HR Laws
Texas
Employment Law Letter

Vol. 35, No. 3 | March 2024

LABOR LAW

Reports of labor exploitation can lead to employment authorization

by Jacob Monty, Monty & Ramirez, LLP

Deferred action is a streamlined and expedited tool that can shield vulnerable migrant and immigrant workers from threats of deportation for reporting unsafe or exploitative employers. Employers taking advantage of risky work conditions need to be on notice of these new protections.

Temporary protection and employment authorization

The Department of Homeland Security (DHS) has announced that a streamlined and expedited deferred action request is now available to noncitizen workers who are victims of labor rights violations and offers protections from threats of immigration-relation retaliation such as deportation. A noncitizen suffering from exploitive working conditions can now report unlawful activity to a labor agency requesting an investigation and can attain lawful employment authorization while the investigation takes place.

While deferred action does not automatically grant lawful status or excuse past unlawful presence, a noncitizen granted deferred action is considered lawfully present in the U.S. while deferred action is in effect. If deferred action is approved, it may be granted for up to two years at time, and workers can request an additional two-year period of deferred action, so long as the request is made 120 days prior to the expiration of the original granted period.

Pursuing deferred action status

Noncitizen workers looking to pursue this route first report the violation of their labor rights to an agency related to labor complaints. The agency looks over the information relayed to them and determines if they are interested in preparing a statement of interest form. If so, such form is sent to DHS indicating that individuals working for the targeted employer need to be protected from deportation to be witnesses for their impending investigation. The employee is also granted a copy of this statement of interest, which the worker can use to request deferred status and employment authorization from DHS while the labor agency conducts its investigation of the employer.

Because of the nature of the investigation, noncitizen workers also working for the employer can request these protections and be granted deferred action status as their cooperation can potentially be vital to the labor agency's investigation.

Protections can apply to noncitizens in removal proceedings

Deferred action status also extends to individuals currently in removal proceedings or who have a final order of removal. In this scenario, U.S. Citizenship and Immigration Services (USCIS) forwards requests to the U.S. Immigration and Customs Enforcement for consideration.

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Under these regulations, an individual whose case has achieved deferred status is eligible to receive employment authorization so long as they demonstrate an economic necessity for employment. While deferred action can be renewed for periods of two years, it's important to note that DHS can terminate this status at any time, at its discretion.

What to expect as an employer receiving an investigation notice

Employers that receive notice from a federal, state, or local labor agency of an impending investigation should engage labor counsel and cooperate with the investigating agency without retaliating against any individuals it suspects may have made the report to avoid potential fees or further complications stemming from the investigation. Employers should also review their personnel records and hiring procedures to ensure they are in compliance with applicable labor and immigration laws.

Hiring workers who have received employment authorization documents (EADs) under these new regulations remains straight forward. Individuals under deferred action status can be treated as any new hire, with presentation of an EAD falling under List A for I-9 acceptable documentation. You will need to reverify employment authorization at the expiration of the EAD depending on whether the worker has extended their deferred action status or pursued alternative means of citizenship.

Seeking out deferred action status can be a powerful shield for migrant workers dealing with unsafe and exploitive labor conditions and can help lead to legitimate employment authorization. This policy marks a significant shift toward ensuring immigrant workers are protected from retaliation for speaking out about labor violations and should continue to be a powerful tool moving forward.

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ATTORNEY-CLIENT PRIVILEGE

Tales of Trump: Attorney-client privilege versus confidential information

by Michael P. Maslanka, UNT-Dallas College of Law

I was watching the hearing in Atlanta on efforts to disqualify Fulton County D.A. Fani Willis from prosecuting former President Donald Trump because she engaged in a romantic affair with the person she appointed to be the special prosecutor in the case.

Early in the proceeding, there was confusion by the lawyers on the difference between the attorney-client privilege (ACP) and keeping a client's confidences. So, I thought we could do a quick primer.

What is the ACP?

The ACP is a narrow privilege, applying only when a person comes to a lawyer for the express purpose of seeking legal advice. If so, then no third person can inquire into what the client (or prospective client) said to the lawyer and what the lawyer said to the client (or prospective client). Merely communicating with a lawyer—absent this purpose—is of zero legal significance.

If you communicate with a lawyer about firing an employee and the legal issues that might arise, then the discussion is covered by the ACP. If you communicate with a business colleague in your company about buying a new machine for your manufacturing plant and you

"cc" your lawyer to keep her in the loop, the communication isn't privileged.

If you communicating with your lawyer about whether buying the machine is a good idea from a business perspective but no legal advice is sought, the communication isn't privileged.

