TEXAS PAYDAY ACT

I. INTRODUCTION

The objective of the Texas Payday Act ("TPA") is to deter employers from withholding wages by providing wage claimants an avenue for the enforcement of wage claims, many of which would be too small to justify the expense of a civil lawsuit. *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 561 (Tex. App.–Houston [14th Dist.] 2002, no pet.); *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192-94 (Tex. App.–Fort Worth 1995, writ den'd).

The TPA requires an employer to pay its employees in full and on time on regularly-scheduled paydays. The law deals with the timing and manner of wage payments and how to avoid illegal deductions from wages. There are also provisions for a wage claim and appeal process, for collection of wage judgments, and for prevention of future violations of the wage payment laws.

The thrust of the TPA is to require timely payment of wages that are due and payable. In order to determine what is due and payable, the law looks to all factors going into the compensation agreement, including rate, method, and frequency of pay, written and unwritten agreements concerning wages, and state and federal laws regarding wages and hours.

A very large influence on the TPA is the Fair Labor Standards Act (FLSA), the main federal wage and hour law. In order to determine what wages are due and payable, the law must first determine what legal requirements apply, including federal laws requiring payment of minimum wage and overtime. In addition, wage agreements must sometimes be analyzed in terms of their status as contracts.

II. COVERAGE

The TPA applies only to employees, not to independent contractors (section 61.001(3)(B)). It covers only private employers; it does not cover governmental employers, *i.e.*, a public employee who has a wage complaint may not file a wage claim under the TPA (*see* Section 61.003). Unlike many other employment laws, the TPA has no limitations on business size, nature of the business, or number of employees (section 61.001(4)). It applies to any situation in which someone has hired someone else to perform any kind of work for pay under the kind of direction and control that would normally establish an employment relationship.

III. FREQUENCY OF PAY AND DESIGNATION AND POSTING OF PAYDAYS

Regarding timing of wage payments, the TPA requires employers to pay non-exempt employees at least twice per month, and exempt employees at least once per month (section 61.011). "Exempt" has to do with whether the employee meets the requirements for an overtime exemption as a salaried executive, administrative, or professional employee under the FLSA. Section 61.013 of the TPA provides that, "[a]n employer shall pay an employee who is not paid on a payday for any reason, including the employee's absence on a payday, on another regular business day on the employee's request."

An employer shall designate paydays in accordance with section 61.011. If an employer fails to designate paydays, the employer's paydays are the first and 15th day of each month. (section 61.012). An employer shall post, in conspicuous places in the workplace, notices indicating the paydays.

IV. FINAL PAY

Under TPA section 61.014, an employer shall pay in full an employee who is discharged from employment not later than the sixth day after the date the employee is discharged. An

employer shall pay in full an employee who leaves employment other than by discharge not later than the next regularly scheduled payday.

V. COMMISSIONS AND BONUSES

A. Generally

Wages paid on commission and bonuses are due according to the terms of: (1) an agreement between the employee and employer; or (2) an applicable collective bargaining agreement. A common problem is that of what happens with an employer's duty to pay commissions and bonuses once an employee has left the company. The answer depends upon the terms of the commission or bonus agreement. A good agreement will avoid the risks of ambiguity by clearly setting out how commissions are earned, when and under what circumstances they are paid, and what happens to commissions from sales in progress at the time of work separation. Similarly, a bonus agreement should specify exactly how a bonus is earned, when it is paid, and what happens to a bonus that is not determined or paid out until after an employee has left the company. If the commission or bonus agreement provides for payment of commissions and bonuses in any way after an employee has separated from employment, the deadline for such a payment would be based upon the wording of the agreement. Employers have the right to make commission and bonus agreements entirely discretionary, in which case they would not be liable under the agreements. *See, e.g., Lewis v. Vitol, S.A.*, No. 01-05-00367-CV, 2006 WL 1767138, at *4-5 (Tex. App.–Houston [1st Dist.] 2006, no writ) (there was no enforceable contract to pay a bonus where the agreement stated that, "Mr. Lewis is eligible to receive a yearly bonus based on the various performance parameters considered by the company. The bonus is at the sole discretion of the management.").

Note also that employers have the right to modify their commission, bonus, and other compensation plans. Enforceable at-will employment contract modifications require proof of (i)

notice of the change and (ii) acceptance of the change. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986). To satisfy notice, the employer must prove it "unequivocally" notified the employee of "definite changes" in employment terms. *Id*. The employer must prove the employee knew of the "nature of the changes" and the "certainty of their imposition." *Id*. Acceptance is satisfied as a matter of law by an employee's continued employment after unequivocal notice. *Id*. *See, e.g., Lindsey v. DynCorp Intern. LLC*, NO. CIV. A. H-09-07002010 WL 376327 (S.D. Tex. Jan 25, 2010) ("The record shows that, in addition to the pay statements, DI sent Lindsey a new first page of the employment agreement, clearly stating the new compensation terms. The pay statements and the replacement page together revealed the "nature of the changes" because they showed that Lindsey's pay had been changed from $4,063.66 biweekly to $24.90 per hour. And they revealed the certainty that the changes would be imposed."); *Mitsubishi Aircraft Int'l, Inc. v. Maurer*, 675 S.W.2d 286 (Tex. App.–Dallas 1984, no writ) (sales representative, who was informed by employer of amendment to commission plan in which commissions would not be paid until customer made second deposit and then, only if personnel was still an employee of employer at applicable time, and who continued working for employer, engaging in three customer transactions, accepted amendment as a modification of his at-will employment contract; therefore, representative's work in obtaining letters of intent and initial deposits for purchase of jet aircraft by three customers was covered by express contract.).

