

HRFOCUS

PRESIDENT'S MESSAGE

Wow, what a year this has been! We have had the "never-ending" Presidential election, which will actually **end** this November, I've heard...that is, of course, if no "hanging chads" get in the way! We dodged the federal collective bargaining bullet again, but maybe for the last time. Talk about unfunded mandate! I think that regardless of who wins the election, there is a good chance that our lives will never be the same again. If nothing else, things will get more interesting from here on.

The Mid-Year Conference at South Padre was a lot of fun. Martha Butz and her committee put together some great sessions, although I do think that the mouse may have won the award for "most exciting moment." I'm not sure Eric Henry (TMRS) will ever be the same again!

We held our second of two sold-out Nuts and Bolts sessions in June. I attended both sessions, and they were great. To date, all of this year's conferences have sold out. What a great testament to all the hard work and creativity that goes into each one. Kudos go to Lonnie Parent-Smith and TML for all their assistance. TMHRA would not be able to put on the level of conferences we do without all their help.

Information is out on the Employment Law Seminar (www.tmhra.org or www.tml.org) in September. We will meet at South Shore Harbor Resort and Conference in League City on September 11-12. We will have several attorneys speaking from across the state, and the topics sound extremely interesting. We hope to see you there!

You should have received your ballots for the 2008-2009 TMHRA Board election. We have a strong slate of candidates. Bonita Hall will be our president for 2008-2009, and she is very excited about the upcoming year!

TMHRA Newsletter Summer 2008

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UPCOMING EVENTS

EMPLOYMENT LAW SEMINAR

South Shore
Harbour Resort and
Conference Center
2500 South Shore
Boulevard
League City

September
11-12, 2008

The primary focus of the seminar will be to discuss and review the current employment issues facing municipal governments, including recent changes to federal and state laws.

NPELRA Academy I: The Foundation of Labor Relations

Marriott Las Colinas, Irving
February 3, 2009

TxPelra Workshop
Marriott Las Colinas, Irving
February 4, 2009

Civil Service Workshop
Marriott Las Colinas, Irving
February 5-6, 2009

NPELRA Academy III: The Negotiations Process

Hyatt Regency, San Antonio
April 5, 2009

For further information, go to www.npelra.org.

Nuts and Bolts of HR in the Public Sector: Discovering the Fundamentals

Texas Municipal Center
April 3, 2009

Mid-Year Conference

Riding the River to Success

Holiday Inn Riverwalk, San Antonio
June 3-5, 2009

**MARK YOUR
CALENDARS NOW!!!**

Do you know what to do if the union comes knocking?

Come learn about the Freedom of Choice Act and how to prepare for the possibility of unionization.

Do you lack knowledge about the current employment issues facing municipal governments, including FMLA?

Hear all about this topic and many more. Walk away with a clearer understanding of the laws and how to avoid expensive mistakes.

The presenters include Bettye Lynn, Partner, Lynn Pham and Ross, LLP, who will provide an update on public sector legal issues; Lowell Denton, Partner, Denton Navarro Rocha and Bernal, P.C., who will provide information on "The Freedom of Choice Act"; representatives from the Texas Public Entity Labor Relations Association (TXPELRA) and the Texas Public Risk Management Association (TXPRIMA), who will review programs and services; Sheila Gladstone, Attorney, Lloyd Gosselink Rochelle & Townsend, P.C., who will give an update on recent court rulings that are impacting FMLA; Julie Ross, Partner, Lynn Pham and Ross, LLP, who will discuss preparing effective separation agreements; Matthew Scott, Attorney, Bell Nunnally & Martin, Dallas, who will cover preparing for a reduction in force; and Alan J. Bojorquez, Partner, Bovey & Bojorquez, who will discuss legal aspects of flexible work schedules.

Space is limited, so register online today! For further details or to register for this outstanding program, click on TMHRA Employment Law Seminar.

If you have questions, you may contact TML staff at 512-231-7400 or tmhra@tml.org.

NEWSLETTER INPUT NEEDED

This is YOUR newsletter, and we want to ensure it provides you with a valuable source of information from TMHRA. If you have any ideas, articles, or information you would like to see included in future newsletters, please submit them to the Newsletter Committee.

2007-2008 Newsletter Committee Chair

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INTRODUCING...New Members to TMHRA

By Janie Mehrens

TMHRA will provide you with opportunities to participate in planning educational sessions and all the other activities sponsored by our organization. As a member, you will also have access to TMHRA e-Solutions – a great way to get advice or feedback from your colleagues.

