

JACKSON WALKER L.L.P.

PRESENTS

**THE 2005
LABOR & EMPLOYMENT LAW
SYMPOSIUM**

THURSDAY, NOVEMBER 10, 2005
SAN ANGELO, TEXAS

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ROSTER

OUR EXPERIENCE

LABOR AND EMPLOYMENT

Jackson Walker has extensive experience representing management in a comprehensive range of employment and labor law issues. These include, among others, counseling with management, defending employee claims, workers' compensation issues, and traditional labor relations.

COUNSELING WITH MANAGEMENT

Members of the section routinely provide counsel and assistance to their clients on numerous employment related issues including the following listed below.

- Employment issues relating to employee training, workforce reductions, corporate acquisitions, reorganizations, and relocations
- Appropriate discipline of employees
- Drafting and enforcement of employment contracts, including non-competition agreements
- Preparing and auditing employee handbooks and personnel policies
- Unemployment compensation claims
- Wage-hour obligations
- Workers' compensation claims
- Occupational safety and health issues
- Immigration control procedures
- Affirmative action plans and OFCCP compliance issues

DEFENDING EMPLOYEE CLAIMS

The section members also offer to our clients expertise in mediating, arbitrating, and litigating the defense of individual and class action employee charges and suits involving a wide range of matters and issues.

LABOR AND EMPLOYMENT

- Race and sex discrimination claims
- Sexual harassment claims
- Age discrimination claims
- Disability discrimination claims
- Family and medical leave claims
- Defamation claims
- Wrongful discharge claims
- Workers' compensation retaliation
- Claims asserting violations of various other federal and state employment related and civil rights statutes

WORKERS' COMPENSATION ISSUES

Section members, in conjunction with the firm's employee benefits attorneys, also assist employer subscribers and non-subscribers under the Texas Workers' Compensation Act.

- Review and analysis of employers' existing workers' compensation insurance arrangements
- Evaluation of legal risks associated with becoming a non-subscribing employer
- Rejection of the Texas Workers' Compensation Act
- Evaluation and implementation of employee benefit programs in lieu of workers' compensation, including design and drafting of employee benefit plans; analysis of insurance policies, safety consultants, and medical providers; and coordination with insurance advisors
- Establishment of litigation minimization procedures, such as hiring policies, safety procedures, and claims processing
- Representation of employers in claims disputes

LABOR AND EMPLOYMENT

TRADITIONAL LABOR RELATIONS

Jackson Walker's labor and employment law attorneys also provide substantial experience and expertise in management's dealings with labor unions. Their expertise encompasses such areas as those listed below.

- Union avoidance campaigns
- Union election contests
- Negotiation of collective bargaining agreements
- Arbitration of disputes arising under collective bargaining agreements
- Responding to unfair labor practice charges under the National Labor Relations Act, the Railway Labor Act, and related statutes

EMPLOYEE BENEFITS / EXECUTIVE COMPENSATION

Section members also assist clients in a variety of matters related to ERISA, Employee Benefits and Executive Compensation, including the following:

- counseling regarding plan governance procedures and best practices designed to minimize fiduciary liability risk; and
- assistance in dealing with compliance and administrative considerations related to plans, including matters pertaining to participants and governmental agencies.

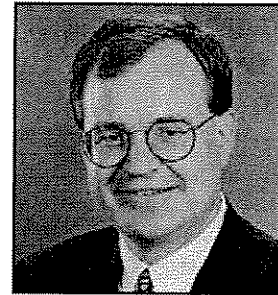
LEGAL UPDATES

JON MARK HOGG

General Employment Law Update

JON MARK HOGG

Jon Mark Hogg is a partner in the Labor and Employment section of Jackson Walker and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. His practice consists of advising and counseling clients in employment related matters and the defense of employment related litigation. He advises clients in dealing with complicated workplace issues and decisions involving hiring, compensation, discipline, and termination of employees. He provides preventive services for employers in reviewing and drafting employee handbooks and policies; offering in-house training and seminars; and drafting executive and employment contracts, severance agreements and related documents and agreements. In addition, his practice includes defending governmental entities and their employees in civil rights lawsuits as well as defending personal injury and commercial litigation.



Mr. Hogg has extensive experience in Federal and State courts in defending and favorably resolving through dismissal, summary judgment or trial all manners of complex lawsuits. He has successfully defended high profile clients in large civil rights cases and large national and international clients in complex personal injury and commercial lawsuits in both State and Federal courts. He also has great success in defending employers during investigations by the Equal Employment Opportunity Commission and other Federal and State administrative agencies.

Mr. Hogg's clients include hospitals and hospital systems; nursing and retirement homes; large national and international manufacturers; construction companies; insurance companies; and numerous large and small businesses.

Mr. Hogg is admitted to practice in all State Courts of Texas, the United States Supreme Court, the Fifth Circuit Court of Appeals and the United States District Courts for the Northern and Western Districts of Texas.

Jon Mark Hogg practices litigation.

B.A., Baylor University

J.D., St. Mary's University

jmhogg@jw.com

JON MARK HOGG

MEMBERSHIPS

Mr. Hogg is a member of the Labor and Employment Sections of the State Bar of Texas and the Defense Research Institute, and is also a member of the Society For Human Resource Management.

EDUCATION

Mr. Hogg received his B.A. degree from Baylor University and his J.D. Degree from St. Mary's University School of Law.

GENERAL EMPLOYMENT LAW UPDATE

Presented by:
Jon Mark Hogg
301 W. Beaugard Suite 200
San Angelo, Texas 76903
(325) 481-2560 (325) 481-2585 (fax)
jmhogg@jw.com

Supreme Court of the United States

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Supreme Court of the United States

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Supreme Court of the United States

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Supreme Court of the United States

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Supreme Court of the United States

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Supreme Court of Texas

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Supreme Court of Texas

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Presented by:
Jon Mark Hogg
301 W. Beauregard Suite 200
San Angelo, Texas 76903
(325) 481-2560 (325) 481-2585 (fax)
jmhogg@jw.com

GENERAL EMPLOYMENT LAW UPDATE

Jon Mark Hogg
301 W. Beauregard Suite 200
San Angelo, Texas 76903
(325) 481-2560
(325) 481-2585
jmhogg@jw.com

W. Gary Fowler
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-5922
(214) 953-5822 (fax)
gfwler@jw.com

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DEVELOPMENTS IN TEXAS STATE LAW

AGE

Texas Parks & Wildlife Dep't v. Dearing, No. 03-03-00131-CV (Tex. App.—Austin 2004). This case involved an interlocutory appeal from a class certification asserting disparate-impact liability for age discrimination under the Texas Commission on Human Rights Act. The Department challenged the class certification on the basis that disparate impact claims were not viable under the Texas Commission on Human Rights Act for claims of age discrimination. Joining the Fifth Circuit, the Austin Court of Appeals agreed that disparate impact was not a basis for employer liability for age discrimination. Unlike other forms of discrimination, the Texas Commission on Human Rights Act mandates that in determining the availability of and burden of proof applicable to a disparate impact case involving age discrimination, courts are to apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments. Thus, because disparate impact claims are not viable claims under the Age Discrimination in Employment Act in the Fifth Circuit, such claims are equally unavailable under the Texas Commission on Human Rights Act. The court of appeals vacated the class certification and remanded the case to the trial court.

City of Houston v. Fletcher, 166 S.W.3d 479 (Tex. App.-Eastland 2005). Fletcher sued alleging that her supervisor, a 48 year old woman, had harassed her based on her age. It was alleged that her supervisor called her a “stupid old woman”, “incompetent”, “stupid”, and “senile”. Her supervisor eventually stripped all of her duties except making copies. Fletcher was eventually terminated and sued under the TCHRA Chapter 21 of the Texas Labor Code for Age Harassment. Jury returned a verdict for Plaintiff and the City appealed. The Court of Appeals held that an age-based hostile work environment claim is available under the TCHRA Chapter 21.

ARBITRATION

J.M. Davidson v. Webster, 128 S.W.3d 223 (Tex. 2003). In this case, the Texas Supreme Court considered whether an employer's promise to arbitrate was illusory, and thus, insufficient as consideration to support an arbitration agreement when the employer reserved the right to unilaterally modify or terminate the arbitration policy without notice. This case was heard by the Court after it rendered an important decision in *In re Halliburton Co. v. Brown & Root Energy Services*, 80 S.W.3d 566 (Tex. 2002). The plaintiff in *Halliburton* was an “at-will” employee at Brown & Root Energy Services when Root's parent company, Halliburton, sent notice to all employees that it was adopting an Alternative Dispute Resolution Program, which would require binding arbitration for resolution of all disputes between the company and its employees. The notice expressly provided that any employee continuing to work after January 1, 1998 would be deemed to have accepted the new program. The terms included the employer's right to modify or discontinue the program, but also required the employer to give employees notice of any such changes and provided that any amendments would apply only prospectively. In 1998, Halliburton demoted the plaintiff from his position as general manager based on his “lack of interpersonal skills.” Because the plaintiff believed that the real reason for this adverse employment action was age and racial discrimination, he filed suit in state district court alleging

wrongful demotion pursuant to the Texas Commission on Human Rights Act. In response, Halliburton moved to compel arbitration pursuant to its Alternative Dispute Resolution Program. The trial court denied Halliburton's motion, and the court of appeals denied Halliburton's petition for writ of mandamus. On appeal, the Texas Supreme Court granted Halliburton's application for writ of mandamus and enforced the parties' arbitration agreement. The Court held that the agreement was supported by sufficient consideration because both parties were bound by their promises to waive the right to litigation and submit all employment disputes to arbitration. Specifically, the Court reasoned that Halliburton's right to modify or discontinue the program did not allow the employer to avoid its promise to arbitrate altogether because it was limited by express contract provisions. Distinguishably, in *J.M. Davidson*, the clause in dispute provided, "The Company reserves the right to unilaterally abolish or modify any personnel policy without prior notice." Because the Court could not determine from the clause in dispute whether the employer's unilateral right to terminate "personnel policies" applied to the parties' agreement to arbitrate, it concluded that the arbitration agreement was ambiguous and remanded the case for further proceedings on that issue. However, without unequivocally stating so, the Court did intimate that if an employer retained the unilateral, unrestricted right to modify or terminate its arbitration program without notice, an agreement to arbitrate under such terms would be considered illusory.

Granite Const. Co. v. Beaty, 130 S.W.3d 362 (Tex. App.—Beaumont 2004). In this mandamus proceeding, an employer challenged the trial court's denial of its motion to compel arbitration of a wrongful discharge claim pursued by a former employee. The court recognized that evidence demonstrating that the employer mailed its arbitration policy to an employee's address was sufficient to establish proof of an employee's notice of the policy. The court of appeals held that a valid arbitration agreement existed between the parties and the employer had not waived its right to arbitrate by failing to move for arbitration at the outset of the litigation. In this case, there was no showing that the employer "substantially invoked the judicial process to its opponent's detriment" or that the employee suffered any prejudice or increased cost based on the employer's delay in invoking arbitration. The court also found that the policy which specifically applied to "wrongful discharge" and "all disputes . . . except workers compensation claims" applied to claims of workers' compensation retaliation. Accordingly, the employer's petition for writ of mandamus was conditionally granted.

COVENANTS NOT TO COMPETE

Alex Sheshunoff Management Services, L.P. v. Johnson, 124 S.W.3d 678 (Tex. App.—Austin 2003, pet. granted). In this summary judgment case, the issue was whether a covenant not to compete agreement entered into a few months after an employee was promoted to a new position was enforceable as a matter of law. After reviewing the record, the Austin Court of Appeals held that under the circumstances the covenant not to compete was unenforceable because it was not ancillary to or part of an otherwise enforceable agreement since it lacked sufficient consideration on the employer's part. Specifically, although the employer had promised to provide the employee with confidential information and training to assist in the performance of his duties, the employee already had access to special training and confidential information by virtue of his promotion. In addition, the employer could escape its obligation to perform by firing the employee immediately after he entered into the agreement; thus, the promise was deemed

illusory. The employer's only non-illusory promise, independent of continued employment, was to give the employee notice of termination. But, this promise was also insufficient to support the covenant not to compete because it did not give rise to the employer's interest in restraining the employee from competing. The Texas Supreme Court has granted the employer's petition for review in this case.

DAMAGES

Shear Cuts, Inc. v. Littlejohn, 141 S.W.3d 264 (Tex. App.—Fort Worth 2004). In the fall of 2001, the plaintiff, a licensed cosmetologist, applied for a position with Shear Cuts. The plaintiff interviewed with the area supervisor for the store manager position at Shear Cuts' Arlington salon. According to the plaintiff, during the course of that interview, she was offered the position and assured that she would make at least \$30,000 her first year. However, the area supervisor stated that she did not offer the plaintiff the position and instead told the plaintiff that she would call her. The following afternoon, the plaintiff went to the salon and began setting up her workstation. The plaintiff testified that she was immediately confronted by a salon employee, who eventually called the area supervisor. She then testified that the area supervisor called her and fired her, reasoning that the salon employees were concerned that they would lose their white clientele because blacks would be coming to the salon. In contrast, the area supervisor testified that the plaintiff unexpectedly appeared at the salon, and because she was never hired, she was asked to gather her belongings and to leave the premises. The plaintiff filed suit alleging that Shear Cuts discriminated against her on the basis of her race in violation of the Texas Commission on Human Rights Act. The trial court, sitting without a jury, found in favor of the plaintiff and awarded her \$107,123.50 in damages, apportioned as follows: \$40,911 for lost wages, \$50,000 for punitive damages, \$8,712.50 in attorney's fees, and \$7,500 for appellate costs. The trial court specifically found that clear and convincing evidence existed that Shear Cuts acted with malice or reckless indifference to the plaintiff when it engaged in the discriminatory employment practice. Shear Cuts appealed the trial court's judgment. After reviewing the evidence in light of the five factors established by the United States Supreme Court to determine the reprehensibility of conduct in support of punitive damages, the Fort Worth Court of Appeals held that the evidence was legally insufficient to support the trial court's award of punitive damages. Facts weighing against the imposition of punitive damages included the following: (1) despite her claims of emotional distress, the plaintiff's damages were primarily economic and she did not require medical treatment; (2) Shear Cuts' misconduct did not constitute reckless disregard for the health and safety of others; (3) due to the plaintiff's short term of employment, she was no more financially vulnerable than if Shear Cuts had never hired her and no evidence existed that she had refused other employment in reliance of her expected employment; (4) Shear Cuts' prior conduct with respect to African Americans indicated that this was an isolated event; and (5) Shear Cuts' misconduct did not show malice or reckless indifference to the plaintiff's rights.

Hoffman-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438 (Tex. 2004). The plaintiff sued her former employer for sexual harassment and retaliation under the Texas Labor Code in addition to alleging a common law claim for intentional infliction of emotional distress. The jury returned a verdict for the plaintiff and awarded her nearly \$20 million in damages, including punitive and mental anguish damages. Because the damages against the defendants were statutorily capped

under the Texas Commission on Human Rights Act, the plaintiff moved to limit her recovery under the Act to front and back pay and attorney's fees and to recover the remaining punitive and mental anguish damages under her intentional infliction of emotional distress claim. Hoffman-La Roche appealed the intentional infliction of emotional distress award to the Texas Supreme Court. The Texas Supreme Court held that where the gravamen of a plaintiff's complaint is for sexual harassment, the plaintiff must proceed solely under the statutory claim, unless there are additional facts, unrelated to sexual harassment, that support an independent tort claim for intentional infliction of emotional distress. The Court reasoned that the tort of intentional infliction of emotional distress was a "gap-filler" tort created by the courts to allow recovery in rare instances where a defendant inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. In fact, according to the Court, anytime the gravamen of a plaintiff's complaint is the type of wrong that a statutory remedy was intended to cover, a plaintiff cannot maintain an actionable intentional infliction of emotional distress claim, regardless of whether he or she succeeds on, or even makes, a statutory claim.

Southwestern Bell Telephone Co. v. Garza, No. 01-1142 (Tex. December 31, 2004). In this action for a violation of the Anti-Retaliation Law, the jury found that SBC acted with actual malice in harming the plaintiff, and awarded punitive damages. On appeal, the Texas Supreme Court stated that an elevated standard of proof at trial, i.e, clear and convincing evidence, requires a correspondingly elevated standard of review on appeal. Accordingly, in a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Applying this standard of review, the Court held that a reasonable trier of fact could not have formed a firm belief or conviction that SBC acted toward the plaintiff with ill will, spite, evil motive, or purposeful injury. According to the Court, while there were some indications that SBC might have acted with malice, there were a number of other indications that the organization did not. Because the evidence was insufficient to produce a reasonable conviction that SBC intended to punish the plaintiff without cause, the Texas Supreme Court reversed the punitive damage award.