If the employer fails to provide "unequivocal" notice, it will be required to honor the terms of the original commission, bonus, or other compensation plan. *See Hathaway*, 777 S.W.2d at 229 (finding that no unequivocal notice was given because employee was told different things by different representatives of the employer); *Intec Systems, Inc. v. Lowrey*, 230 S.W.3d 913, 918-19 (Tex. App.–Dallas 2007, no pet.) (finding that enforceability of a

modification was not "conclusively established" by an e-mail containing a formula for calculating the amount to be deducted from an employee's commission because it did not state that the formula was being changed); *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 350 (Tex. App.–Houston [14th Dist.] 2001, pet. denied]) (holding that there was "some evidence" to support jury's finding that a commission statement calculating commission at a rate different than provided in contract did not provide unequivocal notice of future basis for calculation).

B. <u>Discretionary v. Nondiscretionary Bonus Plans</u>

The traditional view is that when an employment contract does not guarantee a bonus in a fixed, nondiscretionary amount, and the bonus offered is "an incentive to encourage the employee to perform in accordance with the previously existing contract of employment," the "promise to pay a bonus is unenforceable for want of sufficient consideration, since the employee is only giving the same service it has already contracted with the employer to render." *See Williams v. Vynckier Enclosure Sys., Inc.*, No. H-04-cv-3223, 2005 WL 2810709, at *10-11 (S.D. Tex., Oct. 27, 2005); *Castranova v. Teknerkron Infoswitch, Inc.*, No. 3:00-cv-0361, 2003 WL 22143793, at *3 (N.D. Tex., Aug. 18, 2003). In *Castranova*, the plaintiff's initial employment contract provided that he could receive a discretionary bonus each year. One year, the plaintiff did not receive a bonus, despite being told by a supervisor that he was eligible for a bonus in an unspecified amount that year. 2003 WL 22143793, at *1. The plaintiff asserted that he was entitled to a bonus as part of his compensation because he and the employer had "agreed at the outset of the employment relationship that Plaintiff would work for salary plus bonus and that the work he performed during the year was induced by Defendant's promise to pay the bonus." *Id*. at *2. The court rejected this argument, concluding that "[t]here is no evidence that Defendant promised Plaintiff an annual non-discretionary bonus at the commencement of his

employment in exchange for Plaintiff's work performance." *Id*. The court in *Williams* reached the same outcome on a similar set of facts. *See* 2005 WL 2810709, at *10-11.

Although a promise to pay a discretionary bonus generally does not create a contract because of failure of consideration, the rule, accepted in Texas, is that "[a]n employer's promise to pay a bonus in contemplation of the employee's exerting extra or additional efforts in his service for the employer's benefit . . . create[s] a valid and enforceable contract once accepted as against the contention of lack of consideration." 43 A.L.R.3d 503 § 8 (2008). *Toch v. Eric Schuster Corp.*, 490 S.W.2d 618, 624 (Tex. Civ. App.–Dallas 1972, writ ref'd n.r.e.) is instructive. In *Toch*, the plaintiff's initial employment agreement was silent on whether he would receive any bonus, but the employer later "set up a bonus scale to induce the salesmen to work harder to perform their contracts or as an added incentive to carry out their duties." 490 S.W.2d at 624. The court held that because "[t]his scale was accepted by the employees, including Toch . . . it can reasonably be said that it constitutes a contract for the payment of services rendered . . . ." *Id*.

In *Vanegas v. American Energy Services*, 302 S.W.3d 299 (Tex. 2009), American Energy Services ("AES") was formed in the summer of 1996. AES hired eight employees that same year. The employees allege that in an operational meeting in June 1997, they voiced concerns to John Carnett, a vice president of AES, about the continued viability of the company. The employees complained that the company required them to work long hours with antiquated equipment. The employees alleged that, in an effort to provide an incentive for them to stay with the company, Carnett promised the employees, who were at-will and therefore free to leave the company at any time, that "in the event of sale or merger of AES, the original [eight] employees remaining with AES at that time would get 5% of the value of any sale or merger of AES." AES

Acquisition, Inc. acquired AES in 2001. Seven of the eight original employees were still with AES at the time of the acquisition. Those remaining employees demanded their proceeds, and when the company refused to pay, the employees sued, claiming AES breached the oral agreement. The lower courts dismissed the case, holding that the employer's supposed promise was illusory. The Texas Supreme Court held that, "[a]ssuming AES did make such an offer, the seven remaining employees accepted the offer by staying with AES until the sale. Regardless of whether the promise was illusory at the time it was made, the promise became enforceable upon the employees' performance."