You see where this is going.

Don't open the door

Now note that the privilege can be waived if you or your lawyer aren't careful. Here's a scenario involving a deposition from a Fair Labor Standards Act (FLSA) case in Texas.

The lawyer deposing the company rep asks if he met with the company lawyer to discuss the deposition. That's a fair question. For how long? No problem with that question. Next up: What topics did you discuss? The company lawyer balks and says that is ACP. The counsel opposite says essentially, "I don't want to know what was said between you two but rather just the general topics discussed."

The company lawyer relents and lets the question be asked. Bad idea. The appeals court holds the ACP is waived and the door is now open to testimony on the specific contents of the conversation between attorney and client. In for a dime, in for a dollar. *Nguyen v. Excel Corporation*, 197 F. 3d 200 (5th Cir., 1999).

What are client confidences?

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct—"Confidentiality of Information"—says anything a client tells a lawyer during the course of representation must be kept confidential by the lawyer. This is so regardless of whether legal advice is being sought.

Think of an industrial strength vacuum cleaner. It sucks up everything in its path. Same here.

Let's say the lawyer is defending a client on an unlawful sex discrimination claim. The client tells the lawyer, "I think you should know that 15 years ago at another company, I actually did fire an employee because she was a woman." While this tidbit has nothing to do with the current lawsuit, nor was advice being sought about it, it's nonetheless confidential information shared with the lawyer during the current representation. The lawyer can't say a word to anyone about it.

Takeaways

In short, the ACP is intended to stop a third person—such as the government or a party opposite in a lawsuit—from prying into what was communicated between lawyer and client or prospective client.

It's a shield that can't be cracked open but can be tossed away. By contrast, Rule 1.05 is intended to prevent the client's lawyer from blabbing to anyone outside the lawyer's firm about anything the client communicates to the lawyer. The purpose is the same though—to encourage clients and prospective clients to tell everything to their lawyer so the best advice can be given. No self-censorship. These are the basics that you need to know.

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TECHNOLOGY

AI attorney is no match for human attorney

by Michael P. Maslanka, UNT-Dallas College of Law

A lot is being written on artificial intelligence (AI) and its use in law. A court opinion from February illuminates its "use" in an employment case and the disastrous consequences.

I.O.U. instead of wages

Molly Kruse went to work for Indigo Three, Ltd., as a creative director in 2015. She agreed to accept—in lieu of a paycheck—promissory notes. She was fired in October 2019, never having been paid, with only a handful of worthless paper for her efforts. (Now you know what "not worth the paper it's printed on" means.)

Kruse sued for her unpaid wages and was awarded more than $311,000. Our story begins with the appeal that followed.

Consultant takes on appeal

Unable to find a lawyer, the owner of the company located a California-based consultant to file an appeal. The cost was less than 1% of what the owner would pay for a lawyer. What a deal! And the company's brief included such gems as the following:

> For instance, in *Smith v. ABC Corporation*, 321 S.W.3d 123 (Mo. App. 2010), the Court of Appeals held that it had the duty to review the grant of judgment as a matter of law de novo, stating that "the appellate court should not be bound by the trial court's determination and must reach its own conclusion based on the record."

Sounds good, but it looks odd with the "ABC" and the "123." Kruse's lawyer thought so too, and after a deeper dive into the brief, he discovered 23 other AI hallucinations. The owner of the company apologized, said he hadn't intended to mislead, and explained the expense rationale (a lawyer would have been too costly) that led him to hire the consultant.

Apology accepted, but a $10,000 sanction was imposed, and the appeal was dismissed. *Kruse v. Karlin et al.* (Missouri Court of Appeals , Eastern District)(February 13, 2024).

Bottom line

Be vigilant. The courts are very sensitive to AI misuse. Federal district judges in east Texas have adopted a rule telling lawyers that use of generative AI in brief writing is forbidden, and they must certify that it wasn't used. And the U.S. 5th Circuit Court of Appeals (which covers Texas employers) is considering adopting such a rule. Stay tuned.

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RACE DISCRIMINATION

Texas court: FedEx delivers timely win in Section 1981 lawsuit

by Michael P. Maslanka, UNT-Dallas College of Law

A creative FedEx policy gets the credit in beating back a $366,160,000 jury verdict in a race discrimination case arising in Houston. Read on for news you can use!

Section 1981 vs. Title VII

Section 1981 of the Civil Rights Act of 1866 prohibits race/ethnic discrimination, as does Title VII of the Civil Rights Act of 1964. But that's the end of the similarities. Section 1981 doesn't require employees to file an unlawful discrimination charge, uses a four-year statute of limitations, and allows for the possibility of uncapped compensatory and punitive damages.