DEFAMATION

Cram Roofing Co. v. Parker, 131 S.W.3d 84 (Tex. App.—San Antonio 2003). In this case, the plaintiff, a former employee, filed suit against Cram Roofing for libel. After the plaintiff left his employment with Cram Roofing, he and another former employee started a competing business.

Cram Roofing's attorney sent several letters to suppliers and roofing companies which provided that the plaintiff had voluntarily terminated his employment with Cram Roofing. The letters also asserted that the plaintiff had engaged in "illegal activities" based on his breach of a non-compete agreement. Cram Roofing maintained that these statements were not defamatory and were substantially true. At trial, the jury found that Cram Roofing had libeled the plaintiff, and the trial court rendered judgment in the plaintiff's favor. On appeal, the San Antonio Court found that the statement that the plaintiff voluntarily terminated his employment was not defamatory. However, based on the statement regarding "illegal activities," the court held that the jury could have properly found that the gist of the statement was not substantially true and that Cram Roofing libeled the plaintiff. The court reasoned that a reasonable person could have believed that such an allegation of "illegal activities" implied criminal conduct and/or activities. The court affirmed the trial court's judgment.

DISABILITY

Little v. Texas Dep't of Criminal Justice, 148 S.W.3d 374 (Tex. 2004). The plaintiff filed suit against the Texas Department of Criminal Justice alleging disability discrimination under the Texas Commission on Human Rights Act. The plaintiff, whose leg was amputated at the knee, wore a prosthetic leg and walked with visible limp. The trial court granted summary judgment in favor of TDCJ, and the court of appeals affirmed the judgment, holding that plaintiff failed to present sufficient summary judgment demonstrating that she was disabled because there was no evidence showing that she was substantially limited with respect to any major life activity or that TDCJ regarded her as having an impairment. After reviewing the record, the Texas Supreme Court found probative summary judgment evidence suggesting that at the time of the adverse employment actions, the plaintiff was significantly restricted as to the manner in which she could walk compared to the manner in which the average person in the general population could walk. As a result, the Court concluded that the plaintiff raised a genuine issue of fact regarding whether she suffered from a physical impairment that substantially limited at least one major life activity at the time of the adverse employment action, and reversed and remanded the case for further proceedings.

Haggar Apparel Co. v. Leal, No. 02-1182 (Tex. December 21, 2004). The plaintiff was employed as a seamstress for Haggar Apparel Co. During her employment, she began suffering from carpal tunnel syndrome and lower back problems. The plaintiff was later terminated for returning from vacation two days late. At the time, she was on probation for excessive unexcused absences. The plaintiff filed suit against Haggar Apparel Co. alleging age and disability discrimination, workers' compensation retaliation, and intentional infliction of emotional distress. The jury found in favor of the plaintiff with respect to her disability claim only, and the court of appeals affirmed the trial court's judgment. The Texas Supreme Court reversed the decision of the court of appeals and rendered judgment in favor of Haggar Apparel Co. The Court held that there was no evidence to support the plaintiff's claim that her impairments (carpal tunnel syndrome and lower back problems) substantially limited a major life activity, namely her ability to work.

NEGLIGENT DRUG TESTING

Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003). The plaintiff was employed as a truck driver for Mission Petroleum Carriers. Pursuant to the Department of Transportation's regulations, Mission required all of its employees to submit to random drug testing. The plaintiff, an at-will employee, was terminated after he tested positive for marijuana use. The plaintiff then filed suit against Mission alleging that it breached a common-law duty by not exercising ordinary care in the manner it collected his urine specimen for testing. At trial, the jury found in favor of the plaintiff and awarded him approximately \$900,000 in damages. The case was ultimately appealed to the Texas Supreme Court. The Texas Supreme Court reversed the decision and rendered a take nothing judgment in favor of Mission. In light of the Department of Transportation's extensive regulations governing drug testing, the Court declined to impose a common law duty on employers to exercise ordinary care in the manner it collects urine for drug tests. The Court also noted that imposing such a duty on employers would undermine the at-will employment doctrine because an employer's basis for termination would necessarily have to be justified by a reasonable investigation.

PROOF OF DISCRIMINATION

Wal-Mart Stores v. Canchola, 121 S.W.3d 735 (Tex. 2003). Canchola was employed as the deli manager in a Wal-Mart store in Mission, Texas. During his employment, Canchola was permitted to take several leaves of absence and to work a reduced schedule due to a medical condition. After two employees complained that Canchola had engaged in inappropriate behavior towards them, he was suspended pending an investigation of the complaints and eventually terminated for violating Wal-Mart's sexual harassment policy. Thereafter, Canchola filed suit alleging that Wal-Mart had unlawfully discriminated against him based on his age and his disability in violation of the Texas Commission on Human Rights Act. After a trial on the merits, a jury rendered a verdict for Canchola on his disability discrimination claim. Wal-Mart appealed arguing that there was insufficient evidence that its stated reason for the termination was a pretext for intentional discrimination or that Canchola's disability was a motivating factor in his termination. In response, Canchola maintained that Wal-Mart's investigation into the charges against him was inadequate and one-sided; thus, constituting some evidence that Wal-Mart was motivated by his disability. In reversing the jury's verdict, the Texas Supreme Court stated that the evidence offered by Canchola which assailed the quality of Wal-Mart's investigation was insufficient to prove that Canchola's medical condition was a motivating factor in his termination. Because Canchola failed to offer evidence that Wal-Mart's stated reason for terminating him was false and that Wal-Mart's decision to discharge him was based on his disability, the Court held that the evidence was legally insufficient to support the jury's finding of disability discrimination.

Winters v. Chubb & Son, Inc., 132 S.W.3d 568 (Tex. App.—Houston [14th Dist.] 2004). The plaintiff was employed as an underwriter in Chubb & Son's Department of Financial Institutions section. During this time, his supervisor, Deanne Gordon, observed various performance issues and met with the plaintiff several times to discuss these issues. Eventually, the plaintiff's continuing performance issues culminated in a written warning advising the plaintiff that termination could result if his performance did not improve. Shortly thereafter, the plaintiff

resigned and filed suit against Chubb & Son and Gordon alleging racial discrimination under the Texas Commission on Human Rights Act. Chubb moved for summary judgment, maintaining that the plaintiff failed to offer sufficient evidence of disparate treatment based on race. The trial court granted summary judgment in Chubb's favor, and the plaintiff appealed. In affirming the trial court's judgment, the court of appeals adopted the Fifth Circuit's rule that an employer's deferential treatment of employees is insufficient to prove disparate treatment unless this treatment occurred under nearly identical circumstances. Consequently, because the plaintiff in this case did not offer any evidence of preferential treatment of other employees under nearly identical circumstances, he did not present sufficient evidence to demonstrate that he was treated differently based on his race.

Kokes v. Angelina College, 148 S.W.3d 384 (Tex. App.—Beaumont 2004). In this case, Angelina College rejected the plaintiff's (a sixty-five-year-old white male) application for the position of psychology instructor and hired a younger African American female for the position instead. The plaintiff filed suit alleging that Angelina had discriminated against him on the basis of age, race, and gender. Angelina filed a motion for summary judgment on the basis that the plaintiff had failed to prove that its stated non-discriminatory reasons for rejecting the plaintiff were merely a pretext for discrimination, and the trial court granted the motion. In reviewing the trial court's decision, the appellate court focused on statements made by an official involved in the selection process which suggested that discrimination was a motivating factor in the plaintiff's rejection. Although Angelina argued that these statements were only stray remarks, the court held that the statements constituted direct evidence raising a genuine issue of material fact as to whether Angelina made its decision based on age, race, or gender, despite its proffered explanations for its decision. Consequently, the Beaumont Court of Appeals reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

PROOF OF RETALIATION

Pineda v. United Parcel Service, Inc., 360 F.3d 483 (5th Cir. 2004). The plaintiff filed suit against United Parcel Services for retaliation pursuant to the Texas Commission on Human Rights Act after he was discharged by the company. During his employment with UPS, but while on medical leave for diabetes, the plaintiff filed a charge of discrimination against UPS for allegedly delaying his return to work. Additionally, upon his return to UPS, the plaintiff provided deposition testimony against UPS in a discrimination suit brought by another employee. The plaintiff was eventually terminated by UPS after three coworkers alleged that he made violent threats against them. The plaintiff maintained that he was discharged in retaliation for engaging in the protected activities of filing a discrimination charge and testifying in a discrimination case. At trial, the jury found in favor of the plaintiff and awarded him damages, including \$400,000 in compensatory damages. UPS moved for judgment as a matter of law and sought remittitur of the compensatory damage award. The trial court refused to disturb the jury verdict, but remitted the compensatory damage award to \$202,500. UPS appealed both rulings. On appeal to the Fifth Circuit, the plaintiff argued that in retaliation cases brought under the Texas Commission on Human Rights Act, the less stringent "motivating factor" test applied, as opposed to the "but for" standard. However, the Fifth Circuit rejected this argument, holding that in retaliation cases under the Texas Commission on Human Rights Act, the plaintiff had the burden to prove that "but for" the discriminatory purpose he would not have been terminated.

Applying the “but for” causation standard, the court found that the evidence was insufficient to support the jury’s finding that UPS retaliated against the plaintiff because he engaged in protected activity. Although the plaintiff presented evidence suggesting that he did not commit the acts alleged by his coworkers and that UPS selectively investigated and terminated him, he presented no evidence that independently suggested that UPS falsely and selectively fired him because he engaged in protected activity, or that had he not engaged in that activity he would not have been terminated. Accordingly, the Fifth Circuit reversed the trial court’s ruling denying UPS’s motion for judgment as a matter of law and remanded the case to the trial court for entry of judgment in favor of UPS.

SABINE PILOT LITIGATION

Morales v. Simuflite Training Int’l, Inc., 132 S.W.3d 603 (Tex. App.—Fort Worth 2003). Simuflite is an aviation training company headquartered at the Dallas-Fort Worth International Airport. Simuflite’s classroom and hands-on training activities are highly regulated by the Federal Aviation Administration. As a result, the training centers, as well as the instructors and evaluators that provide this training, are required to acquire and to maintain a FAA training certificate. The plaintiff was a part-time instructor for Simuflite. In 1999, the plaintiff’s certification expired and he did not obtain the necessary flight time to renew his certification. Although Simuflite was aware that the plaintiff was no longer certified to train its pilots, after a scheduling mistake, his supervisor instructed him to go ahead and train the pilots, but not to sign off on the training that he had performed. The following week, without the plaintiff’s knowledge, the supervisor signed off on the pilots’ training record using his own identification number. Shortly thereafter, the FAA began investigating Simuflite regarding simulator training provided by the plaintiff. At this time, Simuflite became aware of the possible training violation and asked the plaintiff to sign a blank flight report. Because the plaintiff was concerned that Simuflite might falsify the blank flight report to cure the training violation that was being investigated, he refused to sign the form. The plaintiff was then given the opportunity to resign in lieu of being discharged, and he chose to resign. The plaintiff filed suit against Simuflite alleging that he had been terminated solely for refusing to sign the form, which he believed could have possibly subjected him to criminal sanctions. The basis for his claim was the Texas Supreme Court’s decision in *Sabine Pilot Serv., Inc. v. Hauck*, wherein the court provided that an at-will employee could maintain a common law claim for wrongful termination if the sole reason for the employee’s termination was his refusal to perform an illegal act. 687 S.W.2d 733 (Tex. 1987). The trial court granted summary judgment in favor of Simuflite. The Fort Worth Court of Appeals reversed this decision, finding that the evidence raised a genuine issue of fact as to whether the plaintiff was asked to perform an illegal act and whether his refusal to perform the illegal act was the sole basis for his termination. The court recognized that under the circumstances, the plaintiff could have been charged with aiding and abetting the falsification of a federal document.

WORKERS’ COMPENSATION

Lone Star Steel v. Hatten, 104 S.W.3d 323 (Tex. App.—Texarkana 2003). In this case, the plaintiff sustained an on-the-job injury to her right hand while employed by Lone Star Steel. Although the plaintiff was originally allowed to return to her normal position, her condition

began to deteriorate, ultimately resulting in her placement in an alternative work program. Lone Star's alternative work program was only available to employees who had been injured on the job and had filed a workers' compensation claim. After an eligible employee had been in the program for thirty days, his or her condition was re-evaluated and if the employee's condition had not improved, Lone Star placed them on restricted medical leave without pay until the employee was cleared to return to work. When the plaintiff was re-evaluated, she was diagnosed with carpal tunnel syndrome and she showed no signs of improvement. In addition, Lone Star was notified by its workers' compensation insurance carrier that the plaintiff's injury might not have been caused by work. Consequently, the plaintiff was taken out of the work program and placed on restrictive leave without pay until she was medically released to return to work. Pursuant to company policy, the plaintiff was required to notify Lone Star of her medical status when medically cleared. The Texas Workers' Compensation Commission later determined that the plaintiff had a compensable injury. Approximately one year later, the plaintiff was notified that she had reached maximum medical improvement and her benefits ceased. The plaintiff then filed suit against Lone Star alleging workers' compensation retaliation. Upon learning, through the lawsuit, that the plaintiff was cleared to return to work, Lone Star promptly notified the plaintiff that she was welcome to return to work. The plaintiff did return to Lone Star, but the lawsuit remained pending. The plaintiff's main contention was that being placed on leave without pay was a violation of §451 of the Texas Labor Code. After a trial on the merits, a jury awarded the plaintiff \$50,000 in compensatory damages and \$2,000 in lost wages. The Texarkana Court of Appeals reversed the trial court's judgment and rendered a take-nothing judgment in favor of Lone Star. The court held that the plaintiff failed to present evidence establishing a causal link between being placed on restrictive leave and the filing of the workers' compensation claim. The court recognized that neither an employer's economic incentive to dispute a workers' compensation claim nor an employee's assignment to work in contradiction with his or her medical condition constituted sufficient evidence of an expression of a negative attitude towards the employee's injury.

Aust v. Conroe I.S.D., No. 09-04-063-CV (Tex. App.—Beaumont December 16, 2004). Aust was employed by the district as an electrician's helper for approximately nineteen years. In December 2000, he injured his knee while getting out of a maintenance truck. This injury resulted in the filing of a workers' compensation claim. Although Aust underwent knee surgery for his injury, the surgery was only partially successful in repairing his knee. As a result, Aust sought light duty work with the district, but was unsuccessful. The following year, the district eliminated Aust's position, moved him to another department, and decreased his salary. Aust then resigned and filed suit against the district asserting workers' compensation retaliation and constructive discharge. After the trial court granted summary judgment in favor of the district, Aust appealed. The court of appeals reversed and remanded the decision, holding that Aust raised a genuine issue of material fact as to whether the district's stated reason for the adverse actions was a pretext for retaliatory action. Specifically, the summary judgment evidence showed that only two months after Aust's position was allegedly eliminated, the district hired a new employee to fill the position. Likewise, in its motion for summary judgment, the district articulated a different reason for Aust's transfer (i.e., worker safety), which resulted in the decrease in his salary.

DEVELOPMENTS IN FEDERAL LAW

ANTI-INJUNCTION ACT AND THE ADEA

Vines v. University of Louisiana at Monroe, 398 F.3d 700 (5th Cir. Jan. 28, 2005) (designated for publication). Plaintiffs were former administrators and faculty at the University of Louisiana at Monroe. Plaintiffs retired and received benefits, but were periodically rehired to perform additional work. Subsequently, the University implemented a policy by which it would no longer hire retired former employees. Plaintiffs brought suit under the Age Discrimination in Employment Act ("ADEA") and related Louisiana state law. Plaintiffs were initially engaged in a lawsuit along with the EEOC, but the district court later ruled that it lacked jurisdiction over the individual claims. The EEOC's claim (seeking damages) on behalf of the plaintiffs was allowed to proceed, but the district court eventually found that the University's policy did not violate the ADEA. When the individual plaintiffs sought to recover on their Louisiana causes of action in state court, the Fifth Circuit ordered the district court to issue an injunction pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, which allows a federal court to issue an injunction against state court proceedings in order to protect or effectuate a prior judgment by a federal court. The Fifth Circuit held that since the EEOC had sought damages on behalf of the individual plaintiffs, and because the state law claims were essentially identical to the previous federal case, the individual plaintiffs were precluded from continuing with their lawsuit in state court.

