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Pending Texas Legislation

Some Issues for Texas PEOs

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His articles on employment law topics have appeared in PEO Insider, trade association journals and in the South Texas Law Review and the Corporate Counsel Review. In addition to a full time private practice, Mr. Rice serves as an adjunct professor at South Texas College of Law where he teaches employment law and deceptive trade practices law.

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UI Claims and the “Report Back” Rule

Current Statute

For several years, Texas PEOs have enjoyed the benefit of a report back rule. That is, worksite employees must report back to the PEO in order to maintain eligibility for state unemployment benefits. The report back rule applicable to PEOs is found in the Texas Unemployment Compensation Act at Section 207.045(i) of the Texas Labor Code.

Temporary staffing firms have the benefit of a largely identical rule, found at Texas Labor Code §207.045(h). The rule that applies to employees of temporary staffing firms is:

> h) A temporary employee of a temporary help firm is considered to have left the employee's last work voluntarily without good cause connected with the work if the temporary employee does not contact the temporary help firm for reassignment on completion of an assignment. A temporary employee is not considered to have left work voluntarily without good cause connected with the work under this subsection unless the temporary employee has been advised:
>
> > (1) that the temporary employee is obligated to contact the temporary help firm on completion of assignments; and
> > (2) that unemployment benefits may be denied if the temporary employee fails to do so.

The PEO rule is essentially the same, but with one provision that favors the employees. Texas Labor Code Section 207.045(i) currently provides:

> i) An assigned employee of a staff leasing services company is considered to have left the assigned employee's last work without good cause if the staff leasing services company demonstrates that:
>
> > (1) the staff leasing services company gave written notice to the assigned employee to contact the staff leasing services company on termination of assignment at a client company;
> > and
> > (2) the assigned employee did not contact the staff leasing services company regarding reassignment or continued employment;
> > provided that the assigned employee may show that good cause existed for the assigned employee's failure to contact the staff leasing services company.

The two rules are similar, but not identical. For example, the statute merely requires the temporary service to “advise” the temporary employee of the report back requirement. PEOs are required to give the assigned employee written notice. In addition, an assigned employee who failed to report back would still receive unemployment benefits if the employee can show that there was “good cause” for the failure to contact the PEO and request reassignment.

Thus Texas law explicitly permits a PEO to challenge claims for unemployment benefits, provided three points have been met:

A) The PEO has given "written notice" to the employee to contact the PEO if the assignment at a client company is terminated.
B) The employee fails to contact the PEO for reassignment.
C) The employee does not demonstrate that "good cause" existed for the failure to contact the PEO.

TWC Precedent Decisions

The Texas Workforce Commission has interpreted and applied the report back rules 8udner both §207.405(h) and §207.045(i) fairly consistently over the years. For example the TWC has issued the following precedent decisions addressing the report back rule.

The key TWC administrative precedent decisions on report back rules are not PEO cases, but rather a temporary staffing case under §207.045(h). In one ruling the TWC barred a laborer from receiving unemployment benefits that he would otherwise have received based on his failure to report back to the temporary staffing firm within one business day of the completion of his assignment.

> Appeal No. 97-004610-10-042497.
> Claimant, a laborer with a temporary help firm, completed his last assignment on Thursday. The following Tuesday morning, he contacted the employer for reassignment, but no work was available. Claimant was well aware his unemployment benefits could be denied if he failed to contact the temporary help firm for reassignment on completion of a temporary job. HELD: Disqualified for leaving voluntarily without good cause. Here, claimant effectively abandoned his job by failing to contact the temporary help firm for reassignment within a reasonable time after completion of a temporary job. "Reasonable time" as used here means not later than the next business day.

Similarly, in another temporary help case, the TWC upheld the temporary agencies policy requiring employees to report back within 24 hours and actually sign the temporary staffing firm's log book. In this decision, the TWC denied the employee benefits because the employee failed to sign the logbook, even thought he employee actually went into the staffing firm's office.