C. Right To Post-Termination Bonuses

1. Termination For Cause

In *Property Tax Analysts, Inc. v. Jones*, No. 05-93-00390-cv, 1994 WL 24376, at *3 (Tex. App.–Dallas, Jun. 27, 1994, writ denied), the court stated that "the terms of the employment agreement and facts of a particular case determine whether an employer must pay the bonus, even if the employer discharged the employee for cause."

In *Jourdan v. Schenker Int'l, Inc.*, 71 Fed. Appx. 308, 312 (5th Cir. 2003), the Fifth Circuit reversed a grant of summary judgment for the defendant, concluding that fact issues existed as to whether the plaintiff had a right to receive post-termination commission payments. The plaintiff's employment contract stated that commissions based on gross profits from accounts would be paid on a quarterly basis but did not state whether payments would continue after termination. The plaintiff was terminated for cause. The court concluded that the plaintiff had "raise[d] the reasonable possibility that [her] right to a sales commission accrued, not at the time that the commission was to be calculated, but at the point at which the . . . account showed a gross profit." *Id*. at 312. The Fifth Circuit concluded that because the contract was silent as to

the effect of job termination, a jury should consider the plaintiff's right to post-termination bonus payments, even if the termination was for cause. 71 Fed. Appx. at 312.

In *Shanklin v. Columbia Management Advisors, L.L.C.*, NO. CIV.A. H-07-2690, 2008 WL 4899631, at *15 (S.D. Tex. Nov 12, 2008), Judge Lee Rosenthal agreed that "Texas cases make clear that the specific facts of each case must be analyzed to determine whether the employee was informed that termination, including termination for cause, would forfeit any bonus or commission payments that were earned but not paid before the employment ended."

In *Kona Tech. Corp. v. Southern Pacific Trans. Co.*, 225 F.3d 595, 605 (5th Cir. 2000) and *Metal Structures Corp. v. Bingham*, 347 S.W.2d 270, 271 (Tex. Civ. App.–Dallas 1961, writ ref'd n.r.e.), the courts enforced contracts to pay commissions after the plaintiffs ended their employment. But both these opinions stressed that the result would have been different had the plaintiff been terminated for cause. *See* 347 S.W.2d at 274 ("There is no evidence that appellee was discharged for any valid reason other than appellant wanted to get someone else to do sales work."); 225 F.3d at 605 (stating that its rule applied to "[a]n agent who has not breached the terms of the contract").

2. Termination Without Cause

Employers often have bonus plans that require employees to be employed on a certain date, or after a certain event (*e.g.*, actual payment from the client), to be eligible to receive a bonus under the plan. Where an employer terminates an employee without cause, some Texas courts have refused to enforce such limitations. Other courts, however, have enforced such limitations. Both lines of authority are summarized below.

In *Enstar Corp. v. Bass*, 737 S.W.2d 890 (Tex. App.–El Paso 1987, no writ), an employee incentive program, which was conceded to be "unambiguous," *id*. at 893, provided that a participant "must be employed by the Company on December 31 of a Program year in

order to earn the incentive units [the employee was] awarded for that Program year," *id*. at 891. It was further provided that if a participant "terminated [his] employment with the Company for any reason other than death, retirement or permanent disability, [he] would receive no further payments for incentive units . . . and would forfeit all unpaid incentive units." *Id*. at 891-92.

Several employees were terminated prior to December 31 of the program year because their services were no longer needed. Notwithstanding that they were "not employed on the critical date required by the compensation plan," *id*. at 892, they were allowed by the court to recover "all past years' bonuses which had been earned and remained unpaid, and . . . a pro rata bonus for the part of the year worked prior to termination of . . . employment," *id*. at 893.

It appears the rationale for the court's decision was that, because the employees were terminated without good cause, they would be entitled to recover. The expression, "without good cause," or some variation of it, is used or is quoted a number of times in the course of the court's opinion. Yet, as the court concedes, "[n]o mention is made in the plan of the company's termination of an employee's employment, whether for good cause or without good cause." *Id*. at 893 (emphasis added). It is obvious, therefore, that the *Enstar* court wrote the "good cause" provision into the parties' contract, and then awarded bonuses to the employees because they were not terminated for "good cause," even though they were not employed by the company on the day they had to be employed to earn a bonus under the employee incentive plan.

In *Coleman v. Graybar Electric Co.*, 195 F.2d 374 (5th Cir. 1952), the employee worked under an incentive compensation plan. The plan required that the employee be in the service of the company on the first day of April in the following year for which the additional compensation was payable. The application for employment provided that "employment is at the discretion of the company and may be terminated at any time." Mr. Coleman was terminated on

February 15, 1949, and he sued for the compensation benefits earned the preceding year, even though he was not employed on April 1 of the following year. The court noted the compensation plan was to provide “an incentive to continuous service with the Company.” It recognized that an employee who voluntarily quit or was terminated for cause would forfeit benefits under the plan. The court then said:

> However, a construction of the language which would permit the employer to terminate the continuity of service without any cause and as a matter of arbitrary choice, or because of a desire to evade the payment of additional compensation would be entirely inconsistent with the purpose of the plan and, in the absence of clear and compelling language, should not be adopted.
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> We conclude that in this case the contract did not authorize a forfeiture of additional compensation provided in the plan of compensation if the services of the employee were terminated arbitrarily and without cause.