By contrast, Title VII requires employees to exhaust their administrative remedies, uses a 300-day limitations period, and caps compensatory and punitive damages at $300,000. For some inexplicable reason, the lawyers representing Jennifer Harris didn't sue under Title VII for race discrimination, like most employees' lawyers do. Here's where our story begins.

FedEx career derails, lawsuit commences

Harris started as an account executive for FedEx in 2007. She ended as an account executive with supervisory sales responsibilities in January 2020. When she started work, she signed an at-will employment agreement containing a "limitations provision" that said, "to the extent the law allows an employee to bring legal action against the Company, [she] agrees to bring that complaint within the time prescribed by law or six months from the date of the event forming the basis of [her] lawsuit, whichever expires first."

All was well until 2017, when Harris was assigned a new supervisor named Michelle Lamb and was given the new responsibility of leading a team of eight account executives. Let's just say for now that Lamb wrote several poor performance write-ups about Harris, and Harris made several corresponding internal complaints asserting race discrimination by Lamb (of which FedEx cleared her).

Harris was fired in January 2020. She then sued for race discrimination and retaliation in May 2021, 16 months after FedEx fired her.

Verdict's aftermath

An angry jury awarded big-time damages to Harris under Section 1981. But recall the "limitations provision" she signed when she started at FedEx. She didn't file her lawsuit—as she promised to do—within six months of being fired.

The U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) held the trial court was wrong in letting the Section 1981 claim go to the jury but was right in letting the Title VII retaliation claim go to the jury.

Why the difference? Section 1981 permits individuals to enter into contracts, including at-will employment contracts (which is what Harris was claiming), and the courts uniformly hold that parties to a contract can agree to a limitations provision. By contrast, Title VII is a statutory mandate that can't be varied by agreement.

The appeals court allowed the retaliation claim under Title VII to stand, with an award of compensatory damages of $248,619.57 but no punitive damages.

Now, let's turn to the court's analysis of the retaliation claim (there is one) and an award of punitive damages for such a claim (there is none).

Title VII retaliation

The appeals court asked one question: Was there enough evidence for a reasonable jury to conclude FedEx fired Harris for claiming unlawful discrimination? The appeals court said "yes" despite her performance deficiencies being well documented.

There was only one other employee in Harris's position who had been discharged, and that person had likewise claimed unlawful discrimination. Others in her position weren't making their numbers (sales is one tough job) but weren't disciplined or fired. Yes, their numbers were better than hers at various points in the year, but the bottom line is they were equally poor.

Words matter, and they matter a lot. Harris's supervisor testified she had "extreme concern with [Harris's] behavior" because she was "taking the approach of arguing with [Lamb] about many things" and "demonstrating an insubordinate attitude."

Yes, I know what you're thinking. Harris went to Human Resources (HR) and claimed unlawful discrimination

each time she was criticized for her performance. And, per FedEx policy, the review was put on hold, an investigation was conducted at once, and no merit was found to support her accusation.

The jury should have concluded her performance was poor and that the complaints were a ruse to avoid criticism. But our system doesn't work this way. Rather, it's the jury's job to decide which argument to believe, and it believed her, not FedEx.

But punitive damages for the violation? Not so fast. To receive punitive damages, employees must show the employer acted with malice or reckless disregard for their federally protected rights. And this means what exactly? The employer knew that firing an employee for protesting unlawful discrimination violates the law but threw caution to the wind and did it anyway.

The 5th Circuit curtly wrote that there was no such evidence. And even if there were, it held that a company's good-faith efforts to comply with Title VII absolve it of exposure to punitive damages. Here, FedEx completed its investigations, and its policy prohibits any sort of discipline from being imposed while the investigation is ongoing. The appeals court said the employee's right to punitive damages requires a lot of evidence, and here, there was zip. *Jennifer Harris v. FedEx Corporate Services* (5th Cir., Feb. 1, 2024).

On-time delivery

First, incorporate FedEx's "limitations provision" in all your offer letters.

Second, follow FedEx's lead in its investigation's policy—make it complete, and put discipline on hold during the investigation.

Finally, don't assume the employee is manipulating the system. Employees have the right to complain about unlawful discrimination, so let them. Don't impugn or characterize their motives, or it will come back to hurt you.

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LITIGATION

Eastland appeals court slaps employer on social media discovery

by Michael P. Maslanka, UNT-Dallas College of Law

A recent employment law case in West Texas sheds light on what an employer in an employment lawsuit can ask of the employee via written discovery (pretrial fact finding). It's a gold mine! We will talk about it in this month's issue and the next.