> Appeal Number 99-011197-10-111299. The claimant was employed by a temporary help firm. The claimant was aware that the employer's policy required employees to make themselves available for reassignment within the 24-hour period immediately following the close of the last involved temporary position. The employer's policy indicated that availability for reassignment was to be accomplished via the employee signing in on the employer's

> availability logbook. While the claimant went to the employer's office within 24 hours of having been informed of the close of his last assignment, the claimant did not sign in the employer's availability logbook at that time and was thus not considered to be available by the employer. HELD: The claimant was voluntarily separated from his last position of employment without good work-connected cause. The employer's requirement that employees make themselves available by signing in the logbook constituted a reasonably promulgated policy and the claimant's failure to follow that policy constituted a failure on the claimant's part to make himself effectively available for reassignment as per Section 207.045(h) of the Act. The claimant was disqualified from the receipt of benefits.

Here is a third precedent decision denying UI benefits to a temporary employee based on failure to comply with the report back rule.

> Appeal No. 1252-CA-77. The claimant, an employee of a temporary help service, failed to report for reassignment after the completion of the last assignment he was sent out on by the temporary help service. HELD: Because the claimant was separated when he failed to report for reassignment after completion of a temporary job, his separation was voluntary and without good cause connected with the work. Disqualification under Section 207.045.

The TWC' precedent decisions addressing the similar PEO report back rule simply follow in the light of the temporary decisions.

> Case No. 523756-2. The employer is a licensed staff leasing services company. It entered into a staff leasing services agreement with the client for which the claimant worked. The staff-leasing employer did not require employees to contact them at the end of an assignment for placement with another client. The client discharged the claimant for failing to comply with a reasonable request. In its response to the notice of initial claim from the TWC, the employer reported that the separation occurred when the claimant left the client location. HELD: A staff leasing agreement establishes a co-employer relationship between the client and the staff leasing company. Each entity retains the right to discharge a worker. If the staff leasing services company does not invoke the notice requirement in Section 207.045(i), then Section 207.045(i) is not applicable. In this case, by not invoking the notice issue in

its response to the TWC , the staff-leasing employer essentially *ratified* the actions of its co-employer client in relation to the work separation. Therefore, the Commission will analyze the separation from the client in determining qualification for benefits and, if applicable, chargeback to the account of the staff leasing services company.

The case listed below became a precedent case effective May 13, 2003.

Case No. 428646 to be digested in the Appeals Policy and Precedent Manual at VL 135.05.

The claimant quit her job with the employer, a staff leasing services company, by submitting a resignation letter giving two weeks notice to the employer's client. The employer had not given the claimant written notice to contact them on termination of her assignment at the client company. However, the claimant sent a copy of the letter to the staff leasing employer, thereby indicating that she was aware of her relationship with the employer. The claimant quit because of stress resulting from the demands of the job. The claimant did not discuss her concerns with the office manager of the client company, and did not discuss her concerns with a representative of the staff leasing services company because she did not want to appear to be circumventing the client's authority. At the time she resigned, her assignment with the client company had not been completed, and work was still available for the claimant. HELD: The claimant voluntarily quit her job by sending a copy of her resignation letter to the staff leasing services company. Under the facts of this case, Section 207.045(i) does not apply. The claimant voluntarily quit without good cause connected with the work when she initiated her separation without first discussing her job dissatisfaction with the client and the staff leasing services company.

The case listed below became a precedent case effective October 12, 1998.

Precedent Case to be digested at Section VL 135.05.

Appeal No. 97-006956-10*-061998. The employer, a staff leasing firm, had a policy that required employees to contact them within two days after the completion of an assignment. In this case, the claimant contacted the employer within that time frame. HELD: Where an employer's policy is less restrictive than the "next business day" requirement, as stated in Appeal No. 97-004610-10-042497 (also in VL--135.05), reasonable time will be established on the basis of the employer's less restrictive policy. This precedent is also applicable to temporary help firms.

Case No. 428646. The claimant quit her job with the employer, a staff leasing services company, by submitting a resignation letter giving two weeks notice to the employer's client. The employer had not given the claimant written notice to contact them on termination of her assignment at the client company. However, the claimant sent a copy of the letter to the staff leasing employer, thereby indicating that she was aware of her relationship with the employer. The claimant quit because of stress resulting from the demands of the job. The claimant did not discuss her concerns with the office manager of the client company, and did not discuss her concerns with a representative of the staff leasing services company because she did not want to appear to be circumventing the client's authority. At the time she resigned, her assignment with the client company had not been completed, and work was still available for the claimant. HELD: The claimant voluntarily quit her job by sending a copy of her resignation letter to the staff leasing services company. Under the facts of this case, Section 207.045(i) does not apply. The claimant voluntarily quit without good cause connected with the work when she initiated her separation without first discussing her job dissatisfaction with the client and the staff leasing services company.