Thus, where the employee worked the whole year, and was terminated without cause, he could recover even though he was not employed on the critical date required by the compensation plan.

In *Miller v. Riata Cadillac Company*, 517 S.W.2d 773 (Tex. 1974). Mr. Miller was employed as used car manager with a monthly salary, plus a monthly bonus based upon the company’s gross profits. The bonus was usually paid in March following the year in which it was earned. He was discharged on October 20, 1971, and the company contended he was required to hold the position of used car manager on December 25 in order to be entitled to a bonus for that year. A jury found that the company did not have good cause to terminate Mr. Miller’s employment. Citing the *Coleman* case and others, Justice Sam Johnson wrote:

> We agree with the Court of Civil Appeals’ holding that an employee who is discharged without good cause prior to the time specified for payment of a bonus is entitled to recover a pro rata part of such bonus for the period he actually worked.

Thus, where the employee was terminated without good cause before the end of the calendar year, he was permitted to recover a pro rata part of the bonus for the period he actually worked.

In *Handy Andy, Inc. v. Rademacher*, 666 S.W.2d 300 (Tex. App.–San Antonio 1984, no writ), the employee worked under an oral employment contract terminable at the will of either party. The company had a bonus incentive plan which required that the employee be actively employed at the time the bonus was paid. Mr. Rademacher was advised in March, 1980, that he could resign or be discharged. He resigned. This was about a month before the end of the fiscal year and three months before the bonus would be paid. He sued for his bonus, and the jury found that he was terminated without just cause and that he was entitled to a bonus for the fiscal year. The appellate court affirmed the pro rata recovery for the eleven months of the fiscal year that Mr. Rademacher was employed. Thus, where the employee was terminated without good cause before the end of the fiscal year, he was permitted to recover a pro rata part of the bonus for the period he actually worked even though he was not actually employed at the time the bonus was paid as required by the bonus incentive plan. *See also Lewis v. Vitol, S.A.*, No. 01-05-00367-CV, 2006 WL 1767138, at *3 (Tex. App.–Houston [1st Dist.] 2006, no writ) ("We agree that, under *Riata* and *Handy Andy*, an employee who is discharged without good cause prior to the time specified for payment of a bonus is entitled to recover a pro rata part of such bonus for the period he actually worked.")

On the other hand, in *Mitsubishi Aircraft Int'l, Inc. v. Maurer*, 675 S.W.2d 286 (Tex. App.–Dallas 1984, no writ), in which the Texas court held against a commissioned sales representative. The plaintiff's commission agreement provided for payment after Mitsubishi received a certain portion of an aircraft sales price from the purchaser. The plaintiff was

terminated without apparent cause after he had negotiated several sales, but before the triggering date in the commission agreement. The court held that because the agreement covered his right to commissions, no quantum meruit claim could be made. The court also rejected the plaintiff's contention as to the applicability of quantum meruit if, by its wrongful action, an employer prevented the employee's performance under the contract. The court held:

> In the present case Maurer was an employee at-will. Mitsubishi, therefore, had the right to terminate him at any time, for any reason . . . . Thus when Mitsubishi terminated Maurer it broke no contract. Consequently, there was no wrongful discharge and no breach of contract preventing Maurer's completion of performance. Therefore, we conclude that Maurer's wrongful discharge and prevention arguments fail to establish in the present case any limitations or exceptions to the rule that if the work in question is covered by an express contract, there can be no recovery in quantum meruit.

675 S.W.2d at 289.

The Fifth Circuit followed *Maurer* in *Caton v. Leach*, 896 F.2d 939 (5th Cir. 1990), a factually similar case involving a sales representative who claimed he had been wrongfully terminated in order to prevent his recovery of commissions under his compensation agreement. Likewise, in *Becker v. Nat'l Educ. Training Group, Inc.*, No. 3:01-CV-1187-M, 2002 WL 31255021, at *6 (N.D. Tex. Oct. 7, 2002), the plaintiff's agreement stated that "no commissions will be paid on contracts or revenue recognized [sic] signed by a Client subsequent to the termination date of the employee, regardless of the reasons for such termination." The plaintiff was fired and sued for commissions, claiming that he was fired so that the company would not have to pay him commissions. The court rejected his argument as a matter of law, stating:

> Becker's claim that NETg breached its contract by preventing Becker's performance fails. NETg's termination of Becker is not a breach of Becker's employment contract because that contract allowed NETg to discharge Becker "with or without cause and with or without notice." Additionally, Becker's argument that NETg's discharge was wrongful is of no assistance to him. The Texas Supreme Court has held that "absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at-will for good cause, bad cause or no cause at all." Becker has not presented any evidence of an

> agreement indicating that his employment status at NETg was anything other than that of an at-will employee. To the contrary, the only evidence before the Court is an express agreement between Becker and NETg stating that Becker was an employee at-will who could be terminated with or without cause. Thus, Texas law precludes recovery under his cause of action for breach of contract.
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> The Compensation Plan specified that if Becker was terminated before a final contract sale, NETg would not pay him commission "regardless of the reasons for such termination." As a matter of law, Becker's unjust enrichment claim fails because an express contract governs his compensation.

Id. at *4 (footnotes and citations omitted).