Facts

Richard Scherer sued his former employer, Endeavor Energy, in Midland County state court. He claimed his age and his national origin were considered by Endeavor in denying him a promotion.

The company sent Scherer written discovery asking questions it thought were relevant to its defense. He resisted answering some of the written questions (called interrogatories). The dispute found its way to the appeals court.

Social media interrogatory

Here was the company's written question on social media:

> List all email addresses you have used during the last five years and provide all web addresses for any online content with which you are associated, including, without limitation, social media websites (e.g., Facebook, Instagram, LinkedIn, Snapchat, Tik Tok).

Scherer objected to the request as overbroad. Or as my mother would say, "What does the request have to do with the price of eggs in China (i.e. the lawsuit)?"

Here is how the court expressed my mother's sentiments:

> Requests for social media posts which are limited in time or scope, but which bear no restrictions as to the requested subject matter are properly denied. . . . The request seeks the "web addresses" for all online content with which Scherer is associated. . . . That is, it effectively seeks a list of every web page and any piece information generated by or associated with Scherer that has been posted within the last five years without any limitation in its scope or content."

By way of example, according to the court, the request would require Scherer to cough up every piece of social media content in which he is "tagged." Too much! The appeals court remarked that the company could submit a narrower request linked directly to the lawsuit allegations but couldn't go deep sea fishing by spreading its nets as far and wide as possible.

As the expression goes in the military: "The juice is not worth the squeeze." But wait, there's more!

Pencil ready? Calculating noneconomic damages

Successful claims under the Texas Labor Code—as with many other types of claims—allow a winning employee to recover economic damages such as lost wages, as well as noneconomic damages such as mental anguish. While noneconomic damages must have some factual foundation (sleepless nights, upset stomach, fits of crying), they aren't susceptible to mathematical precision.

Well, you guessed it—the employer asked not only for the amount sought for noneconomic damages (fair enough) but also how those damages are precisely calculated (not fair). Why?

As the expression goes: "The heart knows what the mind cannot understand." That is, some things are quantifiable, some aren't. Here's how the appeals court put it:

> Endeavor's briefing seems to assume that, because noneconomic damages must have a rational basis, all such damages are subject to some form of calculation. . . . We do not believe that all noneconomic damages can necessarily be expressed in the form of verifiable calculations.

So, the trial court erred when it ordered Scherer to do so. *In re Richard Scherer* (Tex. App. Eastland, February 15, 2024).

Bottom line

Cases can be won or lost in the trenches. These are the trenches. Next month, I will get into the opinion and the slaps it laid on the employee and his errors in written discovery.

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WHISTLEBLOWING

Dollars to doughnuts: Unsupported conclusions won't knock courts' SOX off

by Michael P. Maslanka, UNT-Dallas College of Law

Riddle me this: Why are conclusions like doughnuts? I use this question in class with my students. The answer: Because they look pretty (especially with sprinkles), taste yummy, and contain zero nutritional value. This truth played out in a recent case from the U.S. 5th Circuit Court of Appeals, the federal appeals court covering Texas.

SOX claim?

Darrell Seybold worked at Charter Communications but was fired for alleged unprofessional conduct. He disagreed, asserting the discharge resulted from engaging in protected conduct under the Sarbanes-Oxley Act (SOX).

As a publicly traded company, Charter is subject to SOX, which protects employees from retaliation for blowing the whistle on their employer's shady financial practices. Seybold claimed that's exactly what he did.

Enter the 'doughnut'

The trial court looked at the written claim in the filed lawsuit and tossed it, and the appeals court agreed. Why? Because Seybold asserted only conclusions ("I engaged in protected activity."), not facts ("Here are the details of what I did and why I believe I was protected from termination.").

According to the appeals court, Seybold summarized his actions as "reporting," "opposing," and "disputing" certain Charter policies, but he didn't show he held a "reasonable belief that the conduct violates" securities laws. If anything, it expresses mere disagreement with company policy.

The court said that "because he did not show what he actually reported to Charter, [he] could not show that his actions constituted protected activity under SOX, or that Charter believed it to be protected activity." In short, he offered no allegations that actually blew the whistle.

Bonus lesson

Seybold also alleged a breach of contract—namely, that he didn't receive unpaid commission under the company's commission plan and this failure was a breach of contract by Charter.

Here's a good rule to follow: When in doubt, look at the instructions—in this case, the plan itself. To wit: "Nothing in this Plan shall constitute a contract of employment or contract of any other kind." Game over. *Seybold v. Charter Communications, Incorporated,* Case No. 23-10104 (5th Cir., November 7, 2023).