STATUTE OF LIMITATIONS FOR 42 U.S.C. § 1981

Pegram v. Honeywell, Inc., 361 F.3d 272 (5th Cir. 2004). In *Pegram v. Honeywell*, the Fifth Circuit established a two-year statute of limitations for claims under 42 U.S.C. § 1981 that are brought in Texas. Pegram, an African-American sales employee began working for Honeywell in 1991. In 2000, Pegram was promoted to the position of Total Plant Account Manager ("TPAM"). Later that year, Pegram was transferred to a Service Account Manager ("SAM") position. Pegram was dissatisfied with the SAM position, which he considered a demotion. Pegram alleged that while the base pay of the two positions was equal, the opportunities for incentive based compensation were less frequent in the SAM position than in the TPAM position. Pegram attempted to find a TPAM position within the company, but when he could not do so he was terminated. Pegram brought suit, in part, under 42 U.S.C. § 1981, alleging racial discrimination. As part of his claim of discrimination, Pegram alleged that several earlier actions by Honeywell constituted racial discrimination, including a failure to include him in the MBA program, denial of various training opportunities, and denied access with clients. The Fifth Circuit held that these additional claims were time-barred. Because § 1981 had no internal statute of limitations, the Court held that the applicable statute of limitations was that of the most closely analogous state law. The Court held that the two-year statute of limitations found in Tex. Rev. Civ. Stat. art. 5526 was applicable, and ruled that any act which occurred more than two years prior to the filing of the federal complaint was time-barred.

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004). In *Jones*, the Supreme Court took a different approach to the statute of limitations under 42 U.S.C. § 1981. The three classes of plaintiffs in *Jones* were African-American employees in defendant's Chicago plant. They

alleged that they were subject to a racially hostile work environment, given an inferior employee status, and wrongfully terminated or denied a transfer in connection with the closing of the Chicago plant. At issue before the Court was whether plaintiffs' claims under 42 U.S.C. § 1981 were subject to a two or four-year statute of limitations. Under federal law, the applicable statute of limitations for laws enacted prior to December 1, 1990 is the statute of limitations for the most closely analogous state law cause of action in the forum state. In this instance, the applicable Illinois statute of limitations for personal injury claims was for two years. However, for claims enacted after December 1, 1990, Congress had set a catchall four-year statute of limitations codified in 28 U.S.C. § 1658. The Supreme Court held that since 42 U.S.C. § 1981 was originally enacted in 1866, any cause of action arising under the original language would operate under the two-year state law cause of action. However, § 1981 was substantially amended in 1991 to allow claims for post-contract discrimination. The Court held that any cause of action which arose from the new statutory language found in the 1991 Amendment would operate under the four-year statute of limitations. Please note that in *Honeywell*, the Fifth Circuit did not address whether the cause of action in question operated under the original language or the 1991 amendment, but because of *Jones* it will be required to do so in the future.

RETALIATION UNDER 42 U.S.C. § 1981

Foley v. University of Houston System, 355 F.3d 333 (5th Cir. 2003). Plaintiffs Dr. Roy Foley and Dr. Nora Hutto were tenured members of the School of Education at the University of Houston, Victoria. Plaintiff Foley, who was African American, alleged discrimination under 42 U.S.C. § 1981 in part on the University's failure to promote him from associate professor to full professor. Plaintiff Foley alleged that he was passed over for promotion because of his race, and in retaliation for earlier charges filed with the EEOC. Plaintiff Hutto, who was Caucasian, alleged that she was removed as department chair in retaliation for her support of Plaintiff Foley. At issue in *Foley* was whether a cause of action for retaliation existed under § 1981. The Fifth Circuit held that it did. However, the court also held that the claims brought against individual officers of the university were subject to the qualified immunity defense.

REVERSE DISCRIMINATION

General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004). In *Cline*, the United States Supreme Court held that the Age Discrimination in Employment Act of 1967 ("ADEA") did not prevent an employer from discriminating against younger employees in favor of older employees. *Cline* involved a collective bargaining agreement between General Dynamics and the United Auto Workers. This agreement eliminated the company's obligation to provide health benefits to the subsequently retired employees, except as to then-current workers who were at least 50 years old. Cline, and several other co-workers who were over 40 (and thus within the protection of the ADEA) but under 50 filed a charge with the Equal Employment Opportunity Commission alleging discrimination because of their age in violation of the ADEA. When no informal resolution could be reached, they filed suit in federal court. The District Court for the Northern District of Ohio held that the ADEA did not prohibit discrimination against younger workers in favor of older workers, but the Sixth Circuit disagreed, holding that the plain language of the ADEA prevented discrimination based upon age. The Supreme Court reversed in a 6-3 decision, with Justices Scalia, Thomas, and Kennedy dissenting. The majority held that

both the language and the intent of Congress in formulating the ADEA was meant to prohibit discrimination against older employees. The majority also held that there could be legitimate reasons why an employer would discriminate against younger employees. The dissenters argued that the ADEA's prohibition against age-based discrimination was not qualified, and thus should prevent reverse age discrimination as well.

CONSTRUCTIVE DISCHARGE BASED UPON SEXUAL HARASSMENT

Pennsylvania State Police v. Suders, 124 S.Ct. 2342 (U.S. 2004). Plaintiff Nancy Suders was an officer of the Pennsylvania State Police. Plaintiff alleged that three of her supervisors subjected her to sexual harassment of such a severe degree that she was forced to resign, and that her resignation constituted a constructive discharge. In *Suders*, the Supreme Court clarified the burdens of proof that each party must bear when the plaintiff alleges constructive discharge due to sexual harassment in violation of Title VII. The Court held that the plaintiff bears the initial burden of establishing a hostile work environment by demonstrating harassing behavior sufficiently severe or pervasive to alter the conditions of their employment. In addition, in order to show constructive discharge, the plaintiff must show that the abusive working environment became so intolerable that her resignation constituted a fitting response. The employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving sexual harassment claims; and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided apparatus. This affirmative defense, however, is not available if the plaintiff quits in response to an employer-sanctioned adverse action officially changing her employment status or situation, such as a humiliating demotion, an extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions. In these instances, the employer is strictly liable for the harassing actions of its supervisors.

REVOCAION OF NOTICE TO SUE

Martin v. Alamo Community College District, 353 F.3d 409 (5th Cir. 2003). At issue in *Martin* was the meaning of the term "issued" in 29 C.F.R. § 1601.19(b). Under § 1601.19(b), if, after the issuance of a notice of right to sue the EEOC issues a notice of intent to reconsider prior to the time when the employee files suit, the notice serves to revoke the employee's right to sue. In the instant case, plaintiff had filed her first complaint on the same day that the EEOC mailed a notice of intent to reconsider. The district court held that "issued" meant received in the mail by the plaintiff, and held that this was presumed to be three days after the letter was mailed. The Fifth Circuit reversed, holding that "issued" meant placed in the mail by the EEOC. The Fifth Circuit went on to hold that because there was no uniform practice among either courts or post offices regarding time stamping, that it would not consider the time of day either action took place, but held that when a complaint was filed on the same day as the notice of intent to reconsider was issued, both acts would be considered to have taken place simultaneously.

DISPARATE TREATMENT V. DISPARATE IMPACT

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). In *Raytheon*, the United States Supreme Court clarified the distinction between disparate impact and disparate treatment analyses as applied to

the Americans with Disabilities Act (“ADA”). Plaintiff Hernandez was a Raytheon employee who tested positive for cocaine and was consequently forced to resign for violating the company’s drug policy. Later, after he had received treatment for cocaine addiction, he re-applied with Raytheon. At the time, Raytheon had a policy in which it refused to rehire employees who had been terminated for violating workplace conduct rules. As Hernandez’s employee file indicated that he had been discharged for violating a workplace rule (although it did not state that the violation was for drug use), Raytheon refused to consider his application. Hernandez brought suit alleging disparate treatment in violation of the ADA. In applying the *McDonnell Douglas* framework, the Ninth Circuit ruled that Raytheon’s policy did not constitute a legitimate, nondiscriminatory reason for its refusal to hire Hernandez. The Ninth Circuit held that a policy which prevented the reemployment of a successfully rehabilitated drug-addict was an unlawful violation of the ADA and thus could not constitute a nondiscriminatory reason for Raytheon’s refusal to hire Hernandez. The U.S. Supreme Court reversed, stating that the Ninth Circuit had inappropriately combined a disparate impact analysis with a disparate treatment analysis. The Court held that Raytheon’s policy satisfied its burden to state a nondiscriminatory reason for its refusal to hire Hernandez, and thus placed the burden upon Hernandez to prove that this reason was a pretext.

AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT AND FMLA

Slaughter-Cooper v. Kelsey Seybold Medical Group, P.A., 379 F.3d 285 (5th Cir. 2004). Employment contract provides that it terminates automatically upon disability lasting more than three months. Employee goes on disability and receives benefits under the Family Medical Leave Act (“FMLA”). When disability lasts longer than three months, employer terminates contract. Fifth Circuit holds that under these facts, employee cannot maintain cause of action for retaliatory discharge in violation of FLMA because employee cannot demonstrate causal link between protected activity and discharge.

JURISDICTION

Arbaugh v. Y&H Corp., 380 F.3d 219 (5th Cir. 2004). The Fifth Circuit reaffirmed its decision in *Dumas v. Town of Mt. Vernon-Alaska*, 612 F.2d 974 (5th Cir. 1980) that the issue of whether an employer has 15 or more employees and is thus subject to Title VII is a question of the court’s subject matter jurisdiction. Plaintiff Arbaugh obtained a jury verdict against Y&H Corp. for sexual harassment in violation of Title VII. The district court, however, later held that it lacked subject matter jurisdiction because several Y&H employees were actually independent contractors. On appeal, plaintiff argued that the Fifth Circuit should reject the *Dumas* holding, and side with the Second and Seventh Federal Circuits which hold that the court has subject matter jurisdiction so long as the plaintiff makes a good faith claim that the employer is covered by Title VII. The court, however, stated that it was bound by the *Dumas* decision, and further noted that this position is consistent with the position taken by the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits.

Clayton v. Rumsfeld, 106 Fed. Appx. 268 (5th Cir. 2004). Civilian employee of the Army and Air Force Exchange Service at Randolph Air Force Base was scrutinized, given a non-promotable performance rating, a letter of warning, and eventually demoted and transferred to

another base. Plaintiff alleged various forms of employment discrimination under Title VII. After a hearing with an Administrative Law Judge (“ALJ”) and filing a charge with the EEOC, plaintiff filed suit in district court. In her complaint, plaintiff for the first time added a cause of action for constructive discharge. The Fifth Circuit held that because she had not raised this claim during her hearing with the ALJ or her charge with the EEOC, she had not exhausted her administrative remedies on that claim, and affirmed summary judgment in favor of the government on the constructive discharge claim.

TAXES ON CONTINGENCY FEES

Commissioner v. Banks, 125 S.Ct. 826 (U.S. 2005). Respondent Banks settled a federal employment discrimination suit against his employer, a California state agency. On appeal, the Sixth Circuit held that while the settlement amount was to be included as gross income, the portion paid to Banks’ attorney as a contingency fee was not income. In a related case, *Commissioner v. Banaitis* (consolidate with *Banks*), the Ninth circuit held that a similar contingency fee did constitute income. The United States Supreme Court sided with the Ninth Circuit, and held that when a taxpayer recovers settlement amounts which would be classified as income, and a portion of that amount is paid to an attorney as a contingency fee, the amount paid to the attorney must also be characterized as gross income. This decision is ameliorated somewhat by the American Jobs Creation Act of 2004, 26 U.S.C. § 62(a)(19) which establishes that a contingent fee will not constitute income to the plaintiff in a specified list of 18 types of cases involving “unlawful discrimination.”

RETALIATION UNDER GERA

Brazoria County, Tex. v. EEOC, 391 F.3d 685 (5th Cir. 2004). Plaintiff Kyle Knight was employed as a clerk by former justice of the peace David Christian. Plaintiff resigned in November of 1996 and filed a charge with the Equal Opportunity Employment Commission (“EEOC”) that month alleging that Christian had created a hostile work environment through sexual harassment, and that after she complained about it to a county official, Christian retaliated by (1) failing to promote Knight, (2) placing Knight on probation, and (3) constructively discharging Knight. As plaintiff was a member of the personal staff of an elected official, she was not covered by Title VII. However, the court held that she was covered under the Government Employee Rights Act (“GERA”), 42 U.S.C. § 2000e-16a. At issue was whether GERA provided a cause of action for retaliation. The Fifth Circuit held that while the language of GERA did not specifically forbid retaliation, statutory language stating that all employment decisions were to be made free from any discrimination prohibited retaliation. Consequently, the court held that a cause of action for retaliation did exist under GERA. However, under the particular facts of Brazoria County, the court held that the plaintiff had failed to establish any ultimate employment action sufficient to state a claim for retaliation.

FACT QUESTION AS TO CONSTRUCTIVE DISCHARGE

Hawkins v. Frank Gillman Pontiac, 102 Fed. Appx. 394 (5th Cir. 2004). Plaintiff Hawkins was a sales manager at Frank Gillman Pontiac for 24 years. Subsequently, Hawkins was offered a mandatory transfer to the position of fleet sales manager. Hawkins alleged that his manager

informed him that they wanted “new blood,” “you know, younger people.” Hawkins considered the transfer a demotion because it was purely commission based whereas his sales manager position paid both commission and salary. In addition, the new position provided Hawkins with fewer subordinates. Hawkins declined the transfer and filed suit under the Age Discrimination in Employment Act (“ADEA”) alleging constructive discharge. The district court held that plaintiff’s claim was time barred, and granted summary judgment in favor of the defendant. The Fifth Circuit reversed on the statute of limitations issue, and then examined the merits of plaintiff’s claim to determine if there was any alternative basis to uphold summary judgment. The court found that under the facts as presented, a reasonable jury could conclude that Hawkins had enough knowledge of the two positions to know that the transfer constituted a demotion, and that Hawkins might feel compelled to resign. The Fifth Circuit accordingly reversed the district court’s order granting summary judgment.

NO CONSTRUCTIVE DISCHARGE

Stewart v. Dept. of Health and Hospitals, 117 Fed. App. 918 (5th Cir. 2004). Stewart, a high-ranking employee in the Louisiana civil service, alleged race and sex discrimination, hostile work environment, and constructive discharge under Title VII. Stewart was transferred to a position that she alleged was inferior to her former position. Stewart then requested a six-month leave of absence, but was granted only one month. When she returned, she was given tasks she felt were beneath her level and experience. She then negotiated, with help of counsel, a six month leave of absence in which she would take administrative leave, and then resign. The Fifth Circuit affirmed summary judgment granted against plaintiff’s constructive discharge claim, holding that a resignation negotiated with the help of counsel, and which provided for 300 hours of paid administrative leave, did not constitute an involuntary termination resulting from intolerable working conditions.

AGE DISCRIMINATION/DISPARATE IMPACT

Smith v. City of Jackson, Miss., ___ U.S. ___, 125 S.Ct. 1536 (2005). City devised pay plan which gave proportionately higher raises to officers with less than five years of service in an attempt to bring starting salaries up to regional average. Officers and dispatchers over the age of 40 sued under the ADEA under disparate impact theory. The District Court granted summary judgment and the Fifth Circuit affirmed. The Supreme Court held that disparate impact theory was available under the ADEA. However, it affirmed the result because the Plaintiffs had failed to show that the pay plan was responsible for any statistical disparities. In this case all Plaintiffs did was show that the pay plan was less generous to older workers than younger workers. There was no specific test, requirement or practice within the pay plan that had an adverse impact on older workers. Also, the Court held that the decision to give raises based on seniority and position was reasonable in light of the stated goal of raising starting salaries to regional average. This was a reasonable factor other than age.

FMLA MEDICAL CERTIFICATION

Urban v. Dolgencorp of Texas, Inc., 393 F.3d 572 (5th Cir. 2004). Urban requested two months FMLA for carpal tunnel surgery. Employer requested medical certification and tentatively

approved the FMLA. Urban failed to return medical certification, even with a 15 day extension. Employer then terminated her after she used up 30 days of non-FMLA leave. Urban sued for violation of FMLA and obtained a summary judgment against employer as to liability. Employer appealed. The Fifth Circuit reversed and held that the cure provision of the FMLA regulations which required an employer to notify the employee of a deficiency on an “incomplete” certification and give them a reasonable opportunity to cure, did not apply when the employee completely failed to provide the certification.

PHILLIP R. JONES

*When Johnny Comes Marching Home:
Employers' Obligations Under USERRA*

PHILLIP R. JONES

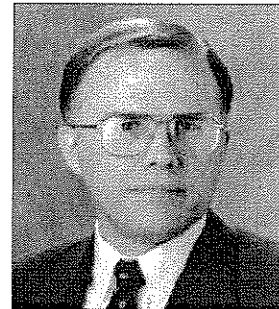
Phillip R. Jones is a partner in the Labor and Employment section of Jackson Walker. Prior to joining Jackson Walker, he was Senior Corporate Labor Counsel for General Dynamics Corporation in St. Louis, Missouri. His experience includes collective bargaining, grievance arbitrations, unfair labor practice litigation, union avoidance campaigns, wage-hour issues, affirmative action programs, and employment discrimination litigation. Mr. Jones is a frequent speaker on various issues in the employment law area, such as executive employment agreements, reductions in force, employee leasing, and employee discharge and documentation.