Proposed Legislation

Pending Texas legislation proposes to significantly amend §207.045(i), thus impacting PEOs. House Bill 1939 would change the current law in the following ways:

- PEOs would have to give the written notice already required under 207.045(i) via a "separate document" that must be given to the employee.
- The written notice must be in bold face, all capital letters or other conspicuous type.
- The notice must be given to the employee at the time the assignment with the client company <u>ends</u>. Thus the bill would require the notice to be given at termination of employment, not at the time of hire.
- The notice must substantially conform to the following statutorily required language:

> "You are an employee of (NAME OF STAFF LEASING SERVICES COMPANY), a staff leasing services company licensed under Chapter 91, Labor Code. In your employment with (NAME OF STAFF LEASING SERVICES COMPANY), you may be assigned to work at a client company and be supervised, wholly or partly, by the employees of that client company. On conclusion of an assignment, you remain an employee of (NAME OF STAFF LEASING SERVICES COMPANY) and must contact (NAME OF STAFF LEASING SERVICES COMPANY) and make yourself available for continued employment and assignments.

> "To report your availability for continued employment and assignments, you must contact (NAME OF STAFF LEASING SERVICES COMPANY) by the end of the next business day after the conclusion of an assignment by calling the company's Employee Assignment Line at (TOLL-FREE TELEPHONE NUMBER), and speaking personally to a company placement representative."

A similar bill would also amend the temporary staffing rule, but in a slightly different way. House Bill 1745 would amend the 207.045(h) to effectively bar temporary employees from filing unemployment claims for at least three days after the end of an assignment. Rather than making the report back rule more onerous for temporary employees, HB 1745 would actually amend the rule in favor of the temporary employer by barring early claims for unemployment benefits.

Self Insured Health Plans

Current Law

The Texas Staff Leasing Licensing Act currently addresses, somewhat vaguely, the issue of self insured health plans.

Texas Labor Code §91.043 provides:

> (a) A license holder may not sponsor a plan of self insurance for health benefits except as permitted by the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.).
>
> (b) For purposes of this section, a "plan of self insurance" includes any arrangement except an arrangement under which an insurance carrier authorized to do business in this state has issued an insurance policy that covers all of the obligations of the health benefits plan.

Section (a) is hardly a model of clarity. However, this section has been consistently interpreted by the State of Texas as effectively prohibiting PEOs from offering self funded health plans.

While not obvious from the text of §91.043, the problem lies in the question of whether a PEO sponsored group health plan can ever be “permitted” by ERISA. Over the years, the U.S. Department of Labor has issued 20 to 30 essentially identical ERISA opinion letters holding that group health plans sponsored by staff leasing firms are Multiple Employer Welfare Arrangements (MEWAs). Under ERISA, the states are free to regulate MEWAs. With respect to non-fully insured MEWAs, the states are free to prohibit them entirely.

Proposed Legislation would Allow PEO Self Insured Health

Senate Bill 976 would change the existing law to explicitly permit PEOs to sponsor self-funded group health plans. SB 976 is thus a significant alteration in existing law.

My prediction is that SB976 will draw significant opposition from the Texas Department of Insurance and the Texas Attorney General.

Mechanics Liens for PEOs?

Existing Law

Some PEOs have tried filing mechanics liens to secure payment from their client companies that do work on construction projects. Under both state and federal law, a subcontractor has the right to file a lien on a construction project if the contractor has not been paid. On public projects, instead of filing a lien a contractor would make a claim against the payment bond required on the project. Unfortunately, it is presently unclear whether a PEO is entitled to protection under the mechanics lien statute.