3. Voluntary Resignation

There is also authority that an employee's voluntary resignation does not preclude post-termination bonus payments. In *Burkard v. ASCO Co*., 779 S.W.2d 805, 806 (Tex. 1989), the Texas Supreme Court reversed an appellate court ruling that, as a matter of law, the plaintiff could not collect bonus payments after voluntarily terminating her employment. The employment contract contained a provision entitling the employee to a bonus if she generated a certain level of revenues during the contract term. The contract did not address whether a bonus would be paid if the employee resigned before the contract term ended. *Id*. The court concluded that "[i]n granting [the employee] the right to a bonus, the contract did not condition that right on [the employee's] continued employment for an entire year, nor was [she] ever told that by failing to complete the term of the contract she would forfeit her right to a bonus." *Id*. The Fifth Circuit reached a similar result in *Trask v. Metrocall*, 252 F.3d 1355, 2001 WL 422165, at *2 (5th Cir. Mar. 26, 2001), upholding a jury verdict awarding post-termination bonus payments to a plaintiff who had voluntarily terminated his employment because the incentive "compensation plan, and all of the relevant company literature . . . [did not] prevent an employee from earning commission after termination or resignation." *Id*.

Other courts have reached a different conclusion about an employee's entitlement to a post-termination bonus. In *American Medical Enterprises v. Rowley*, 2006 WL 860094, at *4 (Tex. App.–Tyler 2006), for example, the court concluded that the plaintiff, who was terminated for cause, was not entitled to post-termination incentive bonus payments, even though her employment contract stated that she would be entitled to a 3% commission on new business starting on the thirteenth month of the new business contract and continuing "as long as" the new business remained a client of the defendant. *Id*. The court found the contract ambiguous and after considering parole evidence as to its meaning, concluded that "[w]e do not believe that the parties intended, nor do we interpret the phrase to mean, that AME intended to provide a "golden parachute" to Rowley should she leave AME's employment, whether voluntarily or otherwise." *Id*.

Some cases prorate post-termination bonus payments that are not tied to particular sales or other events to the time between the former employee's last bonus payment during employment and the time the employment terminated. In *Fujimoto v. Rio Grande Pickle*, 414 F.2d 648, 653 (5th Cir. 1969), the plaintiffs' bonus agreement provided for an annual bonus equal to ten percent of the company's annual profit, payable at the end of the company's fiscal year. The plaintiffs voluntarily terminated their employment before the fiscal year ended. The Fifth Circuit noted that "[t]he employment contracts did not in definitive words require that the employees [who quit] complete the fiscal year before their entitlements matured. The contracts did not even specify that the employees were obligated to remain with the company for a full fiscal year." It rejected the defendants' contention that because the ten percent bonus was not computed until the end of the fiscal year, the plaintiffs' right to receive that payment did not accrue until the end of the fiscal year. But the court concluded that the plaintiffs were entitled

only to a portion of the bonus, prorated for the months they had actually worked. *Id*. at 653. Similarly, in *Property Tax Analysts, Inc. v. Jones*, 1994 WL 24376, at *3 (Tex. App.–Dallas 1994) (unpublished), the incentive plan provided for a minimum bonus payment of $10,000 payable annually. The incentive plan did not state that an employee had to be employed when the bonus became payable in order to receive it. The court nevertheless concluded that the plaintiff could "recover only a pro rata part of the bonus for the time he actually worked." *Id*. at *4; *see also Haggar Co. v. C.G. Rutkiewicz*, 405 S.W.2d 462, 464-65 (Tex. App.–Waco 1966) (incentive plan provided for 2.5% share of company's net profits, payable annually; court upheld jury verdict awarding share of annual bonus prorated for plaintiff's five months of employment because employee was not told of policy that employees must remain with company entire year to receive bonus).

VI. METHODS OF PAY

Employers may pay any of their employees an hourly wage, a periodic salary, a commission or bonus, a day rate, a book rate, a flag rate, a piece rate, or on a per job basis. Since Texas follows the "at-will" employment doctrine, the method of pay may be changed at any time, with or without advance notice, as long as there is no express contract or collective bargaining agreement to the contrary. An employee can even be paid according to a combination of the above methods. Of course, under the FLSA, an employee must be paid overtime unless a specific exemption applies to them.

VII. DELIVERY OF WAGES

Wages can be given in person to an employee, mailed to a designated address (in time to be received on the payday), deposited electronically into an account, or given to a third party who has been authorized by the employee in writing to receive the employee's paycheck. Payment of wages by EFT (electronic funds transfer) must be authorized by the employee in

writing. If the employee receives part or all of the wages "in kind" (in a form other than cash or negotiable money order or check), the employee has to have authorized that in writing in advance of the payment.

VIII. DEFINITION OF WAGES

Under section 61.001(7) of the TPA, "Wages" means compensation owed by an employer for:

(A) labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and

(B) vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with the employer or under a written policy of the employer.

Thus, the TPA includes in the definition of "wages" any fringe benefits promised in a written policy of the employer or in a written agreement (section 61.001(7)(B)). The types of fringe benefits covered by that provision are vacation pay, sick leave pay, parental leave pay, holiday pay, and severance pay. The law will enforce such fringe benefit payments according to the terms of the written policy or agreement. For example, if there are conditions on use of leave or receipt of severance pay, those conditions will be observed. Thus, whatever the employer has taken care to provide in the policy or agreement is what will be enforced, assuming that the employer has put down exactly what it wants to happen under the policy.