MEMBERSHIPS

He is a member of the American Bar Association and its section of Labor and Employment Law as well as the State Bar of Texas and its Labor and Employment Law section.

EDUCATION

Mr. Jones received his B.S. and M.M.S. degrees from Texas Christian University and his J.D. degree from Baylor University.



Phillip Jones practices labor and employment law.

B.S., Texas Christian University

M.M.S., Texas Christian University

J.D., Baylor University

pjones@jw.com

**WHEN JOHNNY COMES
MARCHING HOME:
EMPLOYERS' OBLIGATIONS
UNDER USERRA**

Presented by:
Phillip R. Jones
901 Main Street, Suite 6000
Dallas, Texas 75202
214-953-5921
pjones@jw.com

USERRA

- Uniformed
- Services
- Employment and
- Reemployment
- Rights
- Act

PURPOSES OF USERRA

- Encourage non-career military service
- Guarantee reemployment
- Prohibit employer discrimination

**IMPORTANCE OF KNOWING
USERRA OBLIGATIONS**

- USERRA, a second-generation civil-rights statute, requires more than equal treatment
- *Fink v. City of New York*

EMPLOYERS COVERED

Employer means:

- Any person or entity that pays salary or wages for work performed *or*
- A person or entity that has control over employment opportunities

EMPLOYERS COVERED

Minimum number of employees for
USERRA to apply:

ONE!

EMPLOYERS COVERED

- Public employers
- Private employers
 - Successor entities
 - Employee leasing companies & their clients
 - Foreign entities with U.S. locations
 - Domestic entities with foreign locations
- Churches
- Individuals, such as supervisors

EMPLOYEES COVERED

- Present employees, including citizens & aliens of the U.S. working in foreign countries for U.S. entities
- Former employees
- Applicants, in some instances

EMPLOYER DUTIES UNDER THE USERRA

- The duty not to discriminate
- The duty not to retaliate
- The duty to provide reemployment
- The duty to post the USERRA poster

DUTY NOT TO DISCRIMINATE

Employers may not deny any person "initial employment, reemployment, retention in employment, promotion, or any *benefit of employment*" on the basis of the person's "performance of services, application for service, or obligation" to serve in the armed services.

DUTY NOT TO DISCRIMINATE

Hill v. Michelin North America, Inc.

- A regular work schedule is a "benefit of employment" under the USERRA

DUTY NOT TO DISCRIMINATE

Harris v. City of Montgomery

- An *inaccurate, negative* performance appraisal, "if it prevents a raise, denies a benefit of employment"

DUTY NOT TO DISCRIMINATE

Yates v. Merit Systems Protection Bd.

- An accurate, negative performance appraisal is a "benefit of employment" that should not be "denied"

DUTY NOT TO DISCRIMINATE

Schmauch v. Honda of America Mfg., Inc.

- The failure to remove an employee from corrective disciplinary action can constitute a denial of a "benefit of employment"

DUTY NOT TO DISCRIMINATE

Vickers v. City of Memphis

- Recognizes hostile work environment claims under USERRA

DUTY NOT TO DISCRIMINATE

Reyes v. Hospital San Pablo Del Este

- Recognizes constructive discharge claims under USERRA

DUTY NOT TO RETALIATE

The USERRA forbids employers from retaliating against an individual because the individual has:

- Acted to enforce a protection afforded to any person under USERRA; or
- Testified or otherwise made a statement in connection with a proceeding under the USERRA; or

DUTY NOT TO RETALIATE

(continued)

- Assisted or participated in a USERRA investigation; or
- Exercised a right provided by USERRA

DUTY NOT TO RETALIATE

The USERRA protection from retaliation:

- applies to individuals who have not served in the armed forces and
- is broader in scope than the right of reemployment

DUTY TO PROVIDE REEMPLOYMENT

An employer must *promptly* reemploy employees returning from periods of military service

DUTY TO PROVIDE REEMPLOYMENT

Prompt Reemployment does not mean immediate reemployment; rather, it means as soon as practicable under the circumstances

DUTY TO PROVIDE REEMPLOYMENT

To be eligible for reemployment upon returning from military service:

- Civilian job
- Advance notice provided to employer
- Military service is USERRA qualified
- Period of service is less than 5 Years, subject to numerous exceptions
- Timely reinstatement is sought

TYPES OF MILITARY SERVICE

- Active duty Army, Navy, Marine Corps, Air Force or Coast Guard
- Army, Navy, Marine Corps, Air Force or Coast Guard Reserves
- Army National Guard or Air National Guard
- Commissioned Corps of the Public Health Service
- Other

QUALIFIED MILITARY SERVICE

Duty on a Voluntary or Involuntary Basis, Including

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty
- Absence from work for an examination to determine fitness for any of the above

QUALIFIED MILITARY SERVICE

Leisek v. Brightwood Corp.

- Qualified military service includes "balloon-doggie" service
- If additional volunteer service poses a problem, an employer should address concerns with the appropriate military authority

ADVANCE NOTICE

Written or verbal notice from the employee or a military officer of the employee's intention or obligation to perform military service

Should be provided as far in advance as is reasonable, but not required where impossible or unreasonable under the circumstances, including military necessity

ADVANCE NOTICE

Employee John Rambo: "I'm on a quest for adventure and to see the world. It's been nice working here, but color me gone! I never want to see this place again."

John Rambo, five years later, out of the blue: "I'm back. The world is a cold, cruel place. When can I have my job back? I want to be reinstated now with all my benefits."

ADVANCE NOTICE

Do you have an obligation under USERRA to reemploy John Rambo?

Yes!

ADVANCE NOTICE

You've reemployed John Rambo. Three days later, he says, "I'm suffering from PTSD. I need FMLA leave." He then gives you a doctor's note confirming his PTSD and his need for 12 weeks of leave.

ADVANCE NOTICE

Do you have an obligation under USERRA to provide John Rambo with the requested FMLA leave?

Yes!

MAXIMUM TIME PERIOD

- 5 year cumulative service limit, subject to numerous exclusions, including service rendered during times of war

TIMELY APPLICATION FOR REINSTATEMENT

| Time Following Completion of Qualified Military Service In Which Reinstatement Must Be Requested | Length of Qualified Military Service |
|--|--|
| 1 day and 8 hours (excluding travel time) | Less than 31 days |
| 14 days | More than 30 days but less than 181 days |
| 90 days | More than 180 days |

EMPLOYER'S REINSTATEMENT OBLIGATION

- Escalator Principle
- If military service lasts 1 to 90 days, to the same position as if continuously employed
- If military service lasts more than 90 days, to a position with similar seniority, status & pay

EXCEPTIONS TO EMPLOYER'S REEMPLOYMENT OBLIGATION

There is no duty to reemploy if:

- Changed circumstances make reemployment impossible or unreasonable; or
- The employee is disabled and accommodation or re-training poses an "undue hardship"; or
- The employment was for a brief, non-recurrent period with no reasonable expectation of continued employment

POST-DISCHARGE EMPLOYMENT PROTECTION

"For Cause" Discharge Only

| Protection Period | Period of Military Service |
|--------------------------|-----------------------------------|
| 180 days | 30 to 181 days |
| 1 year | More than 180 days |

POST-MILITARY SERVICE EMPLOYMENT PROTECTION

Duarte v. Agilent Technologies, Inc.

- "Cause" refers to whether or not the employee acted reasonably under the circumstances, and may include adverse economic circumstances.

ENFORCEMENT AND PENALTIES

- VETS
 - Investigation
 - Subpoena power
- Litigation
 - Attorney General
 - Private
 - Double damages
 - Attorneys' fees
 - Jury trial

LAW ENFORCEMENT

- Burden of proof follows burden shifting analysis set forth in *NLRB v. Transportation Management Corp.*
- Mandatory arbitration has been found unenforceable

ESGR

- National Committee for Employer Support of the Guard and Reserve
- www.esgr.org
- 1-800-336-4590

VETS

- VETERANS EMPLOYMENT AND TRAINING SERVICE
- www.dol.gov/vets

**WHEN JOHNNY COMES
MARCHING HOME:
EMPLOYERS' OBLIGATIONS
UNDER USERRA**

Presented by:
Phillip R. Jones
901 Main Street, Suite 6000
Dallas, Texas 75202
214-953-5921
pjones@jw.com

***When Johnny Comes Marching Home:
Employers' Obligations Under USEERRA***

November 10, 2005

Phillip R. Jones
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-5956
(214) 661-6611- (direct facsimile)
pjones@jw.com

1.0 INTRODUCTION

In the 4 years that have passed since the terrorist attacks of September 11, 2001, the Reserve and National Guard forces of the United States have been repeatedly mobilized and demobilized. According to the Department of Defense, there were 150,754 Reserve and National Guard forces mobilized as of October 27, 2005, down from the 185,432 such troops who were mobilized as of February 16, 2005. More than one Pentagon official has noted that the days of weekend warriors – who could expect to train one weekend per month and two weeks during the summer and rarely, if ever, be mobilized – are over. If the past 4 years are a guide, the United States will continue mobilizing and demobilizing Reserve and National Guard forces into the near future. Employers should therefore become familiar with the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), which governs leaves of absence taken to perform military service and the service-members’ right to reemployment following such leaves.

2.0 THE USERRA

Congress passed the USERRA after the first Persian Gulf War to clarify and strengthen the USERRA’s predecessor, the Veterans’ Reemployment Rights Act. In passing the USERRA, Congress intended to: (1) to encourage “non-career” participation in the armed services by minimizing the harm caused to civilian careers by such service; (2) facilitate prompt reemployment of men and women in uniform after they complete their military service, thereby minimizing the disruption to their lives, their employers, their fellow employees and their communities; and (3) prohibit discrimination against individuals based on their military service. To this end, the USERRA establishes certain rights and benefits for employees who serve, have served, or intend to serve in the uniformed services. These rights and benefits apply primarily in the context of employment, reemployment, and retention in employment.

2.1 THE IMPORTANCE OF UNDERSTANDING USERRA.

Most anti-discrimination statutes forbid disparate treatment, *i.e.*, they require employers to treat protected individuals the same as non-protected individuals. The individualized assessment and accommodation sometimes required by the USERRA upon returning an employee to work is similar to the individualized assessment required by the Americans With Disabilities Act of 1990 (“ADA”). Like the ADA, the USERRA requires employers to individually assess requests for accommodation made by members of the protected class and, where an accommodation does not impose an undue hardship, provide it. The employer’s duty to provide individual assessment, treatment and accommodation is illustrated by *Fink v. City of New York*, 129 F. Supp. 2d 511 (E.D. N.Y. 2001).

In *Fink*, a fireman, Fink, could not take a job-related examination which was a prerequisite for promotion because he was ordered to serve in Bosnia. Following the end of Fink’s tour in Bosnia, he returned to his job as a fireman and requested that he be permitted to

take a make up examination so that he would be eligible for promotion. The fire department refused the request, and when pressed on the issue, the personnel director stated that she did not want to hear any more of Fink's "veteran's bullshit." She also told Fink that he was being treated like every other person on a leave of absence. When Fink informed the fire department that under federal law he was entitled to receive credit for the time he spent in Bosnia for purposes of calculating his pension, a representative told him, "I don't know nothing about the law. This is the way the fire department does it. . . . Period. That's it. You're not getting it." The Court correctly noted that Fink "was not on an ordinary leave of absence" and affirmed the jury's finding that the fire department violated the USERRA.

The fire department failed to understand its duties under the USERRA, which can trump an employer's obligations under a collective bargaining agreement or state law. Although the fire department followed its own policies, it failed to understand that that the USERRA required it to treat Fink differently, indeed more favorably, than other employees on a leave of absence. The fire department also failed consider how inflammatory its conduct would appear to a jury. Fink was a *highly-decorated* veteran of the wars in Vietnam and Bosnia. He received more than 50 decorations from a variety of sources, including the Army, the Navy, the Marines, NATO and the state of New York. His service in the fire department also was exemplary. Had the fire department inquired into its duties under the USERRA, or paused to consider Fink's natural jury appeal, it would have realized the need to accommodate Fink's relatively simple requests. However, it did not and, consequently, Fink was awarded almost \$900,000 by the jury.

2.2 THE MEANING OF "EMPLOYER" AND "EMPLOYEE" UNDER THE USERRA.

2.2.1 "Employer"

"Employer" means "any person, institution, organization, or other entity that pays salary or wages for work performed *or* that has control over employment opportunities, including . . . a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities . . ." Thus, unlike many other anti-discrimination statutes, an employer need not have a minimum number of employees to be covered by the USERRA. Also, as explained by the USERRA regulations (hereafter, the "Regulations"), where one entity pays an employee and another controls the employee's "employment opportunities," both entities are "employers" under the USERRA. Similarly, successor entities are included in the definition of "employer,"^A as are foreign employers that have physical locations in the United States and American companies that operate directly or indirectly in foreign countries.^B Finally, the definition of USERRA appears to include

^A An ERISA-governed employee pension benefit plan is an "employer" with respect to its obligation to provide pension benefits to an employee even if it is not the employee's employer. 20 C.F.R. § 1002.5(d)(3).

^B "The determination of whether an employer is a successor in interest must be made on a case-by-case basis using a multifactor test that considers the following: (a) Whether there has been a substantial continuity of business operations from the former to the current employer; (b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production; (c) Whether there has been a substantial continuity of employees; (d) Whether there is a similarity of jobs and working conditions; (e) Whether there is a similarity of supervisors or managers; and, (f) Whether there is a similarity of products or services." 20 C.F.R. § 1002.35.

supervisors, managers and other individuals or entities that have “control over employment opportunities.”

2.2.2 “Employee”

“Employee” means “any person employed by an employer” and includes an employer’s former employees. The term also includes citizens and national or permanent resident aliens of the United States who work in foreign countries for employers that are incorporated or organized in the United States, or that are controlled by an entity organized in the United States. The USERRA also protects applicants for employment by forbidding employers from refusing to hire an individual based on his or her past service in the armed forces, obligation to perform service in the armed forces, or application to become a member of the armed services. Therefore, with respect to denials of “initial employment” based on a person’s military service, the employer need not actually employ the person to be liable to him or her under the Act. The USERRA does not protect individuals who are discharged dishonorably, for bad conduct, or under conditions that are other than honorable.

2.3 EMPLOYER DUTIES UNDER THE USERRA.

2.3.1 The Duty to Not Discriminate .

The USERRA forbids employers from denying to any person “initial employment, reemployment, retention in employment, promotion, or any *benefit of employment*” on the basis of the person’s membership or application for membership in the armed services or the person’s “performance of service, application for service, or obligation” to serve in the armed services. The USERRA defines *benefit of employment* quite broadly. It includes “any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice . . .” It includes “rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select hours of work or location of employment.” The broad definition of *benefit of employment* is illustrated by USERRA cases.

2.3.1.1 *Hill v. Michelin North America, Inc.*

In *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312-13 (8th Cir. 2001), the court held that a regular work schedule is a *benefit of employment* under the USERRA, at least where the employee was required to work a schedule consisting of both 8 and 12 hour shifts and the schedule to which the employee was arguably entitled consists of only 8 hour shifts.

2.3.1.2 *Harris v. City of Montgomery*

In *Harris v. City of Montgomery*, 322 F.Supp.2d 1319, 1324 (M.D. Ala. 2004), the court held that a poor evaluation of an employee’s performance, “if it prevents a raise, denies a benefit of employment.” *Harris v. City of Montgomery*, 322 F.Supp.2d 1319, 1324 (M.D. Ala. 2004). In *Harris*, the employee’s supervisor wrote a memorandum about the employee, Harris, stating that Harris is:

knowledgeable of and carries out his duties and assignments. He is punctual for work and notifies me if he may be late. He requests leave in advance and does not abuse sick leave. However, he needs improvement in the area of following the chain of command.

Harris, 322 F.Supp.2d 1319, 1322.

Three days later, the same supervisor had this to say about Harris:

Coach Harris fails to notify the Director of intent to be off work in a timely manner; fails to submit request for leave/submit military leave orders in a timely manner; leaves work early; fails to notify the Director of his practice schedule; fails to follow protocol & chain of command in resolving problems; displays a lack of respect for the Director/Assistant Director – failure to maintain a professional domineer [sic] when speaking with the Director; questions/challenges authority & decisions made by the Director; jeopardized the safety of athletes; and is not a team player.

Harris, 322 F.Supp.2d 1319, 1322.

After noting that neither party offered an explanation for the dramatic change in the supervisor's opinion, the court noted that when a poor performance evaluation results in the denial of a pay raise, it denies a benefit of employment. *Harris*, 322 F.Supp.2d 1319, 1324.

