varieties of restrictions on non-English language speakers. Additionally, employers should be prepared to show legitimate, non-discriminatory reasons for requiring applicants to speak fluent English and for denial of employment opportunities to individuals because of an individual's accent or manner of speaking.

b. Immigration Laws

Employers with more than four employees are required to verify that all employees hired are eligible to work in the United States by the Immigration Reform and Control Act (IRCA). Federal immigration law prohibits employers from imposing citizenship requirements on job applicants or from giving preference to United States citizens. Thus, employers who request employment verification only for individuals of a particular national origin or individuals who appear to be or sound foreign may violate both Title VII's prohibition against national origin discrimination as well as the IRCA, for failing to request employment verification from all employees and/or giving preference to United States citizens.

4. Sex Discrimination

In addition to prohibitions against discriminating against individuals on the basis of sex in the terms of employment, employers may be held liable for sexual harassment among co-workers, if the employers knew about the harassment and did nothing to abate it. Discrimination based on pregnancy, childbirth, or related medical conditions is also prohibited. And, in addition to Title VII, the Equal Pay Act prohibits employers covered by federal minimum wage and overtime law with more than two employees from discriminating in pay for comparable jobs based on sex.

a. Sexual harassment

To hold an employer liable for sexual harassment, an employee must show that she experienced unwelcome conduct or communication of a sexual nature that was serious enough to affect a term, condition, or privilege of her employment. An employee must also show that the employer is responsible for the treatment, either by demonstrating that the harassment was "quid pro quo," or that it created a hostile work environment.

Quid pro quo harassment results when a supervisor, manager, or other employer with authority to make personnel decisions concerning the employee forces the employee to submit to

unwelcome sexual advances in exchange for continued employment or a favorable employment decision, such as promotion. A hostile work environment is actionable if other employees, not necessarily supervisors of the employee, engage in physical or verbal conduct that has the purpose or effect of unreasonably interfering with the employee's work or performance or of creating an intimidating, hostile, or offensive work environment.

An employer's strongest defense against hostile work environment claims is the adoption of an unambiguous, written anti-harassment policy. This policy must be clearly and effectively communicated to employees. Employers must also promptly investigate any claims and take remedial measures, if appropriate.

b. Pregnancy Discrimination

Title VII's and Texas state law's prohibitions against discrimination "on the basis of sex" include discrimination on the basis of pregnancy or related health conditions. Employers may not refuse to hire a woman because she is pregnant, if she is qualified and otherwise able to do the job. Pregnant employees must be treated in the same manner as any other employee: if a pregnant employee is temporarily unable to perform her job, she must be accommodated in the same manner as any other temporarily disabled employee. Employers may not prohibit pregnant women from working prior to delivery, nor may they prohibit an employee from returning to work for a predetermined length of time after childbirth. Pregnant employees on medical leave must accrue benefits, such as vacation and seniority, on the same terms as non-pregnant employees on medical leave.

Employers providing health insurance for employees must include coverage for pregnancy-related conditions on the same basis as costs for other medical coverage. If a health insurer excludes benefits for pre-existing conditions, a pregnancy may be excluded if the employee was already pregnant when coverage became effective. Employers must provide the same level of benefits for spouses of male employees as for female employees, and may not limit other pregnancy-related benefits to married employees. Finally, the federal Family Medical Leave Act (FMLA) requires that employers provide employees with up to 12 weeks leave for qualifying medical conditions, which includes pregnancy.

5. Religion

Texas law and Title VII prohibit discrimination on the basis of religion, meaning that an employer may not discriminate on the basis of any practice, belief, or aspect of religious observance unless the employer can prove that it is unable to reasonably accommodate the religious observance or practice of an employee or applicant without undue hardship.