The key case is *AMS Staff Leasing v. Warm Springs Rehabilitation*, 94 S.W.3d 152 (Tex. App.--Corpus Christi 2004). AMS entered into a PEO arrangement with a construction contractor which was a subcontractor on a construction project. When AMS was not paid by its client, AMS filed a mechanics lien. When it did not get paid, AMS sued to enforce its lien rights. In defense, the owner asserted that AMS had no right to file a lien since AMS had not "furnished labor" to the project, only provided administrative services to the subcontractor who was the one who actually provided the labor and did the work. The Court of Appeals agreed that this was a fair question, but one that could not be decided on appeal, and so sent the case back to the trial court for additional factual determinations. The AMS case thus raises more questions than it answers, other than making clear that there is an issue as to whether a PEO has standing to assert a lien.

In a later case, the same Court of Appeals looked at similar arguments in the context of a lien claim filed by a temporary staffing firm. *Advanced Temporaries v. Reliance Surety Company*, 2004 WL 1632737 (Tex.App.--Corpus Christi 2004).

Here the Court pointed out that only those who furnish "labor" within the meaning of the lien statute have a right to file a lien. The statute defines labor as "labor used in the direct prosecution of the work." Tex. Prop. Code 53.021(3). Helpfully, the court rejected the idea that the statute requires every lien claimant to "engage in the business of construction" as being "contrary to the legislature's intent to construe the lien statute liberally for the purpose of protecting laborers and materialmen." The Court of Appeals held that "the property code affords protection to those who 'furnish labor' as well as those who actually labor on a construction project in Texas."

But, here is the rub. Simply providing HR or staffing services does not necessarily mean

that you have standing to assert a lien. The Court cautioned: "However, we conclude that not every arrangement will establish that a temporary employment agency "furnishes labor" as defined by chapter 53. For instance, a temporary employment agency may contract with a construction company to provide *only administrative services* for the contractor's employees *and not labor engaged in direct prosecution of the work*."

Despite these concerns, the Court of Appeals did find that the temporary staffing firm had "furnished labor" and thus had a right to file a lien. However, the Court of Appeals relied on the following facts in reaching this conclusion:

- The temp service actually recruited & hired the employees that were provided to its contractor client.
- The temp service "qualified" the workers by verifying legal documentation, driver's licenses, social security cards, and federal employment forms.
- There was no evidence that the client company had done any employee screening, qualifying or hiring of the temporary workers.
- The temp service recruited and hired the workers as its own employees, and provided the workers' compensation, unemployment insurance, and general liability insurance.
- The workers received their paychecks from the temp service, not the contractor, and the temp service made the payroll deductions.

On these facts, the Court of Appeals reversed the trial court's holding that the temporary staffing firm had not "furnished labor" and instead held that it had and therefore had standing to assert a lien claim under Chapter 53 of the Texas Property Code.

Keep in mind the limits of a lien claim. Mechanics liens exist only to the extent provided by Chapter 53 of the Texas Property Code - i.e. for "labor furnished" in connection with construction of improvements to real property. No lien is available under the mechanics lien statue where the work is something other than construction of improvements to real property.

This means that the mechanics liens are not available to PEOs whose clients are engaged in any thing other than construction work. For example, no mechanics lien is available under Property Code chapter 53 if the client company is an auto repair shop, a barbershop, a childcare facility, an optometrist's office, or a manufacturer. Liens are available *only* where the labor is furnished in connection with construction projects related to real property.

Pending Legislation to Permit PEOs to File Mechanics Liens

House Bill 2995 would amend Texas mechanics lien statute to explicitly authorize a PEO to file a lien on a private project or to file a claim on the bond covering a state public project.

The bill would add express authority for PEOs to file liens under Chapter 53 of the Property Code and under Chapter 2253 of the Government Code by enlarging the definition of a subcontractor to include a PEO.

This is an interesting idea, and would clarify what is currently very murky law. PEOs should bear in mind the limits of what this statute would do.

- HB2995 simply gives PEOs the right to file a lien on a private construction project or to make a bond claim on a public project.
- This bill would only give PEOs a mechanism to file a lien (or a bond claim) as to that portion of their invoice that directly relates to the client's work on a construction project.
- The bill would not address unpaid invoices for client companies that do not supply labor or materials to construction projects. Nor would the bill address that work done by a PEO for a client, but unrelated to a construction project.
- As a state statute, this bill could not address the question of whether a PEO is permitted to make a bond claim on a federal public project.