2.3.1.3 *Yates v. Merit Systems Protection Bd.*

Yates v. Merit Systems Protection Bd., 145 F.3d 1480 (Fed. Cir. 1998) is similar to *Harris*. In *Yates*, a new postal service employee was on a 90-day probationary period and was supposed to receive performance evaluations at 30, 60 and 90 days into her employment. She did not receive the 30-day evaluation because of military service. At the end of her 90-day probation, she was discharged for unsatisfactory performance. In a subsequent lawsuit, Yates claimed that the postal service denied her a "benefit of employment" under the USERRA when it failed to give her the 30-day performance review. According to Yates, had she received the 30-day performance review, she would have withdrawn from her position with the postal service and not quit a full-time job she had elsewhere. The court found that Yates stated a claim under the USERRA because her evaluation "is properly viewed as a 'benefit of employment' because ... [it] was an 'advantage' or 'status' of her probationary employment with the Postal service." *Yates*, 145 F.3d 1480, 1485.

2.3.1.4 *Schmauch v. Honda of America Mfg., Inc.*

The failure to remove an employee from corrective disciplinary action can, in some circumstances, constitute a denial of a *benefit of employment* under the USERRA. In *Schmauch v. Honda of America Mfg., Inc.*, 295 F.Supp.2d 823 (S.D. Ohio 2003), Honda placed an employee with poor attendance on an Attendance Improvement Program ("AIP"). Employees on the AIP were required to improve their attendance and adhere to criteria over a span of time totaling six months. Pursuant to the AIP, "absences taken during the period covered by an AIP

for Military Leave, FMLA Leave, Medical Leave, Personal Leave, and Educational Leave prolong the AIP by the number of days spent on such leaves.” *Schmauch*, 295 F.Supp.2d 823, 826. This was not true for other types of absences, such as leaves for bereavement, court-appearances and worker’s compensation.

While on AIP, Schmauch took military and FMLA leave. Schmauch was not disciplined for taking this leave, but Honda extended the length of the AIP by a number of days equal to the time Schmauch was absent on military and FMLA leave. As a result, Schmauch would have completed the AIP in June, but it was extended into August. On August 7, Schmauch had an “attendance occurrence” for which he was terminated. In a subsequent suit, Schmauch claimed that Honda violated both the FMLA and the USERRA by extending his AIP. The court held that Schmauch created a genuine issue of material fact as to whether Honda violated the FMLA by extending the AIP of employees on FMLA leave and thus “discouraging” them from taking FMLA leave. *Schmauch*, 295 F.Supp.2d 823, 831-32. With respect to the USERRA claim, the court stated:

A “benefit of employment” includes an “advantage” or “privilege” accrued by reason of an employment contract. A reasonable jury could find the employment relationship between Schmauch and Honda is an “employment contract,” and it is an “advantage” or “privilege” to be able to extinguish one’s AIP because, plainly, the quicker an associate does so, the less time he is in peril of losing his job for an unexcused attendance occurrence. Here, if Schmauch’s AIP had expired on June 21, 2001, his August 7, 2001 attendance occurrence would not have been cause for his termination. Thus, the “extinguishment of an AIP” may constitute a “benefit of employment,” as defined under USERRA.

Schmauch, 295 F.Supp.2d 823, 839.

2.3.2 The Duty to Not Retaliate.

The USERRA also prohibits employers from retaliating against an individual because the individual has:

- (1) acted to enforce a protection afforded any person under USERRA;
- (2) testified or otherwise made a statement in connection with a proceeding under the USERRA;
- (3) assisted or participated in a USERRA investigation; or,
- (4) exercised a right provided for by USERRA.

Like “Title VII, many actions may form the basis of protected activities giving rise to a claim of retaliation under the USERRA.” *Gagnon v. Sprint Corp.*, 284 F.3d 839, 854 (8th Cir. 2002). An internal complaint regarding an employer’s failure to comply with the USERRA constitutes a protected activity under the USERRA and, therefore, any retaliation against an

employee for making such an internal complaint constitutes illegal retaliation under the USERRA. *Gagnon*, 284 F.3d 839, 854.

The protections afforded to individuals under the USERRA's anti-retaliation provisions apply whether or not the individual is a member of the armed services if the individual has engaged in conduct protected by the Act. Similarly, the USERRA's anti-retaliation *and* anti-discrimination provisions apply to employees in brief, non-recurrent positions of employment even though these employees have no right to reemployment under the USERRA.

2.3.3 The Duty to Provide Reemployment.

An employer must promptly reemploy an eligible covered employee when he or she returns from a period of service. "Prompt reemployment" means as soon as practicable under the circumstances of the individual case.

An employee who is absent from work for military leave is entitled to reemployment rights and benefits and other employment benefits if:

- (1) the absence is for USERRA-protected service, *i.e.*, "service in the uniformed services"; and
- (2) the employer is given advance written or verbal notice of the military service (unless the giving of such notice is unreasonable or impossible); and
- (3) the cumulative length of military service is does not exceed five years; and
- (4) the employee submits an application for reemployment or reports for reemployment; and
- (5) the employee is not discharged dishonorably, for bad conduct, or under conditions that are other than honorable.

2.3.3.1 Service in the Uniformed Services

"Service in the Uniformed Services" means the "performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty" under Federal authority, and absences for medical examinations and funeral honors duty.^C Although the USERRA is "most often understood as applying to National Guard and reserve military personnel . . . [it] also applies to persons serving in the active components of the Armed Forces. However, [the] USERRA's reemployment provisions vary according to the length of service in the uniformed services."

It is important to remember that "service in the uniformed services" also includes service in "the commissioned corps of the Public Health Service . . . and any other category of persons

^C "Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not 'service in the uniformed services.'" 20 C.F.R. § 1002.55(b).

designated by the President in time of war or national emergency.” Similarly, pursuant to the Public Health Security and Bioterrorism and Response Act of 2002, service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or as a participant in an authorized training program counts as “service in the uniformed services.” Because of the broad definition of “service in the uniformed services,” an employer is forbidden from taking adverse action against an employee who continually volunteers for extra military service. See *Leisek v. Brightwood Corp.*, 278 F. 3d 895 (9th Cir. 2002). If an employer has an issue with an employee continually volunteering for extra service, the employee should address the matter with the appropriate military authority as noted by 32 C.F.R. § 104.4.

In determining whether an employee’s absence is for “service in the uniformed services,” it is important to note that employees are not required to begin military service immediately after taking off work, nor are they required to report to work immediately after completing their military service. At a minimum, the employees must have enough time after leaving their employment position to travel safely to the site where their military service is to be performed, and arrive fit to perform. Depending on the specific circumstances, an employee may need additional time to rest, or to arrange his or her affairs and report to duty. If, for example, an employee is ordered to perform an extended period of military service, the employee typically will require a reasonable period of time off work to put his or her personal affairs in order before beginning the military service. This time off is protected by the USERRA, as is the time following a period of military leave, which is discussed generally in § 2.3.3.4, *infra*.

2.3.3.2 Advance Notice

“Notice,” when an employee is required to give advance notice of service, means any written or verbal notification of the employee’s obligation or intention to perform service in the uniformed services provided to the employer by the employee who will perform such service or by the uniformed service in which the service is to be performed. Notice should be provided as far in advance as is reasonable under the circumstances, but no notice is required where giving notice is prevented by military necessity or is otherwise impossible or unreasonable under the circumstances. Only a designated military authority can make a determination of “military necessity,” and such determinations are not subject to judicial review.

When notice is being provided to an employer regarding the necessity of an employee to take military leave, the employee may not be required to state whether he or she intends to seek reemployment after completing military service. Moreover, even if an employee expresses an intention to not seek reemployment after completing the military service, the employee does not forfeit right to reemployment under the USERRA.

2.3.3.3 Five-Year Cumulative Limit On Service

The five-year limit does not include all the time off work an employee takes for military service. The five-year limit does not, for example, include the time an employee takes off work before and after a period of military service. See § 2.3.3.1 *supra*. Rather, it includes only the time actually spent by the employee performing military service. Likewise, the five-year limit does not include periods of military service rendered by an employee when the employee worked for a previous employer. Additionally, several categories of “uniformed service” are specifically

exempted from, and thus do not count toward, the five-year limitation, including but not limited to:

- (1) service performed in excess of five years if through no fault of the service-member an order releasing the service-member from service could not be obtained;
- (2) service performed, including but not limited to the following, if the service-member was ordered to or retained on active duty under the following conditions: (i) involuntary active duty by a military retiree, (ii) involuntary active duty in wartime, (iii) retention on active duty while in captive status, (iv) involuntary active duty during a national emergency for up to 24 months, (v) involuntary active duty for an operational mission for up to 270 days, and (vi) involuntary retention on active duty of a critical person during time of crisis or other specific conditions;
- (3) service performed in a uniformed service if the service-member was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by a proper military authority;
- (4) service performed if the service-member was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under law, as determined by a proper military authority;
- (5) service performed if the service-member was ordered to active duty in support of a critical mission or requirement as determined by a proper military authority;
- (6) service performed as a member of the National Guard if the service-member was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States; and
- (7) service performed to mitigate economic harm where the service member's employer is in violation of its employment or reemployment obligations to the service member.

The foregoing list of exceptions to the five-year service limit is by no means exhaustive. Rather, it merely represents the types of service which a service-member is likely to be called to perform in order to maintain national security in light of the terrorist attacks of September 11 and the subsequent wars in Afghanistan and Iraq.

2.3.3.4 Application for Reemployment

Set forth below are the time-frames within which an employee must report back to work or seek reemployment following an absence for USERRA-protected service. Importantly, an employee who misses these time-frames does not automatically forfeit right to reemployment

under the USERRA. Rather, the employee becomes subject to the employer's conduct rules, established policy, and general practices pertaining to absences.

An employee's application for reemployment need not follow a particular format, nor must it be in writing. However, the application should indicate that the employee is a former employee returning from military service seeking reemployment. The employee may identify a particular position in which he or she is interested, but the employee cannot be required to do so. The application must be submitted to the employer or an agent or representative of the employer who has apparent responsibility for receiving employment applications. Additionally, an employee does not lose eligibility for reemployment by seeking or obtaining employment with a new employer, provided the employee makes a timely reemployment application to the employee's pre-service employer.

If an employee's period of service lasts more than 30 days, the employer may request – and the employee must furnish – documentation to establish that: (1) the employee's reemployment application is timely; (2) the employee has not exceeded the five-year service limit; and (3) the employee's separation or dismissal from service is not disqualifying. An employer may not delay or deny reemployment if documentation establishing the employee's eligibility does not exist or is not readily available, but the employer may terminate an employee upon receiving documentation showing that the employee is not eligible for reemployment.

(i) *Military service lasting less than 31 days*

For periods of service less than 31 days, or for an absence for an examination to determine an employee's fitness for duty, the employee must report back to the employer "not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of" service, and a period of eight hours following a period of time allowing for the employee's safe transportation from the place of service to his or her residence. If, through no fault of the employee, this is impossible or unreasonable, then the employee must report to the employer as soon as possible after the expiration of the eight hour period.

If, for example, an employee completes a period of service and travels home, arriving at 10:00 p.m., the employee cannot be required to report to work until the beginning of the next full regularly-scheduled work period that begins at least eight hours after the employee safely arrives home, *i.e.*, no earlier than 6:00 a.m. According to the regulations, if the employee in the foregoing example was scheduled to start working at 5:00 a.m., the employer could not require him to report to work at 6:00 a.m., after the shift began. Rather, the employer could only require the employee to report to work the following workday at 5:00 a.m., if that is the next full regularly-scheduled shift.

(ii) *Military service lasting more than 30 days but less than 181 days*

An employee whose period of military service is more than 30 days but less than 181 days must submit an application for reemployment within 14 days after the completion of the period of service. If, through no fault of the employee, this is impossible or unreasonable, then the employee must submit an application for reemployment on the next full calendar day when submission of such application becomes possible.

(iii) *Military service lasting more than 180 days*

An employee whose period of military service is more than 180 days must submit an application for reemployment within 90 days after the completion of the period of service.

(iv) *Military service extended by hospitalization or convalescence*

An employee whose leave for military service is extended by a period of hospitalization or convalescence because of an illness or injury suffered or aggravated by military service shall, at the end of such period of hospitalization or convalescence, report for reemployment or apply for reemployment as set forth in §§ 2.3.3.4(i)-(iii) *supra*. If the period of recovery exceeds two years, the employee shall have such rights as an employee who missed an equivalent period of time for a non-USERRA protected leave of absence would have under the employer's general policies or practices. However, such "two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the [applicable] period[s] . . . impossible or unreasonable."

2.3.3.5 Discharge From The Uniformed Services

An employee does not lose his or her USERRA rights based on the character of the employee's service unless the employee has been discharged in one of the following four scenarios: (i) dishonorable or bad conduct discharge; (ii) under other than honorable conditions, as characterized by military regulations; (iii) for a commissioned officer, dismissal by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or (iv) for a commissioned officer dropped from the rolls due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

If any of the foregoing types of discharges are later upgraded, the service member's right to reemployment under USERRA will be restored if the service member is otherwise eligible, but the service member will not be entitled to back pay and other benefits for the period of time between the disqualifying discharge and the upgrade.

2.3.4 Employer Defenses To The Duty To Provide Reemployment.

An employer is relieved of its obligations to reemploy a person under the USERRA if it can prove:

- (1) the employer's circumstances have so changed as to make reemployment impossible or unreasonable;
- (2) the employee became disabled or aggravated a disability and accommodating the employee in his position or training the employee for a new position would pose an "undue hardship" on the employer; or

- (3) the original employment was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

2.3.4.1 Changed Circumstances

An example of a change in circumstances under which an employer would not have a duty under the USERRA to reemploy an otherwise eligible employee is a reduction-in-force in which the employee would have been laid off had he or she not been on military leave.

2.3.4.2 Undue Hardship

“Undue Hardship,” in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of:

- (1) the nature and cost of the action needed under the USERRA;
- (2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (3) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
- (4) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

2.3.4.3 Employment In “Brief Non-Recurrent” Positions

Positions for brief, nonrecurrent periods should not be confused with temporary, part-time, probationary, or seasonal employment positions, which do give rise to reemployment rights under the USERRA.

2.3.5 Application of the “Escalator Principle” In Reemployment.

As a general rule, the eligible covered employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for his or her absence due to military service. This policy is known as the “escalator principle;” the job position that it identifies is the “escalator position.” The escalator principle holds that, if not for the period of military service, the employee could have been promoted (or, alternative, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites that he or she would have attained if not for the period of service. In all

cases, the starting point for determining an eligible covered employee's proper reemployment position is the escalator position.

An individual "is entitled to seniority and other rights and benefits determined by seniority" that he had on the date his military service began "plus the additional seniority and rights and benefits" that he would have attained had he remained continuously employed. "Seniority" means "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment." With respect to rights and benefits not determined by seniority, a person who is absent by reason of military duty is deemed to be on furlough or leave of absence during such service and is "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer . . . to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the covered employee must be given the most favorable treatment accorded to any comparable form of leave.

In a recent case, the Fifth Circuit Court of Appeals confirmed this interpretation of the escalator principle, with regard to both the rate of pay that an employee would have achieved, as well as seniority rights that would have accrued. *Rogers v. City of San Antonio*, 392 F.3d 758, 769 (5th Cir. 2004).

2.3.5.1 Military Service Lasting Less Than 91 Days

Except as noted in §§ 2.3.5.3 and 2.3.5.4 *infra*, a person returning from a period of military service that was for less than 91 days is entitled to the position of employment he would have held if the employment had not been interrupted by the period of military service, provided the person is qualified to perform the duties of such position. If the employee is not qualified for such position, the employer must make reasonable efforts to qualify the employee for the position. If these efforts fail, the employee may be put in the position of employment he or she held on the date of the commencement of military service.

"Qualified" with respect to an employment position means "having the ability to perform the essential tasks of the position." "Reasonable Efforts" with respect to an employer's USERRA obligations means "actions, including training provided by an employer, that do not place an "undue hardship" on the employer.

2.3.5.2 Military Service Lasting More Than 90 Days

Except as noted in §§ 2.3.5.3 and 2.3.5.4 *infra*, a person returning from a period of military service that was for more than 90 days is entitled to the position of employment he would have held if the employment had not been interrupted by the period of military service or a position of like seniority, status, and pay, provided the person is qualified to perform the duties of such position. If the employer is unable, after reasonable efforts, to qualify the employee for any of these positions, the employee may be returned to the position of employment he or she held on the date of the commencement of military service or a position of like seniority, status and pay, provided the person is qualified to perform the duties of such position.

2.3.5.3 Return Of An Employee Who Has Suffered Or Aggravated A Disability During Military Service

If an employee incurs or aggravates a disability during the military service, and by reason of such disability is not qualified for the position he would have held but for the interruption in his employment, the employer must make reasonable efforts to accommodate the disability. If these efforts fail, the individual is entitled to “any other position which is equivalent in seniority, status, and pay” provided the individual is qualified for the position or would become qualified through reasonable efforts of the employer. If no such position is available, the individual is entitled to a position “which is the nearest approximation to [such] position . . . in terms of seniority, status, and pay . . .”