B. Age

Both the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Chapter 21 of the Texas Labor Code protect individuals over the age of 40 from discrimination in employment. The ADEA applies to employers employing more than twenty employees; the Texas statute prohibiting age discrimination applies to employers employing only fifteen employees. Texas law does not prohibit mandatory retirement for employees over the age of 65, who have held executive or policy-making positions for the two years prior to retirement

and are entitled to an immediate and nonforfeitable retirement benefit from a pension, profit-sharing, savings, deferred compensation or a combination of the foregoing of the employer with an aggregate value of at least \$ 27,000. Employers will also not be held liable under Texas law for imposing minimum or maximum age requirements for police officers, firefighters, and other peace officers.

C. Disability

The general rule is that employers should not consider an individual's disability in making employment decisions unless the disability itself would prevent the person from performing the essential functions of the job. If the individual could still perform the job with "reasonable accommodation" made by the employer, the employer is prohibited from discriminating against the individual on the basis of his disability.

1. Federal Law, 42 U.S.C. §§ 12101-12217

The federal Americans with Disabilities Act (ADA) sets the threshold for discrimination against individuals who are or who are perceived to be disabled. It covers the same employers as those covered by Title VII, namely, employers with more than 15 employees who work at least 20 or more calendar weeks per year. The ADA also extends to labor organizations, employment agencies, and joint labor-management committees.

The ADA protects qualified individuals with a disability. A qualified individual is capable of performing a job with or without reasonable accommodation. A disabled individual is a person who has a physical, psychological, or mental impairment that substantially limits a major life activity, who has a record of such impairment or is regarded or treated by other people as having such an impairment. Major life activities include walking, seeing, hearing, speaking, sleeping, thinking or concentrating, interacting with others, reproducing, sitting, standing and the like. It also includes emotional or mental illness, and learning disabilities.

2. Texas Law

Texas law also prohibits discrimination on the basis of disability, on much the same terms as the ADA, with a few exceptions. In Texas, the legislature does not identify as "disabled" individuals who are currently addicted to drugs or alcohol. Individuals who currently carry a communicable disease that threatens the health or safety of others or that makes the affected person unable to perform the duties required by the employer are also not recognized as disabled under Texas law. Texas law defines discrimination "on the basis of disability" to mean "because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job" without reference to "reasonable accommodation."

D. Participation In A Mandatory Evacuation, Tex. Lab. Code § 22.001-04

An employer may not discharge or otherwise discriminate against an employee who leaves the workplace to participate in an emergency evacuation ordered by local or state authorities. An emergency evacuation order means an official statement issued in response to a natural or man-made disaster, which includes the occurrence or imminent threat of fire, flood,

earthquake, wind, storm, wave action, oil spill, water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, or other public calamity requiring emergency action or an energy emergency. An employer who violates this provision is liable for lost wages or benefits incurred by the employee and must also reinstate the employee in the same or equivalent position of employment with commensurate pay, if the employee was discharged. This section does not apply to individuals employed as emergency workers, so long as the employer provides adequate emergency shelter, or to employees who are necessary to provide for the safety and well-being of the general public, such as utility workers.

E. Process

An employee who wishes to file a charge of discrimination under Title VII, the ADEA, the ADA or Texas state law must first file a complaint with the TWC or the EEOC within 180 days of the allegedly unlawful employment practice, or 300 days if the charge includes violation of state law. An employee filing suit under 42 U.S.C. § 1981 is not required to file a complaint with an administrative agency before filing a lawsuit. Once the Commission has issued a “right to sue” letter, the employee must file suit within ninety days.

F. Recordkeeping

An employer under investigation by the TWC must make and retain all records relevant to the charge and to whether unlawful employment practices have taken place. The employer must preserve these records for the period required by TWC or court order, and must make reports from those records if ordered to do so. Any individual in charge of an apprenticeship, on-the-job training, or other training program must keep all records necessary to ensure compliance with Texas Civil Rights Laws, including 1) a list of applicants to the program, 2) a record of the chronological order in which applications for the program were received, and 3) be able to furnish a detailed explanation of the manner of selecting individuals to participate in the program upon request by the Commission.