IX. DEDUCTIONS FROM PAY

A. <u>TPA Issues</u>

Under section 61.018 of the TPA, all deductions, other than payroll taxes, court-ordered garnishments, and other deductions required by law, must be both lawful and specifically authorized in writing by the employee.

It is best to have all employees sign a wage deduction authorization agreement listing all the various types of deductions from pay that might be made and the amounts (as specific as possible) that would be deducted in case those situations were to arise. In addition to the wage deduction authorization agreement, certain deductions should be individually and specifically authorized in writing to give the employer the greatest amount of protection in case a wage claim is filed. Those would include any type of loan or wage advance; before the money changes hands, the employer should have the employee sign a detailed receipt and repayment agreement specifying what the installment payments will be and what happens to a balance remaining when an employee leaves the company; deductions below minimum wage are allowed in this case.

Authorizations that are too general or too broad may not be given effect. Deductions for out-of-pocket loans to an employee, even though there is an oral agreement to repay, or even to repay out of a particular wage payment, will not be allowed, unless the deduction is authorized in writing.

Even if an employee is in possession of company property, the TPA provides that in such a case, wages may be withheld only when the employer is authorized to do so by law, required to do so by a court or has written authorization from the employee for the deduction. Otherwise, the employer would need to attempt to recoup the property — or its value — by some other means, such as civil remedies (*i.e.* lawsuit, small claims court, police report) or arrangements with the employee outside of a wage deduction.

B. FLSA Issues

One note here having to do with the FLSA: To qualify for an exemption from overtime under the FLSA, an employee must generally be paid at a rate of at least $455 per week on a salary or fee basis. Under 29 C.F.R. § 541.602, in order for employees to be considered paid on a "salary basis" they must be paid "a predetermined amount . . . not subject to reduction because

of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Furthermore, "subject to the exceptions provided in [section 541.602(b)], an exempt employee must receive the full salary for any week in which the employee performs any work." *Id*. Section 541.602(b) lists the permissible exceptions to the above rule. None of the exceptions listed contemplates charging employees a fine for damage to or loss of company equipment. The Wage and Hour Division (WHD) interprets these regulatory provisions to mean that if a particular type of deduction is not specifically listed in section 541.602(b) (formerly section 541.118(a)), then that deduction would result in a violation of the "salary basis" rule.

The WHD takes the position in its enforcement of the FLSA that deductions from the salaries of otherwise exempt employees for the loss, damage, or destruction of the employer's funds or property due to the employees' failure to properly carry out their managerial duties (including where signed "agreements" were used) would defeat the exemption because the salaries would not be "guaranteed" or paid "free and clear" as required by the regulations. Such impermissible deductions violate the regulation's prohibition against reductions in compensation due to the quality of the work performed by the employee. Consequently, any deductions made to reimburse the employer for lost or damaged equipment would violate the salary basis rule.

It is WHD's long-standing position that an exempt employee must actually receive the full predetermined salary amount for any week in which the employee performs any work unless one of the specific regulatory exceptions is met. In this regard, see Field Operations Handbook § 22b14 (deductions from otherwise exempt employee's salary may not be made for cash register shortages; deductions may be made only for the reasons stated in the regulations); WH Opinion Letter November 4, 1981 (deductions from salary of exempt restaurant manager of amount reflecting unacceptably high charge for unauthorized use of restaurant's business telephone

would result in loss of exemption). As the preamble to the final rule explains, the final rule retained the salary basis requirement "virtually unchanged from the [now prior] regulation," and but for "a few identified exceptions" an employee must receive the full salary for any week in which the employee performs any work. 69 Fed. Reg. at 22,176. Moreover, the Department specifically rejected suggestions from several commentators that it add an additional exception for payments in the nature of restitution, fines, settlements, or judgments an employer might make based on the misconduct of an employee. 69 Fed. Reg. at 22,178.

Accordingly, any employer policy that requires deductions from the salaries of its exempt employees to pay for the cost of lost or damaged tools or equipment issued to them would violate the salary basis requirement, thereby necessitating an evaluation under 29 C.F.R. § 541.603 to determine the effect of the improper deduction. It would not matter whether an employer implements such a policy by making periodic deductions from employee salaries, or by requiring employees to make out-of-pocket reimbursements from compensation already received. Either approach would result in employees not receiving their predetermined salaries when due on a "guaranteed" basis or "free and clear" and would produce impermissible reductions in compensation because of the quality of the work performed under the terms of the employer's policies, contrary to 29 C.F.R. § 541.602(a).