The following human resource professionals have chosen to join our great organization, and the Board has unanimously approved their applications. Our newest members (June-September) are:

Tammy Ard, HR Coordinator, Town of Trophy Club
Nan Brush, City Secretary, City of Bangs
Sandra Duran, Director of Human Resources, City of Kyle
Valda DeWitt, Human Resources Bureau Chief, Houston Dept. of Health and Human Services
Daniel Perez, Human Resources Director, City of Eagle Pass
Carmen Williams, Director of Personnel, City of Lake Jackson
Trudy Whitfield, Human Resources, City of Live Oak

We appreciate your interest in helping TMHRA remain a tremendous professional resource throughout the State of Texas.

Welcome to the TMHRA team!

TMHRA SPONSORS

TMHRA is grateful for the continued support of our sponsors. The sponsorships allow us to keep all events reasonably priced and affordable for all members. Thank you to the following sponsors for their support and contributions throughout the year:

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United Healthcare

Federal Legislative Update

Mandatory Collective Bargaining Bill Fails:

In May 2008, efforts to pass H.R. 980 failed in the Senate. The law would federalize collective bargaining for public safety officers by putting the Federal Labor Relations Authority (FLRA) in charge of deciding which states' collective bargaining laws are in compliance with regulations it creates. Many of the bill's supporters believe—incorrectly—that if their state already has collective bargaining, they will not be affected by S. 2123. The bill clearly gives the FLRA the authority to determine the scope of bargaining and who is in compliance. Look for this one to come back again!

IRS/Cell Phone:

On February 14, Representative Sam Johnson (R-TX) introduced H.R. 5450, the “Modernizing our Bookkeeping in the Law for Employee’s Cell Phone Act of 2008,” to remove cell phones from the IRS’s “listed property.” Currently, an employer-provided cell phone will be treated as taxable income to an employee unless very strict limits are placed on its use – e.g., the employer must audit the cell phone records, and employees must reimburse the employer for all personal calls, including a pro-rata share of the monthly service charge. Several public employers have faced substantial fines for failing to follow this policy. If your organization is issuing cell phones to employees, make sure you are in compliance with IRS regulations!

Update—ADA on the Horizon:

The ADA Amendments Act, or H.R. 3915, passed the House; this bill is a compromise worked out between employer groups and the disability community. The ADA Restoration overturns a series of Supreme Court opinions narrowing the definition of a disability. Illnesses such as epilepsy or diabetes may be considered disabilities, even if successfully controlled by medication. Unlike the prior ADA Restoration Act, this bill retains the definition of a disability as one that substantially limits a major life activity. This bill is expected to be passed by the Senate and be signed by President Bush before the end of the year.

Employment Verification - Immigration Reform:

The “New Employee Verification Act” creates an electronic employment verification system—EEVS—that must be certified as accurate by the Social Security Administration and the Department of Homeland Security before being used and also creates a voluntary biometric verification system called the secure electronic employment verification system, or SEEVS.

Age Discrimination in Employment Act (ADEA):

The Equal Employment Opportunity Commission (EEOC) finalized a regulation on July 6, 2007, that incorporates the Supreme Court’s decision in *General Dynamics Land Systems v. Cline* (2004). The regulation allows employers to make age-based employment decisions that favor relatively older workers. This is a change from the EEOC’s prior position that employers could not favor relatively older workers over younger workers if those workers were also over age 40.

Public Pension Legislation:

Last year legislation was enacted allowing public safety officers to use up to \$3,000 of retiree benefits to pay for health care/long-term care insurance premiums. Efforts are now underway to have that provision expanded to all public employees, although passage remains an uphill battle.

Paycheck Fairness Act for Women:

The House Subcommittee on Workforce Protections held a hearing on the Paycheck Fairness Act on July 11, 2007. The measure would create a training program to help women enhance their skills, prohibit employers from retaliating against employees who share salary information, and allow women to sue for punitive damages under the Equal Pay Act.

Texas Legislative Update:

The Texas Legislature will convene for the 81st Regular Session on January 13, 2009. Before they get started, there are a few things you can do to be ready to keep up with the hundreds of bills that may impact our municipalities! The State of Texas provides a Web page to help you monitor various bills. Here are just a few things you can do:

Bill Lists

Create a list of bills that you would like to watch. Each time you run the list, the bill information is updated.

Alerts

Enter bills on the alert list, be notified of committee and calendar postings, receive a list of bills referred to a specific committee, and set your alert preferences.

RSS Feeds

Learn how to view legislative-related feeds through your favorite news aggregator.

You do have to set up an account! Go to <http://www.capitol.state.tx.us/MnuMyTLO.aspx> and set up your account today!

HR Legal Updates

Welcome to Legal Briefs for HR! This employment law update is provided to give HR professionals, in-house counsel, and business owners a short and sweet summary of what's up and what's coming, from all three branches of the government. Anyone is welcome to join the distribution list . . . just e-mail Aubrey Mross to be added to (or removed from) the group.