V. WORKPLACE SAFETY AND HEALTH

A. Federal Law, 29 U.S.C. §§ 651-678

All employers in Texas, even those employing only one employee, are subject to the provisions of the federal Occupational Safety and Health Act of 1970. This Act established the Occupational Safety and Health Administration (OSHA). The statute and regulations adopted by OSHA impose a general duty on employers to provide a safe and healthy working environment for their employees. Many specific regulations govern employers in different industries; these federal regulations supersede any state regulations.

B. Smoking Regulations, Tex. Penal Code § 48.01

Texas law prohibits smoking or possession of a burning cigarette inside a public primary or secondary school, an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, or intrastate bus, plane, or train which is a public place. All of these places

must post reasonably sized signs announcing the prohibition of smoking; they must also provide facilities for extinguishing cigarettes.

Employers may choose to designate all or part of their place of business as non-smoking – this practice is encouraged, if not required, by a variety of non-state law sources such as insurance policies, building codes, and OSHA. OSHA requires that manufacturers of fireworks or other explosives limit smoking in areas near flammable materials.

C. Hazardous Chemicals, Tex. Health & Safety Code, § 502.003 *et seq.*

The Texas Hazard Communication Act (the THCA) requires employers to inform their employees of the effects and dangers of potential exposure to hazardous chemicals while working. The THCA has little real-world effect, however, as it applies only to employers not covered by OSHA, the Federal Coal Mine Health and Safety Act, or the Federal Mine Safety and Health Amendments. OSHA requires most employers to provide similar or more information to employees regarding possible or certain exposure to hazardous chemicals while on the job.

1. Training

Employers must compile and maintain a list of all hazardous chemicals used regularly by the employer and stored in excess of 55 gallons or 500 pounds, less for very hazardous chemicals, and the location of the chemicals in the work area. Employers must provide a training program for employees who use or handle hazardous chemicals, which includes information on interpreting labels and a material safety data sheet, the location of chemicals, proper handling of chemicals known to be in the employee's workplace, acute and chronic effects of exposure to these chemicals, proper use of protective equipment and first aid with respect to hazardous chemicals to which employees may be exposed, and general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals.

Employers must provide additional training if the potential of exposure to hazardous chemicals for that employee increases or if the employer learns of new and significant information concerning the hazard of a chemical in the employee's workplace. Employers must maintain a roster of employees who have received this training for at least five years. Compliance with these rules does not relieve an employer of liability under other laws for accidents and harm caused by hazardous chemicals in the workplace.

2. Reporting Requirements

No later than 48 hours after an employee accident that directly or indirectly involves chemical exposure or asphyxiation, that is fatal to at least one employee or results in the hospitalization of at least five, an employer must report the accident to the Texas Department of State Health Services (DSHS). The report must include the circumstances surrounding the accident, the number of fatalities, and the extent of the victims' injuries.

D. Hazardous Agricultural Fertilizers And Chemicals, Tex. Agric. Code § 125.001 *et seq.*

The Agricultural Hazard Act applies to agricultural laborers who cultivate, harvest, or handle “unmanufactured” agricultural products for an employer who uses more than 55 gallons or 500 pounds of toxic chemicals, or a lesser amount as the DSHS determines is appropriate, or whose payroll is \$50,000 or more a year (or over \$15,000 for seasonal workers). Chemicals covered by this rule are only those labeled under the federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, and fertilizers with chemicals listed or defined as dangerous chemicals in 29 C.F.R. 1910.1200(c) or 1910.1200(d)(3), including those listed or defined in subsequent comparable regulations.