With respect to nonexempt employees, an employer may not lawfully require an employee to pay for an expense of the employer's business if doing so reduces the employee's pay below any statutorily-required minimum wage or overtime premium that is due, because employers must pay all statutorily-required minimum wage and overtime premium finally and unconditionally, or "free and clear." 29 C.F.R. § 531.35. For example, "tools of the trade" and other materials or equipment incidental to carrying on the employer's business are considered

business expenses of the employer that may not be transferred to employees if doing so cuts into their statutory minimum wage or overtime premium pay entitlements. 29 C.F.R. §§ 531.3(d), 531.32(c). Violations occur in two ways: (1) directly, when an employer deducts the cost of furnishing the employee with tools or equipment used in the employer's business from an employee's pay; or (2) indirectly, when the employee must incur out-of-pocket expenses to buy the item and the employer fails to reimburse the employee for the outlay. *See* 29 C.F.R. § 531.35; WH Opinion Letter February 16, 2001.

X. PROCEDURE

An employee who feels that he or she has not been paid all wages earned may file a complaint with the Texas Workforce Commission (TWC). Complaint forms may be obtained from local TWC offices, or upon request through the mail, through the TWC's website, or by calling 1-800-832-9243 /TDD 1-800-735-2989. The TPA states that an employee has the right to file a claim for unpaid wages up to 180 days from the date the wages were due to be paid (section 61.051 (c)). According to the TPA, "[t]he 180-day deadline is a matter of jurisdiction." *Id*. However, despite that express language in the statute, the Texas Supreme Court has held that the 180-day filing deadline is not jurisdictional. *See Igal v. Brightstar Info. Tech. Group*, 250 S.W.3d 78 (Tex. 2008) (mandatory filing limitation period under Section 61.051 of Texas Labor Code not jurisdictional).

The completed form, along with any information necessary to support the claim, may be mailed to TWC at the address shown on the complaint form or may be faxed to 1-512-475-3025. The complaint must be signed, and the signature of the claimant must be verified by a Notary Public or by any employee of TWC. A wage claim must be filed no later than 180 days after the date the claimed wages originally became due for payment.

Upon receipt of a wage claim, TWC notifies the employer of the claim by sending the employer a copy of the wage claim and a form on which to furnish the employer's response. An investigator from TWC's Labor Law Section, using the information furnished by the employee and the employer, along with any additional information that the investigator feels to be essential, issues a written decision [Preliminary Wage Determination Order (PWDO)] as to whether wages are due, and if so, the amount due.

Either party dissatisfied with the PWDO may appeal that ruling to the Special Hearings Department. Requests for hearing must be made in writing no later than the 21st day after the PWDO is mailed to the parties by the Labor Law Section. This time limit is mandatory.

Appeal hearings are usually held by telephone conference call; any party may present witness testimony and submit documentary evidence. The testimony in an appeal hearing is taken under oath, and the entire proceedings are recorded. After testimony is concluded, the hearing officer renders a written order for the payment of wages, or a finding that no wages are due. This decision states the amount of wages due, if any, and any penalty that has been assessed

If either party disagrees with this decision, the party may request a review of the case by filing an appeal in writing to the Commission. The Commission may then review the hearing and decision. The Commission then issues a written decision stating the amount of wages due, if any; any penalty amount due; and advising the parties of their right to judicial review.

Either party dissatisfied with the results of the Commission's decision may file a written motion for rehearing. This motion must be filed within fourteen days after the date on which the decision was mailed. Again, compliance with this time limit is critical, because unless a motion

for rehearing is filed or the Commission reopens the hearing, the order becomes final after fourteen days.

Within thirty days after a final order of the Commission is mailed, either party may file for judicial review in a court of competent jurisdiction. In the petition for judicial review, the Commission and all parties to the proceedings before the Commission must be made parties to the suit. This action must be brought in the county of the claimant's residence; if the claimant is not a resident of Texas, the action must be brought in the county in Texas where the employer has its principal place of business.

If the final order of the Commission requires the payment of wages or a penalty, the party must either deposit into a TWC escrow account the total amount ordered to be paid, or file with the court a timely affidavit of inability to pay. The money deposited is placed in an interest-bearing escrow account to be disbursed at the conclusion of the judicial process, with the interest being paid to the prevailing party.

XI. PENALTIES

If the Commission determines that an employer acted in bad faith in not paying wages as required by the statute, the Commission may assess an administrative penalty against the employer in the amount of the wages claimed or $1,000, whichever is lesser. Penalties in the same amount may be assessed against an employee who files a wage claim in bad faith.

An employer commits an offense that is a third degree felony if the employer hires or intends to continue to employ an employee with the intent to avoid payment of wages owed to the employee and if the employer fails after demand to pay those wages.

XII. LITIGATION IN COURT

A. Standard Of Review

The TWC's final decision can be judicially reviewed in accordance with section 61.062 of the Texas Labor Code. TEX. LABOR CODE ANN. § 61.062 (Vernon 2006); *New Boston Gen. Hosp., Inc. v. Tex. Workforce Comm'n*, 47 S.W.3d 34, 36 (Tex. App.–Texarkana 2001, no pet.). Section 61.0162(e) provides: "An appeal under this subchapter is by trial de novo with the substantial evidence rule being the standard of review in the manner as applied to an appeal from a final decision . . ." TEX. LABOR CODE ANN. § 61.062(e). The substantial evidence rule discourages courts from overseeing regulatory statutes that the Texas Legislature enacts. *Wishnow v. Tex. Alcoholic Beverage Comm'n*, 757 S.W.2d 404, 409 (Tex. App.–Houston [14th Dist.] 1988, writ denied). "At its core, the substantial evidence rule is a reasonableness test or a rational basis test." *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994) (citing *R.R. Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 41 (Tex. 1991)). The substantial evidence standard gives deference to an agency's expertise and decisions. *See R. R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995).