Here's the latest from Aubrey:

1. Not So Independent Contractors – The battle against employers who misclassify workers as independent contractors has gone nationwide. The Employee Misclassification Prevention Act (H.R. 6111) would amend the FLSA, elevating such misclassifications to an FLSA violation and triggering civil penalties and the potential for liquidated damages for willful violations. Employers would be required to advise workers of their classification, as well as their right to challenge the classification. State unemployment insurance agencies (like the TWC in Texas) would audit employers and share their findings with the IRS and the U.S. Department of Labor (DOL). The DOL would be tasked with audits of industries that tend to misclassify the most. What to do? Audit yourself before someone does it for you.

2. Extraordinary Ordinances – Most multi-state employers understand that they need a good working knowledge of both federal and state laws, but don't forget those local ordinances. One employer was just tagged for \$1.44 million because it failed to pay its workers at least the local "living wage" rate of either \$9.25 per hour without employee benefits or \$8 per hour if benefits are provided. *Amaral v. Cintas Corp.* (Cal. Ct. App. 6-08). This Hayward, California, ordinance applies to businesses that contract with the city, even if the work is performed outside of the city limits. Other local ordinances are tied to a geographic location and not conditioned upon contractor status.

3. Retire the "No Rehire" Designation – Yet another company learned that a seemingly innocuous rehire policy can support a discrimination claim. As part of a massive restructuring and RIF, an employer said certain RIF'd employees would not be considered for rehire for one year following discharge or while receiving severance payments, whichever period of time was longer. The district court found and the appeals court affirmed that [1] this was an "employment policy" that could be challenged as having a disparate impact on older workers; and [2] EEOC statistics established prima facie disparate impact, allowing them to proceed with their case against the employer. *EEOC v. Allstate Ins. Co.* (8th Cir. 6-08). Eligibility for rehire designations are often a vestige of old practices that can do more harm than good. "No rehire" status does the employer a disservice when rigidly applied, where a worker's intervening solid work history and new skills make him or her a good catch. And "no rehire" status has triggered successful claims against employers, when the refusal was based on prior poor attendance (and it turned out the absences should've been protected under the FMLA) or past drug use (and this was seen as regarding the person as disabled, under the ADA). Preserve your flexibility to make the rehire decision in light of old *and* new facts.

4. Age-Old Problem – The U.S. Supreme Court made it a bit harder on employers to defend themselves against age bias claims by shifting the burden of persuasion from the employee to the employer in ADEA cases where the employer is claiming a "reasonable factor other than age" is behind the adverse employment action at issue. *Meacham v. Knolls Atomic Power Lab* (U.S. 6-08). Before, employers could articulate a legitimate business reason, and it was up the plaintiff employee to prove the reason was bunk. Now the employer is the one who has to do the proving. The immediate impact may be seen in RIFs that are being affected in a soft economy. Employers' analyses of "who stays and who goes" will be subject to increased scrutiny, and don't even think about finalizing those picks before you've done an adverse impact analysis.

5. No Match No-No – An employer was forced to rehire 33 workers who were fired after failing to produce requested SSN documentation in three work days after being told they were the subjects of "no match" letters received from the SSA. The district court agreed with the employer's view that the workers' failure to respond was constructive notice of illegal status and the employer should not have to risk violating the Immigration Reform and Control Act. The appeals court, however, said the letters themselves are not constructive notice of illegal status, and even the enjoined DHS "no match" regulation proposes to give employers a 90-day safe harbor, during which employees can remain employed while working out their paperwork problem. The court also took notice of SSA's testimony that an estimated 17.8 million of its 430 million records contain errors. *Aramark Facility Servs. v. SEIU Local 1877* (9th Cir. 6-08).

6. Garbage In, Garbage Out – So the SSA database is rife with errors, and yet employers are being pressured (and in some cases, required) to use the E-Verify system (fka Basic Pilot), which relies on the SSA and DHS databases to determine whether an individual is eligible to work in the U.S. Why? Newest developments:

- a. President Bush signed an executive order on June 6 mandating that businesses that contract with the federal government must use E-Verify.
- b. Federal Acquisition Regulation (FAR) Council issued a proposed rule on June 12 to implement the new executive order and make clear that subcontractors are included, too.
- c. South Carolina has a new law that phases in mandatory verification of worker status, starting on 1-1-09 (applying to all public sector employers and private sector employers with a public contract and more than 500 employees) and applying to all employers as of 7-1-10.
- d. An Oklahoma court has blocked implementation of a mandatory verification of status law that was due to take effect in July, stating that the provisions are "substantially likely" to be preempted by federal immigration law.
- e. The House appropriations committee has denied funding for DHS's E-Verify system past the 11-30-08 expiration date.