2.3.5.4 Return Of An Employee Who Is Not Qualified For Reasons Other Than Disability

If, due to a reason other than disability, a person is not qualified for (1) the position he would have held but for the interruption in his employment or (2) the position he held when his service began, and he cannot become qualified for such positions, and the person cannot become qualified through the reasonable efforts of the employer, the individual is entitled to “the nearest approximation to a position” such as that he would have held but for the interruption in his employment or, alternatively, the nearest approximation to the position he held when his employment was interrupted by his military service.

2.3.6 Vacation During Leave For Military Service.

The USERRA explicitly forbids employers from requiring an employee to use his vacation during a period of military service. This is true even with respect to reservists who attend annual training in the summer. If, however, an employee wants to use his vacation when he is on military leave, the employer must permit him to do so.

2.3.7 Discharge Only “For Cause” Following Military Leaves Of At Least 30 Days

An individual who is reemployed after military service of at least 180 days may be discharged only for cause for a period of one year following his reemployment. If the period of military service was more than 30 days, but less than 181 days, the individual may be discharged only for cause for a period of 180 days following his reemployment. “For cause” discharge may be based either upon the employee’s conduct or, in some circumstances, the application of the escalator principle. If the discharge is based upon the employee’s conduct, the employer bears the burden of proving that the discharge was reasonable and that the employee had notice that his or her conduct would constitute cause for discharge. If the discharge is based upon the application of the escalator principle, the employer bears the burden of proving that the employee’s job would have been eliminated.

3.0

BURDEN OF PROOF.

The burden-shifting framework approved of in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401, 103 S.Ct. 2469, 2474, 76 L.Ed.2d 667 (1983) is used to discern

whether an employer has discriminated or retaliated against an employee in violation of the USERRA.^D This requires three phases of proof:

First, the . . . [plaintiff] must show by a preponderance of the evidence that . . . [military status] was a motivating factor in the [the adverse employment decision]. Such a showing establishes . . . [a] violation unless the employer can show as an affirmative defense that it would have [made the same decision] for a legitimate reason regardless of the . . . [plaintiff's military status]. The . . . [plaintiff] may then offer evidence that the employer's proffered 'legitimate' explanation is pretextual – that the reason either did not exist or was not in fact relied upon – and thereby conclusively restore the inference of unlawful motivation.

Harris v. City of Montgomery, 322 F.Supp.2d 1319, 1325 (M.D. Ala. 2004), quoting, *NLRB v. McCain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

4.0 CONCLUSION

Given the mobilization and demobilization of Reserve and National Guard members over the past 3 ½ years and the present active-duty status of more than 185,000 reserve forces, employers should be aware of their obligations under the USERRA. Given the complexity of the statute and its implementing regulations, employers should address questions about an employee's military service to an attorney who understands the USERRA and its implementing regulations.

^D Employers should anticipate that disputes will be adjudicated in a court of law, as at least federal court has determined that Congress explicitly excluded USERRA cases from the purview of mandatory arbitration provisions. *Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717, 721-22 (N.D. Tex 2004).

GARY A. THORNTON

Worker's Compensation and Non Subscriber Law Update

GARY A. THORNTON

Gary A. Thornton is a partner in the Litigation and Labor sections of Jackson Walker. Mr. Thornton leads the Labor group in the Jackson Walker Austin office. Before becoming an attorney, he was a radio/television news broadcaster and college professor. His legal practice focuses in the area of non-subscriber tort litigation and malpractice defense for health care providers. He wrote the foundation article for the *Texas Bar Journal* on non-subscriber litigation. Since that time, he has represented corporations all over Texas in their employee injury matters and has organized an Austin team expanding into all areas of employment law defense.

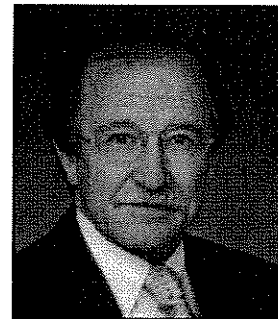
Prior to joining the firm, Mr. Thornton was a briefing attorney for Chief Justice Jack Pope of the Texas Supreme Court.

MEMBERSHIPS

Mr. Thornton is presently a member of the State Bar of Texas, the Travis County Bar Association, the American Bar Association and the Christian Legal Society. He has served as president of the Travis County Bar Association, a member of the MCLE Texas State Bar Committee and one of the chairmen of Committees for the Litigation Section of the American Bar Association. Mr. Thornton was recently paid the honor of being appointed to the Board of Directors for the Texas Association of Business.

COMMUNITY INVOLVEMENT

Mr. Thornton serves as an Elder at the University Avenue Church near the University of Texas, previously he served as chairman of the board for a local homeless organization. He recently served on the Board of Directors for the Greater Austin Chamber of Commerce and the Austin Graduate School of Theology. He also serves as a member of the Board of Trustees for Abilene Christian University and the Board of Visitors at Pepperdine School of Law.



Gary Thornton practices litigation.

B.A., Abilene Christian University

M.A., Abilene Christian University

J.D., Pepperdine University

gthornton@jw.com

GARY A. THORNTON

PUBLICATIONS / SPEAKING ENGAGEMENTS

He is a frequent author and speaker. Among the articles he has authored are “Landowners Should Know Rights in Condemnation Cases,” *The Cattleman* (January 1986); “Additions to and Realignment of Travis County Courts to Help With Heavy Criminal Docket and Condemnation Explosion,” *Austin Lawyers Journal* (November 1987); “Litigation Involving Non-Subscribers to Workers Compensation Insurance,” *Texas Bar Journal* (April 1991); “Jury Selection Study,” *Austin Lawyers Journal* (November 1991) and *The County and District Clerk* (November 1991); and “Litigation Involving High Power Electrical Transmission Line Cases” *Condemnation Law Trends* (Spring 1992) and *Current Condemnation Law* (American Bar Association 1994).

Additionally, Mr. Thornton is often asked to speak at seminars on various employment matters and has advised boards of directors throughout the state regarding the options available to them concerning workers compensation.

EDUCATION

Mr. Thornton earned his B.A. degree, and Master’s degree in mass communications, from Abilene Christian University and his J.D. degree from Pepperdine University.

Worker's Compensation and Non Subscriber Law Update

Presented by:
Gary A. Thornton
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(512) 236-2210
gthornton@jw.com

Tort Reform

Arbitration

Legislation would have required the publication of a significant amount of information about confidential arbitration awards and would have required the registration of arbiters.

Obesity

No cause of action exists in Texas for weight gain related to the consumption of food products.

Jury Service

Pay raise to \$40 per day beginning on the second day of service.

Texas Legislative Reform to Workers' Compensation

Texas Legislative Reform to Workers' Compensation

Texas leads the nation in percentage of uninsured workers according to a study by Robert Wood Johnson Foundation. In Texas, 20% of working adults are uninsured. The average cost of health insurance per employee is \$9,000 per year.

Dallas Morning News, September 15, 2005

- "The Percentage of companies offering insurance dropped to 60 percent in 2005, down from 69 percent five years ago."
- "...premiums continue to increase more than three times as fast as...wages."

Wall Street Journal, September 15, 2005

- "Employers are facing a 9.2% increase in the cost of providing health care to employees this year, pushing the premium for an average family health plan above the annual salary of a minimum-wage worker, a nationwide survey shows...survey conducted by the Kaiser Family Foundation and Health Research and Education Trust."

**Wall Street Journal,
September 15, 2005**

- "That makes a family premium more expensive than the \$10,712 a full-time minimum-wage worker earns in a year. Given the average worker pays 26% of those annual premiums or \$2,713, the cumulative rise in health-care costs has made it all but impossible for many low-income workers to afford company-sponsored coverage."

**Summary of House Bill 7
(79th Legislature)**

- Effective September 1, 2005, The Texas Workers' Compensation Commission (TWCC) is abolished and its functions transferred to the Division of Workers' Compensation (Division) within the Texas Department of Insurance (TDI).
- Administered by a single Commissioner.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- Mission of the Division
 - Treating injured employees with dignity and respect;
 - Providing a fair and accessible dispute resolution process;
 - Providing access to prompt, high quality medical care within the statutory framework; and
 - Providing services to facilitate an injured employee's return to work as soon as it is considered safe and appropriate by the employee's health care provider.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- A new state agency, the Office of Injured Employee Counsel (OIEC), whose primary mission is to represent the interests of injured employees in the workers' compensation system.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- Workers' Compensation Research
 - "Workers' Compensation Research and Evaluation Group."
 - The Group must produce a biennial report on the impact of networks on the cost and quality of medical care and an annual report card comparing workers' compensation health care delivery networks certified by TDI.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- Health Care Networks
 - Insurance carriers, self-insurers, groups of self-insurers and governmental entities that self-insure may elect to contract with or establish health care networks certified by TDI.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- An injured employee may choose a treating doctor from the list of doctors maintained by the network. If an injured employee does not make an initial choice within 14 days, the network will assign a treating doctor to the injured employee. An injured employee may be liable for medical care that is related to the compensable injury if that employee is required to seek care within a network and that employee sees a non-network provider without network approval.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- If an injured employee is dissatisfied with his or her initial choice of treating doctor, the injured employee is entitled to select another treating doctor from the network's list of doctors.
- A network may operate under its own treatment guidelines and preauthorization requirements, although treatment guidelines used by a network must meet minimum statutory criteria.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- The network must ensure that its list of health care providers includes an adequate number of treating doctors and specialists, who are available and accessible to employees 24 hours a day, seven days a week, within the network's service area.
- Pharmacy services are specifically excluded from workers' compensation networks.
- An HMO and PPO may be certified as a workers' compensation health care network.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

• Health Care Definitions

- "Health care reasonably required" is clinically appropriate and considered effective for the employee's injury in accordance with evidence-based medicine or practice standards recognized in the medical community.
- "Evidence-based medicine" is current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and treatment and practice guidelines.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

• Return-to-Work

- For small employers with workers' compensation insurance, grants for up to \$2,500 per employer to pay for workplace modification initiatives begins January 1, 2006 and expires September 1, 2009.
- State Average Weekly Wage
- Income Benefit Retroactive Period

**Summary of House Bill 7
(79th Legislature) (cont'd)**

• Supplemental Income Benefits

- Requires the Commissioner of Workers' Compensation to adopt rules regarding the level of activity an injured employee must have with the Texas Workforce Commission (TWC) and the Department of Assistive and Rehabilitative Services (DARS), as well as the number of job applications that must be submitted by an injured employee each quarter to meet minimum work-search requirements.

**Summary of House Bill 7
(79th Legislature) (cont'd)**

- Intoxication Presumption
 - Rebuttal presumption if the employee tests positive for a controlled substance.

For years, physicians, employers, and injured workers begged lawmakers to reform a state workers' compensation system that was costly, full of hassles, and didn't seem to get workers back on the job very quickly. Now they've gotten their wish. But the question is...

**WILL THEY BE SATISFIED WITH
THE CHANGES MADE BY
THE LEGISLATURE?**

-October 2005 TEXAS MEDICINE

TMA was not enthusiastic about creating workers' compensation networks but supported the reforms after lawmakers granted physicians the ability to negotiate fees-within the networks and subjected the fees to similar prompt pay and patient protection provisions that govern other group health plans.

-October 2005 TEXAS MEDICINE

"What I'm seeing so far, as I predicted prior to the law passing, is the carriers are screening us to be in their network based on our willingness to take a discount off the fee schedule," Dr. Swift said. "The carriers appear to be reverting to their historic predatory behavior."

-October 2005 TEXAS MEDICINE

Dr. Swift says his group has been offered workers' compensation contracts by at least two would-be carriers, including Aetna, substantially below the current fee schedule.

"They're just trying to fill up their network with physicians who are willing to take a discount without regard to quality of care," he said.

-October 2005 TEXAS MEDICINE

Non-Subscriber Cases and Trends

Trend #1

Plaintiff's attorney files

- ERISA claim in federal court
- Negligence claim in state court

Reasons:

- Advanced discovery in federal court case
- Test for fiduciary duties to employees
- Test for consistency of benefit awards
- Test for "committee" functions
- Test for ERISA Plan compliance with regulations
- Test for written authority of ERISA Plan to take actions (i.e. insist on release of liability, deny benefits, etc.)

Trend #2

Arbitration

Case: Halliburton

Case: In re Halliburton
Texas Supreme Court (2002)

Facts:

- Notice from Company:
 - New mandatory arbitration policy
 - Continued employment constitutes acceptance
- Plaintiff claimed:
 - Received notice
 - But did not understand it
- Plaintiff claimed wrongful demotion
- Defendant filed Motion to Compel Arbitration

Texas Supreme Court:

1. Federal Arbitration Act applies

- Why?
- Why is that important?

Texas Law:

In a personal injury claim, an agreement to arbitrate is valid and enforceable only if:

- Each party
 - Agrees in writing
 - With advice of counsel
- Agreement is signed by
 - Each party
 - Each attorney

Halliburton (cont'd)

Supreme Court Considerations:

- Halliburton's right to modify or amend saving language

"no amendment shall apply to a dispute of which Halliburton has notice on the date of the amendment"

Halliburton (cont'd)

(Handbook problem: "Company has the right to change, alter, or amend this handbook at any time with or without notice to employees.")

Halliburton (cont'd)

3. No opportunity to negotiate (unconscionable, adhesion)

Court : "mere employment term"

Halliburton (cont'd)

4. Costs

Court: "The company agreed to pay all expenses... except a \$50 filing fee"

Halliburton (cont'd)

5. Selection of arbitration:

Court: both sides participate

**Case:
Beaird Industries Inc.**

Case: Beaird Industries Inc.
5th Circuit US Court of Appeals (2005)

Holding: Arbitrator is limited by express terms of contract.



**Arbitration:
Wiping Out Consumers Rights?**

BY NOSSAM M. FARNY

The use of consumer arbitration in consumer, specific, their insurance, health, education, and other areas... (text continues in two columns)


EMPLOYMENT LAW

The menace of mandatory arbitration

Arbitration clauses require workers to sign away their rights and take a detour around the courthouse. Although judges have repeatedly upheld these clauses, there are ways to challenge and halt their worst excesses.

JIMMY WALK AND TOM O'BRIEN

The... (text continues in two columns)



BY JIMMY WALK AND TOM O'BRIEN

Case:
Campbell v. Gen. Dynamics

Case: Campbell v. Gen. Dynamics
407 F. 3rd 546 (1st Cir 2005)
email arbitration announcement
= Insufficient notice

Reasons:
Actual policy in attachment to email
No way to prove receipt (notice)

What is Nonsubscription?

- Opting out of the Texas Worker's Compensation System.
- Only available in Texas.
- Been an option since 1913.
- 38% of employers and 24% of all employees (per 2004 TDI study).

What is Nonsubscription?

- Premise: Employers can (and typically will) take better care of injured workers, at a lower cost, than government bureaucracy.
- Selection of Medical Providers: Employer-controlled! Or no benefits.
- Several Employer Friendly Provisions: e.g., Immediate Injury Reporting or No Benefits.
- Employee Satisfaction: Higher than in Worker's Comp!

Who Else Is Nonsubscribing?

- Recent Large Nonsubscriptions
 - AutoZone
 - JCPenney*
 - Hilton
 - Baylor Healthcare System
 - Swift Transportation
 - Federated Department Stores*
 - Target Corporation
- Long-Time Nonsubscribers
 - Home Depot*
 - Kroger, Safeway & H.E.B.*
 - Sonic Drive-In, McDonald's, etc.*
 - Best Buy

*=over 10,000 Texas employees

Participants by Size – 2004

Source: TDI WC Research Group, August 2004

| Employment Size | Nonsubscription Rate |
|-------------------|----------------------|
| 1-4 Employees | 46% |
| 5-9 Employees | 37% |
| 10-49 Employees | 25% |
| 50-99 Employees | 20% |
| 100-499 Employees | 16% |
| 500+ Employees | 20% |

- 58% of Texas nonsubscribers pay medical and/or wage replacement benefits
- Majority select MD or offer approved list
- Only 3% of employers sued over injuries
- Only 3% of Texas workforce works for employers who offer no apparent occupational injury benefits

How (Now) To Settle or Release a Nonsubscriber Case After An Injury

**Section 406.033,
Labor Code**

- (f) A cause of action described by Subsection (a) [that is, a nonsubscriber negligence case] may not be waived by an employee after the employee's injury unless:
- (1) the employee voluntarily enters into the waiver with knowledge of the waiver's effect;
 - (2) the waiver is entered into not earlier than the 10th business day after the date of the initial report of injury
 - (3) the employee, before signing the waiver, has received a medical evaluation from a nonemergency care doctor; and ;
 - (4) the waiver is in a writing under which the true intent of the parties is specifically stated in the document.