A court reviews the reasonableness of the agency's order, not necessarily the correctness of its decision. *City of El Paso*, 883 S.W.2d at 185. "An administrative decision is reasonably supported by substantial evidence if the evidence as a whole is such that a reasonable mind could have reached the same conclusion the judge reached in order to justify his decision." *Garza v. Tex. Alcoholic Beverage Comm'n*, 138 S.W.3d 609, 613 (Tex. App.–Houston [14th Dist.] 2004, no pet.). When reviewing the agency's decision, we are not allowed to substitute our judgment for the agency's judgment. *Wishnow*, 757 S.W.2d at 409; *see Garza*, 138 S.W.3d at 613. Even though substantial evidence is more than a mere scintilla, the evidence in the agency record may actually preponderate against the agency's decision, yet still equate to substantial evidence. *See*

Garza, 138 S.W.3d at 613; *Entergy Gulf States, Inc. v. Pub. Util. Comm'n*, 112 S.W.3d 208, 218 (Tex. App.–Austin 2003, pet. denied). TWC's decision is presumed valid, and the party seeking to set aside the agency decision has the burden to prove the decision was not supported by substantial evidence. *New Boston Gen. Hosp., Inc.*, 47 S.W.3d at 37; *see Wishnow*, 757 S.W.2d at 409. The TWC "determines the meaning, weight, and credibility to assign conflicting evidence." *See County of Reeves v. Tex. Comm'n on Envtl. Quality*, 266 S.W.3d 516, 528 (Tex. App.–Austin 2008, no pet.). Therefore, a court will not disturb the agency's decision simply because there was conflicting and disputed testimony. *Id*. (citing *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984)). *See also Sweeney v. Dyncorp Intern., LLC*, No. 14-08-00923-CV, 2010 WL 811158, at *3 (Tex. App.–Houston [14th Dist.] March 11, 2010, n.p.h.) (affirming TWC's decision in a TPA case).

Whether the TWC's decision is supported by substantial evidence is strictly a question of law. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986). Substantial evidence is more than a mere scintilla of evidence but less than a preponderance of evidence. *City of Houston v. Tippy*, 991 S.W.2d 330, 334 (Tex. App.–Houston [1st Dist.] 1999, no pet.). Consequently, the evidence may preponderate against the TWC's decision but still amount to substantial evidence. *Id*.

B. Other Litigation Issues Under The TPA

The TPA is not an employee's sole and exclusive remedy for a claim based on past wages, but is, rather, an alternative remedy that is cumulative of remedies under the common law. *See Holmans*, 914 S.W.2d at 192-94. After commencing a claim under the TPA, a claimant must exhaust all administrative remedies before seeking relief in the trial court. *See* TEX. LAB. CODE ANN. § 61.062(a) (Vernon 1996). Otherwise, the trial court lacks jurisdiction to hear the claim. *See Holmans*, 914 S.W.2d at 191-92.

As mentioned above, the TPA is not an employee's sole and exclusive remedy for a claim based on past wages, but is rather an alternative remedy that is cumulative of the common law. *See Bennett v. Cash Am. Int.'l, Inc.*, 982 S.W.2d 620, 622 (Tex. App.–Houston [1st Dist.] 1998), *off's*, 35 S.W.3d 12 (Tex. 2000); *Holmans*, 914 S.W.2d at 192-93. However, by initiating and proceeding with his or her administrative remedies under the statute, the employee thereby chooses to forego his or her common-law causes of action and elect the alternative remedy provided by statute:

> [W]e can only conclude the legislature intended the Payday Law to be cumulative of the common law and stand as an alternative remedy a wage claimant may seek. Should a claimant choose to file a claim under the statute, utilize its remedial scheme, and appeal the final administrative order, then the claimant is properly required to abide by the statute's provisions. We do not, however, construe the Payday Law as preempting a claimant, such as appellant, from choosing to pursue his claim as a common-law action in the courts of this state. A claimant will ultimately have to choose which remedy to accept . . . .

Holmans, 914 S.W.2d at 193-94.

Accordingly, a party may not initially elect one remedy and then choose the other remedy when dissatisfied with the first result. *See id*. at 194.

Along the same lines, the Texas Supreme Court has held that the TWC's final administrative decision on a TPA matter is accorded preclusive effect under the doctrine of *res judicata* when a claim for wages is brought under some non-TPA theory. *See Igal*, 250 S.W.3d at 90 (TWC's denial of former employee's wage claim as not filed within 180 days of due date for wages was *res judicata* bar to employee's breach of contract suit in district court).

XIII. CONCLUSION

Texas employers would be wise to review their pay practices both under the TPA and the FLSA to ensure compliance with both laws. Claims under these statutes have increased substantially in recent years. Plaintiffs lawyers are now advertising to attract these types of

claims. Given the often large potential monetary exposure for noncompliance with these laws, employers are far better off investing some time and money now to correct any areas of noncompliance, rather than risking exposure to a lawsuit.