7. Gas Pains – Lots of things going on to try to ease the pain in commuters' pocketbooks:

- a. IRS increased the mileage reimbursement rate from 50 cents to 58.5 cents per mile, effective July 1.
- b. Pending federal bill (H.R. 4106) would require federal agencies to develop programs for eligible employees to telework at least 20 percent of each two-week period.
- c. Utah public employees will be converted to a four-day workweek starting in August (no Fridays), with the exception of essential services.
- d. Employers are passing out gas cards, paying for public transportation, and setting up car pools for their workers.
- e. What are your ideas? Share them with me via e-mail, and I'll post them in next month's LB4HR!

8. American Idol (Not) – A west coast semiconductor production equipment manufacturer just learned that bad music hurts more than your ears. It will pay \$168,000 to settle a racial harassment lawsuit based on the complaints of an African American worker who was regularly exposed to a 27-year-old Vietnamese American coworker who played and rapped aloud using lyrics that included racial epithets. The offended worker reported the utterances to his supervisors, but no action was taken for six months. As part of the settlement, the employer will add "harassment through the playing of music" to its anti-harassment policy and include "offensive musical lyrics" in the list of prohibited examples.

9. Charged Up – While mandatory arbitration and separation agreements may waive an employee's right to litigate a claim, the right to file a charge with the EEOC or a state or local civil rights agency is protected. This became clear to an employer who not only had to revise its mandatory arbitration agreements, but also provide the EEOC with the names of hundreds of current and former employees who had used the company's arbitration process over a two-year period, and who will have the right to file a charge regardless of the outcome of their arbitration. *EEOC v. Ralphs Grocery Co.* (N.D. Ill. 5-08).

Until next time . . . stay cool!

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Legal Briefs for HR ("LB4HR") is provided to alert recipients to new developments in the law and with the understanding that it is guidance and not a legal or professional

opinion on specific facts or matters. For answers to your specific questions, please consult with counsel.

TMRS Update

Carolyn Liner Reappointed to the TMRS Board

Carolyn Liner, the director of human resources for the City of San Marcos, was reappointed by Governor Perry to the Texas Municipal Retirement System Board of Trustees for a term to expire Feb. 1, 2013. The board oversees the Texas Municipal Retirement System, which is responsible for providing a secure retirement benefit plan for more than 750 cities. Carolyn is a past president of the Texas Municipal Human Resources Association, Texas Safety Association, and Texas Public Labor Relations Association. She is also a member of the Texas Municipal League and the American Society for Public Administrators. Way to go, Carolyn!!!

TMRS Annual Training Seminar - "Back to Basics"

September 2-4, 2008 • Corpus Christi

Get back to the basics – and back to the beach! TMRS city correspondents and administrative personnel are invited to two days of comprehensive training at the beautiful Omni Corpus Christi Hotel, located at 900 North Shoreline Boulevard in the downtown Marina District.

This is your chance to learn all about TMRS – the plan provisions, how to administer it for employees, what your city options are, and changes TMRS is undergoing to keep your retirement system strong. After a Tuesday evening reception, the first full class day will start Wednesday at 9:00 a.m. That evening, we will take a boat ride across Corpus Christi Bay to have dinner at the Texas State Aquarium. Thursday, September 4, will feature half a day of classes.

This year will also feature an expanded version of the City Services Suite to provide one-on-one counseling and plan rate projections. The Suite will be open throughout the day Wednesday and Thursday. For more information, visit www.tmrs.org/annual_seminar.shtml.



As a human resources professional, you've probably heard some very original reasons about why employees miss work. Many employees do have legitimate reasons to be absent...but at one time or another, we have the opportunity to hear some really creative "reasons" for not coming to work! Here are a few that I ran across that just might make you smile! And let's hope you haven't heard any of these from your employees!

Top Ten Original Reasons Employees Use to Not Report to Work:

- 1) Employee was sad.
- 2) Employee's horses got loose and were running down the highway.
- 3) Employee called from his cell phone, said he was accidentally locked in a restroom stall, and no one was around to let him out.
- 4) Employee broke his leg snowboarding off his roof while drunk.
- 5) Employee's wife said he couldn't come into work because he had a lot of chores to do around the house.
- 6) One of the walls in the employee's home fell off the night before.
- 7) A skunk got into the employee's house and sprayed all of his uniforms.
- 8) Employee had bad hiccups.
- 9) Employee blew his nose so hard, his back went out.
- 10) A buffalo escaped from the game reserve and kept charging the employee every time she tried to go to her car from her house.

Murphy's Words of Wisdom

When in doubt, mumble. When in trouble, delegate.

Murphy's Committee Rules

- Never arrive on time, or you will be stamped a beginner.
- Don't say anything until the meeting is half over; this stamps you as being wise.
- Be as vague as possible; this prevents irritating the others.
- When in doubt, suggest that a subcommittee be appointed.
- Be the first to move for adjournment; this will make you popular—it's what everyone is waiting for!

HR
HUMOR



Texas Municipal
Human Resources
Association

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