**Section 406.033,
Labor Code (cont'd)**

- (g) The waiver provisions must be conspicuous and appear on the face of the agreement. To be conspicuous, the waiver provisions must appear in a type larger than the type contained in the body of the agreement or in contrasting colors.

**Temporary Workers/Temp.
Agencies**

Case: Garza v. Logistics Co.
Texas Supreme Court (2005)

Issues: Exclusive remedy of W.C. benefits

Facts:

- Garza, a temporary employee assigned to Logistics (client of temp. agency)
- Temp. Agency had W.C. insurance
- Logistics no W.C. insurance for Garza but paid W.C. premium to Temp. Agency

Holding: Defense of "exclusive remedy" requires:

- Plead & prove employee entitled to W.C. benefits
- Employer (Logistics) had W.C. insurance for that employee

Key: Have Temp. Agency add company on as "additional insured"

Job Descriptions

Case: Browne v. Grocery Store
Texas App. - November, 2005

Facts:

- Plaintiff - customer services representative
- Injury: maneuvering display cases for "grand opening" - neck popped.
- Notice for summary judgment: normal duties
- Affidavit of plaintiff:
 - (i) store's grand opening not part of job description
 - (ii) notice to manager - too strenuous

Holding: MSJ denied
Case proceeds to trial

How to prevent?

Worker's Compensation and Non Subscriber Law Update

Presented by:
Gary A. Thornton
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(512) 236-2210
gthornton@jw.com

E. STEVE BOLDEN, II

Employee Retirement Income Security Act Update

E. STEVE BOLDEN, II

E. Steve Bolden, II is an associate in the Business Transactions section of Jackson Walker, where his practice includes representing clients in a variety of ERISA and other employee benefits matters.

Mr. Bolden is admitted to practice in the State of Texas.

MEMBERSHIPS

Mr. Bolden is a member of the State Bar of Texas and the American Bar Association.

EDUCATION

Mr. Bolden received his B.A. degree from Dartmouth College and his J.D. degree from Thurgood Marshall School of Law, *magna cum laude*, where he was a member of the Board of Advocates.



Steve Bolden practices transactional law.

B.A., Dartmouth College

J.D., Texas Southern University

sbolden@jw.com

Employee Retirement Income Security Act Update

Presented by:
E. Steve Bolden, II
901 Main Street, Suite 6000
Dallas, Texas 75202
214-953-6093 (direct) 214-661-6606 (fax) 214-803-6093 (cell)
sbolden@jw.com

Time Sensitive Issues

Agenda

- Katrina Et Al Update
- 409A
- Roth 401(k)
- Medicare Prescription Drug Coverage
- Fiduciary Issues

Katrina Et Al Update

409A

- Background
- Section 409A Highlights and Requirements
- Deferred Compensation
- Stock-Based Compensation
- Separation Pay
- Foreign Arrangements
- Plan Aggregation Rules
- Initial Deferral Elections

409A (cont'd)

- Distributions
- Subsequent Elections
- Nonqualified Plans Linked to Qualified Plans
- Grandfathered Plans; Material Modification
- Transition Rules
- Practical Implications & Future Guidance
- Q&A

Background

- The Jobs Creation Act of 2004 included far-reaching changes in the federal tax laws that apply to nonqualified deferred compensation plans
- The Act added section 409A to the Internal Revenue Code, applicable to amounts "deferred" after 2004
- For the first time, the Code provides specific rules for deferral elections, distributions, and funding mechanisms for deferred compensation
- The first round of guidance, Notice 2005-1, issued in December 2004, provided preliminary transitional relief and definitional assistance
- Proposed Regulations were released in September 2005

Section 409A Proposed Regulations

Highlights

- Extension of the "reasonable and good faith reliance" standard through December 31, 2006
- Extension of the time period for adopting conforming plan documents and for selecting the timing and form of payments through December 31, 2006
- A permanent exception from 409A for stock appreciation rights ("SARs") that are economically equivalent to fair market value stock options, including SARs payable in cash and SARs issued by privately-held companies

Highlights

- An exception for amounts paid within 2½ months after the year of vesting
- Nonqualified plans linked to qualified plans, such as 401(k) wrap-around plans, SERPs and excess benefit plans, may continue
- Exceptions for certain severance arrangements, including collectively bargained severance arrangements and limited severance benefits paid out within 2 years
- Limited exceptions for U.S. persons who earn income abroad under broad-based plans of foreign employers

End of Many Transition Rules

- Initial deferral elections for 2006 salary deferrals must be made by December 31, 2005
- All deferral elections are generally irrevocable beginning January 1, 2006
- Plans generally cannot be terminated to allow current distributions of benefits after December 31, 2005
- Discounted stock options and discounted stock appreciation rights can be amended to provide a fixed distribution date through December 31, 2006

Written Plan Document Required

- Proposed regulations require written documents evidencing all deferred compensation arrangements
- Documentary compliance deadline extended
 - Documents must be brought into compliance by **December 31, 2006**
- Good faith compliance standard for administering arrangements continues for 2006

Service Providers

Who is subject to 409A?

In

- Employees
- Independent contractors (including directors)
- Personal service corporations and similar structures
- Independent investment advisors, including hedge fund managers

Out

- Arrangements between accrual basis taxpayers
- Service provider in active trade or business (other than employee or director) with 2 or more unrelated service recipients
- Most partnership arrangements, pending further guidance

Definition of Deferred Compensation

What is deferred compensation?

- Deferred compensation is compensation that the service provider has a legally binding right to receive and that is payable in a later tax year

Exclusions from Deferred Compensation

What is not deferred compensation?

- Qualified retirement plans
- Bona fide vacation leave, sick leave, compensatory time, disability pay or death benefit plans
- Certain severance pay plans
- Certain foreign plans
- Short-term deferral rule: amounts paid shortly after vesting are not subject to section 409A
 - Includes an amount received by the later of (i) 2½ months from the end of the service provider's vesting year, or (ii) 2½ months after the end of the service recipient's tax year when that vesting occurred
 - Exclusion does not apply if amount is further deferred
 - Late payment is automatic violation of 409A if plan does not provide a fixed payment date

Exclusions from Deferred Compensation

What is not deferred compensation? (cont'd)

- Certain stock-based compensation
 - Incentive Stock Options (ISOs)
 - Employee Stock Purchase Plans (ESPPs)
 - Nonqualified stock options on service recipient stock
 - Only if exercise price can never be less than FMV of underlying stock on grant date and no further deferral features
 - Other stock rights, such as restricted stock units (RSUs)
 - Stock Appreciation Rights that satisfy rules of proposed regulations

Stock-Based Compensation

Stock Appreciation Rights (SARs)

- SARs on service recipient stock are not deferred compensation subject to section 409A if:
 - the exercise price of the SAR can never be less than the fair market value (FMV) of the underlying stock on the grant date,
 - the SAR does not include any deferral feature other than the deferral of income from the grant date until the option exercise date

Stock-Based Compensation

Service recipient stock

- Stock options, SARs and other stock rights must be granted on service recipient stock to be excluded from section 409A
- Proposed regulations use sections 414(b) and (c) as basis for determining whether stock is service recipient stock
- Stock can only be common stock
- Must be the class of common stock that has the highest aggregate value of any class of common stock of the corporation, determined on the grant date
- Stock cannot have preference as to dividends or liquidation rights
- May include ADRs of service recipients that are foreign companies if the stock to which the ADRs relate would otherwise meet all other requirements

Stock-Based Compensation

Valuation of stock

- Valuation for publicly traded stock
 - If the underlying stock is traded on an established securities market
 - Valuation may be based on last sale before or first sale after the grant, or closing price on trading day before or trading day of grant, or any other reasonable basis using actual transactions in the stock as reported by the market
 - Price may be set based on an average of the price over a specified period if the period occurs within the 30 days before and 30 days after the grant date and the terms of the grant are irrevocably established before the beginning of the measurement period

Stock-Based Compensation

Valuation of stock (cont'd)

- Established securities market includes OTC and certain foreign markets
- Non-public stock must have a reasonable valuation method
- Proposed regulations establish factors and presumptions with respect to reasonableness of valuation method

Stock-Based Compensation

Modification of stock rights

- Modification is any change in the terms of the stock right that may give the holder:
 - a direct or indirect reduction in the exercise price of the right,
 - an additional deferral feature, or
 - An extension or renewal of the stock right

Stock-Based Compensation

Modification of stock rights (cont'd)

- Proposed regulations provide that changes to stock rights that meet requirements under section 424 are not treated as new grants of rights
- Exercise period may be extended to the later of December 31 or the 15th day of the 3rd month after the right would have originally expired
- Modifications that result in a discounted option can be revoked

Separation Pay

Separation pay in general

- Severance paid upon either an involuntary or a voluntary separation from service is generally deferred compensation
- Election of time and form of payment may be on or before the date the right becomes vested if severance is due to involuntary termination and is part of an arm's length, bona fide negotiation

Separation Pay

Exceptions:

- Limited dollar amount and duration:
 - the total severance is less than 2x the participant's annual compensation or, if less, 2x the section 401(a)(17) compensation limit (\$210,000 in 2005), and
 - all payments are made within 2 years after the year of separation
- Collectively bargained arrangements
- Reimbursements of previously incurred expenses, reasonable outplacement services, and reasonable moving expenses

Foreign Arrangements

- Broad-based pension arrangements are excepted
- Treaty provisions are not overridden

Plan Aggregation Rules

What is a plan?

- All account balance plans (under FICA rules) are treated as a single plan
- All nonaccount balance plans (under FICA rules) are treated as a single plan
- All other deferred compensation arrangements are treated as a single plan
 - e.g., discounted stock options, other stock-based compensation
- All severance arrangements are treated as a single plan

Effect is to combine benefits in all of each type of plan for purposes of computing penalties

Initial Deferral Elections

In general:

- Deferral election generally must be made in the taxable year before the services are performed
- Election includes election both as to the time and form of payment
- Election becomes irrevocable on the last day that an election can be made
- Elections for fiscal year-based compensation may be made by the last year of the prior fiscal year

Initial Deferral Elections

Nonelective benefits

- Proposed regulations require that the plan set the time and form of payment no later than the time the service provider has a legally binding right to the compensation
 - generally the beginning of the earning period, not the vesting period

Initial Deferral Elections

Performance-based compensation

- Elections may be made as late as 6 months before the end of the performance period if performance period is at least 12 months
- Performance-based compensation is compensation where either the amount or the right to the amount is contingent on satisfying pre-established organizational or individual performance criteria
- Subjective performance criteria may be permitted
- Goals must be set within first 90 days of performance period
- Performance may be based solely on an increase in value of company's stock after the grant date

Initial Deferral Elections

Initial elections relating to short-term deferrals

- Payments that fall under the short-term deferral rule (i.e., paid within 2½ months of the end of the year in which vested) can be deferred, however,
- If initial deferral is not made before the earning period began, any later deferral election must comply with the subsequent election rules
- Later election must be at least 12 months before vesting date
- Payment must be deferred at least 5 years after the vesting date

Initial Deferral Elections

Elections to defer mid-year grants of compensation

- Initial election permitted where grant of compensation is subject to minimum 12 month substantial risk of forfeiture, initial deferral election is made no later than 30 days after grant date, and election is made at least 12 months before the end of the service period

Distributions

Permitted Distribution Events

- On a fixed date or pursuant to a fixed schedule, or
- Upon any of the following events, provided that the plan specifies the objectively determinable date or year following the event for payment:
 - Separation from service
 - Death
 - Disability
 - Change in control of the corporation, or
 - Unforeseeable emergency

Distributions

Fixed date or fixed schedule

- Plans may specify the calendar year or years in which the payments will be made, without specifying the date
- For purposes of subsequent elections, payments under plans without a specific date will be treated as being paid on January 1 of such year
- Fixed date or schedule may be triggered by event that is subject to a substantial risk of forfeiture where date of event is unknown
 - E.g. payment due on change of control will be paid in three annual installments beginning in the year following the change of control

Distributions

Separation from service

- Termination of service is facts and circumstances test
- If employee continues to provide 50% of normal services, there is no termination
- Agreement to provide insignificant services will not be treated as continued employment
- Distributions to key employees of public companies due to severance from service must be delayed for 6 months

Distributions

Multiple payment events

- Plan can provide that payment will be made on the earlier of, or the later of, multiple payment events
- Plan can provide different payment forms for different payment events

Distributions

Acceleration of payments generally prohibited

- Exceptions are:
 - Payment due to a domestic relations order
 - A requirement for divestiture due to a conflict of interest
 - Payment of income taxes upon a vesting event under a section 457 plan
 - Distribution of taxable deferred compensation upon a violation of section 409A

Distributions

Acceleration of payments generally prohibited

- Exceptions are (cont'd):
 - Payment of employment taxes on such deferred compensation
 - Payment of account balances under \$10,000 upon termination of participation in plan
 - Payment upon termination of the plan in connection with bankruptcy, change of control or service recipient's termination of all plans of the same type for all participants

Subsequent Elections

In general:

- Subsequent election to delay either timing or form of payment can be made if:
 - Plan requires election cannot take effect for 12 months after date of new election
 - If it is election for payment at a specified date or schedule, subsequent election must be made at least 12 months before the first scheduled payment
 - Subsequent elections on payments on specified date/schedule, change of control or separation from service must delay payments for at least 5 years from date of original payment

Subsequent Elections

Definition of "payment":

- Each separately identified amount to which an employee is entitled to payment on a determinable date is a separate payment

Nonqualified Plans Linked to Qualified Plans

401(k) wrap plans, SERPs, QSERPs, excess plans:

- Amendments to qualified plans that affect benefits under nonqualified plans are not treated as additional deferrals or accelerations of benefits under the nonqualified plans
- Mid-year changes in elections with respect to 401(k) deferrals may affect nonqualified plan contributions, as long as changes do not result in *increase or decrease* in deferrals under all nonqualified plans by more than the 402(g) limit in effect that year

Nonqualified Plans Linked to Qualified Plans

Payments tied to Election under Qualified Plan:

- Transition Relief Ends: Election as to timing and form of a payment under a nonqualified plan that is controlled by a payment election made under a qualified plan is permitted in 2005 and 2006 only
- Constructive receipt and other legal doctrines will continue to apply to timing and form of payments under nonqualified plan
- After 2006, elections must be made under normal election rules for nonqualified plans, with time and form of payment specified in advance

Grandfathered Plans

- Amounts earned and vested on December 31, 2004 are not subject to the requirements of section 409A, unless the plan is materially modified after October 4, 2004
- Account balance plans: Grandfathered amount is vested account balance on December 31, 2004 plus earnings thereon
- Nonaccount balance plans: Grandfathered amount is present value of benefit the employee becomes entitled to, determined under the terms of the plan as in effect on October 4, 2004, without regard to services performed after December 31, 2004

Grandfathered Plans

- Equity-based compensation: Grandfathered benefit is the payment that would be available if the right was exercised on December 31, 2004, plus earnings from thereon
- Separation Pay Arrangements: Grandfathered benefit is determined based on structure of plan, whether plan is closer to account balance or nonaccount balance plan

Material Modification

- Material modification is adding a new or enhanced benefit to grandfathered plan
- Material modification causes all grandfathered benefits to become subject to section 409A
- If a modification is rescinded before the earlier of the date the new benefit is exercised or the end of the year in which the modification is made, then the plan is treated as not being material modified

Transition Rules

- Deferred compensation arrangements must continue to be operated in good faith compliance with section 409A and Notice 2005-1
- Plan documents must be amended to comply with the statute and the regulations by December 31, 2006
- Regulations will not be effective until January 1, 2007
- Compliance with the proposed regulations will be good faith compliance with the statute
- Discounted options or SARs can be amended by December 31, 2006 to provide a fixed payment date

Transition Rules

- Elections to defer compensation earned in 2006 and later years are irrevocable
- Ability to cancel or reduce deferral elections ends December 31, 2005
- Plan sponsors can terminate grandfathered plans without penalty only through December 31, 2005
- Discounted stock options and discounted SARs can be replaced by fair market value grants through December 31, 2006

Practical Implications of Guidance

- 2005 Material Modifications
 - Review for possible revocation
- 2006 Elections
 - Salary and calendar-year bonus deferrals must be made by December 31, 2005
 - Deferral elections are irrevocable beginning on January 1, 2006

Practical Implications of Guidance

- Amendment/Cancellation of elections ends December 31, 2005
- Plan Amendments due December 31, 2006
- Cash and stock settled SARs permitted, even for private companies
- Aggregation of plans for purposes of penalties

Future Guidance

- Funding arrangements
- Penalty and interest calculations
- Reporting issues

Roth 401(k)

Roth 401(k)

- Added by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)
- Becomes effective for plan years beginning on or after January 1, 2006
- Voluntary and must be adopted by the plan sponsor

*Note: The latest regulations published for Roth 401(k)s are **proposed** and have not yet been finalized. Therefore, the descriptions below, based on proposed regulations, are subject to change. In addition, plan sponsors should note a recent attempt to repeal the Roth 401(k) statutory provisions made by Rep. Benjamin Cardin.*

Major Differences From Traditional 401(k)

- Contributions are made with after tax dollars
- Contributions and earnings are excluded from federal income tax when distributed
- May be able to defer distributions beyond age 70½
- Roth distributions do not impact the taxability of Social Security benefits

Similarities to Traditional 401(k)

- 100% vesting on employee contributions
- Employer can match with pre-tax dollars
- Total employee contribution limits are the same
- Catch-up contributions are allowed

Differences Between Roth 401(k) and Roth IRA

- Contribution limit for 2006 is \$15,000 for Roth 401(k) vs. \$5000 for IRA
- Catch up contributions for those 50 and older in the Roth 401(k) are allowed
- No income limitations for 401(k) vs. IRA:
 - \$160,000 AGI for Married
 - \$110,000 AGI for Single

What Are Roth 401(k) Contributions?