Under Texas Law, an employer must fill out a crop form supplied by the DSHS for workplace chemicals used and indicate a crop, the product name of the chemical used on the crop or that the employer stores, and the location and date of its use, storage, or application. The employer must maintain the list for 30 years. An employer must maintain a separate form for each crop, work area, or the workplace as a whole, and must attach relevant information to the form, such as a material data information sheet (MSDS) as required by OSHA regulation. A copy of the list, as well as names and telephone numbers of knowledgeable representatives of the employer who may be contacted in an emergency, must be provided to the local fire chief if the chemicals or fertilizers are stored within one-fourth mile of a residential area. The fire chief may make inspections of the chemicals on the employer’s premises at any time for the sole purpose of preparing the fire department for an emergency.

The employer must also make a copy of each crop form available to agricultural workers for each crop with which the worker will be working if 1) the worker has no card evidencing participation in a state-run agricultural hazard training program or 2) the laborer requests the crop sheets. In addition to the crop sheet, employers must provide agricultural laborers with basic safety and health-related information on the day on which the laborer is to receive his first pay for that work season. Protective clothing must also be provided to all agricultural laborers.

Agricultural laborers of employers covered by this Act who may be exposed to hazardous chemicals have the right to be informed of possible exposure and to have access to the workplace chemical list and MSDS for these chemicals. Laborers must also receive training on the hazards of the chemicals and methods by which they can protect themselves. An employer covered by this Act may in no way retaliate against a laborer who exercises these rights or who has made an inquiry, filed a complaint, assisted an inspector of the DSHS, testified in a proceeding regarding a violation of this Act, or instituted or caused to be instituted a proceeding under this Act. These rights are non-waivable; any agreement between an employer and a laborer to waive these rights is null and void.

Any employer who complies with the more general Texas Hazardous Chemical Act need not comply with the Agriculture Hazard Act. An employer found to have violated this Act by knowingly disclosing false information or negligently failing to disclose a hazard may be subject to a fine of \$5,000 per violation. Employers who proximately cause injury to an individual by knowingly disclosing false information or knowingly failing to disclose hazard information may be subject to a fine of \$25,000. These fines are in addition to any damages that may be recovered by an injured individual in a private civil action.

E. Reporting Requirements For Health Professionals, Tex. Health & Safety Code § 84.001, et seq.

The Texas Occupational Condition Reporting Act requires that health professionals report certain work-related or occupational diseases to the Texas Department of State Health Services (DSHS). Health professionals include anyone whose vocation or profession is directly or indirectly related to maintaining the health of another individual and whose job requires a certain amount of formal education, including a special examination, certificate or license, or membership in a national or regional association. A treating or diagnosing physician and anyone in charge of a clinical or hospital laboratory, a blood bank, mobile unit, or other unit responsible for laboratory examinations of specimens derived from a human body that yields evidence of an occupational condition is also included within the reporting requirements.

An occupational condition is a disease, abnormal health condition, or laboratory finding that is caused by or related to exposures in the workplace. A reportable occupational condition includes: 1) asbestosis and silicosis; 2) blood lead levels as determined by the Texas Board of Health; or 3) other conditions as determined by DSHS.

After receiving a report of an occupational condition, DSHS will usually investigate the cause of the condition and any preventive measures taken by an employer. In exercising this authority, a DSHS representative may enter into any premises not used as a private residence at any reasonable time. The representative may take samples of materials present on the premises, such as soil, water, air, food, clothing, and household goods. The person taking these samples may compensate the employer for the actual monetary loss caused by the confiscation.

VI. CONCLUSION

Employers in Texas are subject to numerous state and federal laws regulating nearly every area of labor and employee relations. This booklet may be used to help develop policies and procedures that allow employers to avoid lawsuits or to make informed decisions so that when lawsuits do arise they will be in a stronger legal position from which to defend. Our hope is that by providing this summary we will give employers a useful reference to help them quickly answer some of the common, everyday employment questions that can and do arise.

Employers with questions or problems related to any of the material covered in this book are urged to contact the Dallas office of Fisher & Phillips LLP at 214.220.9100, the Houston office at 713.292.0150, or visit our website at www.laborlawyers.com.