- Irrevocable by the employee as designated Roth contributions
- Treated by the employer as includible in the employee's income
- Maintained by the plan in a separate account

Roth 401(k) Elective Deferrals

- The plan must provide for elective deferrals to a Roth account
- Employee may defer *all* or a *portion* of contributions under the plan as Roth contributions
- Roth contributions and traditional deferrals cannot exceed the contribution limits for any plan year

Matching Contributions

- Internal Revenue Code does not provide for specific *after-tax* employer matching contributions
- Employers may make *pre-tax* matching contributions

Rollovers

- Plan may permit participants to rollover a Roth 401(k) account from another qualified plan
- Participants may rollover a distribution from a Roth account to a Roth IRA

Separate Accounting Requirement

- A separate account *must* be maintained for each participant making a Roth contribution
- A separate account must be maintained from the initial contribution and *must* continue until entire account is distributed
- Contributions, withdrawal, earnings, losses, charges and credits *must* be reflected in the account
- Forfeitures *cannot* be allocated to a Roth account

Distribution Restrictions

- A Qualified Distribution is a distribution that is made after either:
 - A participant attains age 59½;
 - A participant's death; or
 - A participant becomes disabled
 - Hardship withdrawal-Not for mortgage
- AND
- Is not made within 5 years of the first contribution to the plan or a predecessor plan permitting Roth contributions
- Roth accounts are subject to the required minimum distribution rules
- We believe that Roth accounts rolled over from a 401(k) or 403(b) plan into a Roth IRA will not be subject to the minimum distribution rules

Taxation: How is a distribution/withdrawal taxed if it is not a Qualified Distribution?

- Because they were *after-tax* contributions, they're treated as basis and not included in gross income upon distribution or withdrawal
- However – the earnings which accumulated on these amounts would be included in gross income
- Further guidance expected to address basis recovery and earnings determinations
- Further guidance expected to clarify if premature distributions of Roth 401(k) are subject to 10% excise tax

Discrimination Testing and Corrective Methods

Roth 401(k) account contributions are taken into account under the actual deferral percentage (ADP) test of Code Section 401(k) just like pre-tax contributions

For plans that limit the amount of pre-tax contributions of HCEs to help pass the ADP test – if the deferrals were contributed to a Roth 401(k), rather than a pre-tax 401(k), HCEs could fund a smaller amount of contributions.

Because the Roth 401(k) amount would not be taxed at distribution, it would be an equivalent balance upon distribution. This would result in a lower ADP, which would help the test.

What Should Employers Consider?

- Is there sufficient participant interest to warrant adding a Roth 401(k) feature?
- Can our payroll system accommodate a Roth 401(k) option?
- Can our plan record keeper handle the separate accounting required in a Roth 401(k) option?

Which Participants Are Likely to Use a Roth 401(k)?

- Highly compensated employees
- Younger employees who have many years to allow their investments to grow
- Participants who expect their tax rates to be higher when they retire than they are today

Comparative Analysis

- For Roth, reduce your contribution by your tax rate e.g. a \$100 contribution becomes a \$85 contribution for a 15% tax rate
- Compute future value based on an assumed return (ROI) until your retirement
- For a traditional 401(k), reduce the future value by your tax rate at retirement

Comparative Analysis

Age: 30 Comp: \$40,000
 Contribution: 6% ROI: 8% Tax Rate: 15%

| Tax Rate | Traditional @ Age 65 | Roth @ Age 65 | Difference |
|----------|----------------------|---------------|------------|
| 10% | \$412,898 | \$389,960 | (\$68,861) |
| 15% | \$389,960 | \$389,960 | \$0 |
| 25% | \$344,082 | \$389,960 | \$45,878 |
| 28% | \$330,319 | \$389,960 | \$59,641 |

Earnings not taxed: \$318,560

Drawbacks to Calculation

- If you take periodic distributions, your investment will continue to grow making the Roth option more attractive because all of those earnings will be exempt from tax
- Difficulty in forecasting an average ROI
- Difficulty in forecasting what might happen to federal and state tax rates and what your own tax situation will be at retirement

What Should Participants Consider?

- Will the money be invested long enough to enjoy significant appreciation?
- Will my tax rate be higher or lower at distribution?
- Does this help my estate planning?

What Are Some of the Impediments to Adoption?

- Sunset provision expires in 2010
- Participant education about the Roth feature
- IRS may modify their proposed regulations
- Plan must be amended
- Payroll procedures and separate accounting must be amended
- Congress may eliminate the Roth 401(k)

What Do Plan Sponsors Need To Do to Adopt a Roth 401(k)?

- Implement a record keeping system to maintain and track Roth accounts
- Make changes to payroll systems to withhold Roth contributions and to include contributions on the W-2 form
- Resolve design issues e.g. how excess contributions should be handled and whether participants can contribute to both Roth accounts and a pre-tax account
- Amend the plan to provide for the Roth 401(k) account
- Amend Summary plan descriptions and other plan documents, including enrollment forms

Is Further Guidance From The IRS Expected?

The IRS asked for comments on their Proposed Regulations dated March 2, 2005, so it is anticipated that more guidance will be forthcoming

Recordkeeper Considerations

- When will they be ready?
- Understand required lead time

Plan Amendment

- Design decisions need to be included in plan amendment
- Must be signed by close of plan year in which Roth 401(k) becomes effective

Plan Design Decisions

Money Coming Into Plan

- Match
 - Will Roth 401(k) be matched?
 - Update program which calculates match
- Combined pre-tax / after-tax limits
 - Will Roth 401(k) be included in limits?
 - Update program which monitors limit
- Catch-up Contributions (CUC)
 - Are CUC pre-tax or Roth?
- Auto enrollment
 - Will default be pre-tax or Roth 401(k)?
- Rollovers in
 - Will plan allow for rollovers in of Roth 401(k)?

Plan Design Decisions

Money Leaving Plan

- Loans
 - Will Roth 401(k) be included in determining maximum amount of loan available?
 - Will loan proceeds be taken from Roth 401(k)?
 - Must determine how loan proceeds will be withdrawn
- 59½ withdrawal
 - Will Roth 401(k) be available?
 - Must determine how Roth 401(k) is withdrawn
 - May want to consider separate 59½ withdrawal just for Roth 401(k) money
- Hardship withdrawal
 - Will Roth 401(k) be available?
 - Must determine how Roth 401(k) is withdrawn

Plan Design Decisions

Testing

- 402(g) limit - \$15,000 + CUC
 - Must decide order of refunds
- 415 annual addition limit
 - Must determine position in hierarchy of any refunds
- ADP / ACP test failure
 - Decide order of money types to be distributed
 - Giving participants the choice may delay testing!
 - Would still need plan default
- Recharacterized CUC
 - Resulting from 402(g) or ADP / ACP test
 - Must decide order of money types to be recharacterized

Plan Design Decisions

Misc

- Mandatory cash-outs between \$1,000 – \$5,000
 - Roth 401(k) will need to be rolled to separate Roth IRA
- Plan-to-plan transfers
 - Receiving plan must be able to administer Roth 401(k)

Plan Design Decisions

Unknowns

- Installment & annuity payments
 - How should earnings be withdrawn?
- Deemed loans
 - How are earnings withdrawn ?
- Distributions-in-kind
 - How should earnings be withdrawn?
- Safe harbor hardship
 - Should Roth 401(k) deferrals be suspended?

Plan Design Decisions

- Let your document provider know the Roth 401(k) design decisions made to ensure plan document is consistent with plan operation !!

Payroll

- Must be able to feed Roth 401(k) amounts to recordkeeper
- Must be able to receive Roth 401(k) rate from recordkeeper
- Include Roth 401(k) when monitoring 402(g) limit
- Update match calculation of Roth 401(k) being matched
- Payroll tax
 - Roth 401(k) treated as after-tax
- W-2 reporting
 - Need to accumulate Roth 401(k)

Medicare Prescription Drug Coverage

The New Certificate of Creditable Coverage

General Rule

Employers that provide prescription drug coverage under a group health plan to Part D eligible individuals are required to disclose to those individuals and to the Centers for Medicare and Medicaid Services (CMS) whether or not the employer's coverage is "creditable prescription drug coverage."

The New Certificate of Creditable Coverage

Medicare Prescription Drug, Improvement, and Modernization Act of 2003

- Medicare Part D – Standard Coverage
- Prescription Drugs
- January 1, 2006

2005 Regulations

42 CFR § 423.56

Creditable Coverage Homepage

<http://www.cms.hhs.gov/medicarerereform>

Initial Notice

- Due by November 15, 2005
- Plan Sponsor
- Employer
- Vendor
- Third Party Administrator

42 CFR § 423.56

Covered Entities

- Employers
- Unions
- Churches
- Governments

- Primary or Secondary

Exempted Plans

- Entities that contract with Medicare as a Part D plan
- Entities that contract with a Part D plan

42 CFR § 423.56

Employer Plans

- Applies to plans that are:
 - Insured, or
 - Self-Insured

Other Plans

- Applies to
 - HRAs that provide prescription drug coverage
- Does Not Apply to:
 - FSAs
 - HSAs
 - MSAs

42 CFR § 423.56

Part D Eligible Individual

The individual is entitled to Medicare Part A and/or enrolled in Part B, as of the effective date of coverage under the Part D plan.

AND

The individual resides in the service area of a prescription drug plan or of a Medicare Advantage plan that provides prescription drug coverage.

An individual who is living abroad or is incarcerated is NOT eligible for Part D because he or she is not considered to "reside" in the service area of a Part D plan.

42 CFR § 423.56

Medicare – Eligible Individuals

- Retirees
- Employees
- Spouses
- Age 65 or older
- Disability
- End Stage Renal Disease
- COBRA Participants

Enrolling in Medicare

<http://www.medicare.gov/publications/pubs/pdf/11036.pdf>

42 CFR § 423.56

Late Enrollment in Part D

- Initial enrollment period
- Gap in creditable coverage for a period of 63 days
- Late enrollment penalty
 - Applicable premium PLUS
 - 1% for each month that the individual did not have creditable coverage
 - Duration of coverage

42 CFR § 423.56

Certificate of Creditable Coverage

- Assist Medicare eligible individuals in determining whether and when to enroll in Part D.
- Notice of Creditable Coverage
- Notice of Non-creditable Coverage
- Annual Notice

42 CFR § 423.56

"Creditable" Requirements

General Test

- Prescription drug coverage under the plan is at least actuarially equivalent to the standard prescription drug coverage under Medicare Part D.
- Actuarial attestation not required unless employer elects to collect the 28% retiree drug subsidy

42 CFR § 423.56

Retiree Drug Subsidy

- Application Deadline
September 30, 2005 / October 31, 2005
- For each qualifying covered retiree
 - 28% of allowable drug costs attributable to gross prescription drug costs between
 - The cost threshold (\$250 in 2006) and
 - The cost limit (\$5,000 in 2006)
- Benefit Design
- Category of Benefits
- Cost Sharing Arrangement

42 CFR § 423.56

"Creditable" Requirements

Alternative Test

- Employers that do not intend to apply for the Retiree Drug Subsidy

42 CFR § 423.56

Alternative Test Requirements

A prescription drug plan's coverage is "creditable" if it:

- Provides coverage for brand name and generic prescriptions
- Provides reasonable access to retail providers and, optionally, for mail-order coverage
- Is designed to pay an average at least 60% of participants' prescription drug expenses
- Has no annual maximum benefit or has annual maximum benefit payable by the plan of at least \$25,000 or as an actuarial expectation that it will pay at least \$2,000 per eligible individual in 2006.

42 CFR § 423.56

Integrated Coverage Exception (includes dental, medical, or both)

- Deductibles no greater than \$250 per year
- Maximum annual benefit of at least \$25,000 (or no maximum annual benefit)
- Lifetime combined maximum benefit of no less than \$1,000,000

42 CFR § 423.56

Form of Notices

- Model Notices
- Custom Notices
 - Required language
 - Recommended language
- Current Model Notices apply only to the initial enrollment period from November 15, 2005 to May 15, 2006

42 CFR § 423.56

Delivery of Notice

- May accompany other documents
 - SPDs
 - Enrollment / renewal materials
 - Electronic
- Prominent reference on 1st page
 - 14 point type
 - Bold, box, set off
 - First page

Sample Text

If you have Medicare or will become eligible for Medicare in the next 12 months, a new Federal law gives you more choices drug coverage starting in 2006.

Please see page ____ for more details.

42 CFR § 423.56

Delivery of Notice

- One notice per family is sufficient, unless the employers knows the spouse or other covered dependent lives at a different address

Electronic Distribution

- Medicare beneficiary must agree to receive information via electronic means
- Right to obtain a paper version
- Hardware / Software requirements

42 CFR § 423.56

Content Requirements

- Indicate that the employer has determined that the prescription drug coverage provided is creditable (or not creditable, as the case may be).
- Set forth the meaning of creditable coverage, including how the amount the employer's plan expects to pay on average in 2006 for prescription drugs compare to what standard Medicare prescription drug coverage would be expected to pay on average (i.e., is the amount the employer expects to pay on average is greater than or equal to (creditable) or less than (non-creditable) what Medicare would pay.
- Explain why creditable coverage is important

42 CFR § 423.56

Timing of Notice

- Prior to November 15, 2005
- Prior to the Part D annual coordinated election period (November 15 - December 31) for each year
- Prior to an eligible individual's initial Medicare Part D enrollment period
- Prior to the effective date of coverage for any Medicare - eligible individual who joins the plan
- Whenever prescription drug coverage ends or changes so that it is no longer creditable or becomes creditable
- Upon request of a beneficiary
- If notice is provided to all participants, notice is deemed satisfied for #1 & #2
- Notice "prior to"
 - Within the past 12 months

42 CFR § 423.56

Penalties

Medicare Prescription Drug Coverage:

The New Certificate of Creditable Coverage

Fiduciary Issues

Relevance of Fiduciary Responsibility

- Employer Objectives and Cost
- Employee Satisfaction
- Personal Liability
- Contribution
- Class Action
- Co-Fiduciary Liability
- Criminal Liability

Insurance

- Fidelity Bond
- Fiduciary Insurance
- D&O Insurance
- Corporate Indemnification Agreements

Who is a Fiduciary

- Discretionary Authority or Discretionary Control Over the Management of the Plan
- Any Authority or Control Over the Management or Disposition of Plan Assets
- Discretionary Authority or Discretionary Responsibility in the Administration of the Plan
- Renders Investment Advice for a Fee or Has Any Authority to Do So With Respect to Plan Assets

Examples of Fiduciaries

- Trustee
- Plan Administrator
- Investment Advisor
- Plan Committee

Fiduciary Disqualifications

- Felony Conviction
- DOL Prohibition

Fiduciary Candidates

- CEO
- CFO
- Human Resources
- General Counsel
- Other Employees

Fiduciary Duties

- Exclusive Benefit
- Prudent Man
- Diversification
- Compliance With Plan Documents
- Prohibited Transactions

Investments

- Investment Policy Statement
- Reliance on Experts and Consideration of Alternatives
- Monitoring
- Expenses

The Lessons

- Conduct Periodic Committee Meetings
- Keep Minutes
- Adopt Investment Policy Statement
- Review Investment Performance
- Purchase Fiduciary Insurance
- Consider Alternatives
- Evaluate Costs

The Lessons (cont'd)

- Educate and Communicate With Employees
- Review 5500
- Adopt Other Policies/Procedures as Necessary, Including
 - Claims
 - QDROs
 - QMCSOs
 - Administrative Compliance
 - Investment Education
 - Loans

Employee Retirement Income Security Act Update

Presented by:
E. Steve Bolden II.
901 Main Street, Suite 6000
Dallas, Texas 75202
214-953-6093 (direct) 214-661-6606 (fax) 214-803-6093 (cell)
sbolden@jw.com

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