Bottom line

While barroom generalities are sometimes of use, nothing in life or the law beats concrete expression.

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WORKPLACE ISSUES

Looking to boost productivity? Check out the latest office design trends

by Tammy Binford

The days of everybody coming into the office every day are over in many organizations, but the office remains key to getting work done. Even with all the change workplaces have experienced in recent years—the rise of remote and hybrid work, open-concept spaces, etc.—offices will face even more transformation in the years to come. And design experts are at work floating ideas to make the transformation productive.

What's fueling change?

There's no denying the impact the COVID-19 pandemic has had on the world of work. Technology enabled

businesses to continue their work even while offices were totally shuttered, but "Zoom fatigue" and a lack of in-person communication took its toll, making many yearn for a return to the office.

Even before the pandemic, workplaces were taking on a new look as employers tried to entice and engage employees with "fun at work" features such as foosball tables and free snacks. An emphasis on collaboration also led to open-concept offices where coworkers had easy access to each other, but the tradeoff was an environment not conducive to individual work.

In January, Hushoffice, a company offering workplace acoustic products, released a list of trends including statistics showing a large majority of employees value private spaces—and their productivity depends on those spaces. Employees also say they need flexibility, not just in terms of work hours and locations but also flexibility and control over their workspace within the office.

For example, not everyone wants a standup desk, but some do. Also, some value quiet solitude, while others thrive on the energy of a workspace buzzing with activity.

Workers also crave different settings for different activities. For example, more offices are providing soundproof pods where employees can make phone calls or block out distractions for other reasons.

Workers also benefit from being able to go from a private pod to a conference room to a space suitable for collaborative work as they see the need. Hushoffice says such activity-based layouts will gain popularity and promote the autonomy today's employees want.

Latest trends

In December, architecture and design firm Gensler released a list of trends expected in 2024. Topping the list: People performance is in, and real estate metrics are out.

That means giving people spaces that allow them to work alone sometimes and collectively other times. According to Gensler, "better designed, people-centric workplaces have significant return on investment for individuals, teams, and the business outcomes." Such people-centric design is more important than measuring success by real estate density and occupancy.

The concept of abundance drives productivity, Gensler says. An office with a variety of spaces—such as team spaces, unassigned desks, and rooms for focused work—takes some getting used to, so workers need to know they can try out different areas without worrying about whether a desired space is available.

"Having more work points than people can provide an opportunity to comfortably try things out while knowing there will always be a seat available," Gensler says. "Abundance naturally allows new behaviors, habits, and mindsets to form."

By contrast, a real estate strategy based on scarcity, such as assigning 100 people to 80 desks, can result in the fear of not getting a seat, the Gensler report says.

Another top trend: privacy. In both the U.S. and globally, Gensler says workers rank "to focus on my work" as the top reason to come into an office. Therefore, to support ways of working beyond the desk, employers need to provide "degrees of openness" ranging from enclosed focus rooms to libraries to quiet zones.

Looking to the future

In addition to its look at workplaces, Gensler released its 2024 design forecast report identifying leading trends driving design that go beyond the workplace.

The forecast dives into ways to rescue the stranded assets many cities are seeing as remote and hybrid work lower the need for office space. Office-to-residential conversions are expected to increase, Gensler says. As more less-than-desirable office buildings become unoccupied, municipalities can be expected to incentivize reuse strategies and conversions to revive areas employers have abandoned.

Communities also are expected to make compelling destinations for the workers who continue to go to the office, Gensler says. For example, workers appreciate having amenities such as coffee shops and restaurants as well as gyms, medical facilities, child care, and farmers markets in or near office buildings.

Sustainable design also can be expected to take center stage and has become what Gensler calls a "non-negotiable."

"As intense weather and climate change assail the built environment, sustainable design shifts from an option to an obligation," the report states. ■

EMPLOYEE COMMUNICATION

Workplace communications not up to par? Take a look at what's going wrong

by Tammy Binford

Ever say something at work you wish you could take back? Does it happen frequently? If so, you're certainly not alone. Stress can be one of the triggers for unfortunate communications at work. But regardless of what causes people to say the things they say—or not say what they probably should—data indicate that workplace relationships could benefit from more attention to effective communication, especially with the prevalence of digital communication among remote and hybrid workers.

Regrettable language

In November, language tutoring platform Preply released results of a survey of Americans showing that 87% confessed to using language they later regretted when their stress levels were high.

The most regretted phrase uttered at work was "I don't care." Other stress-induced remarks revealed in the survey are "Not my job" and "This is a waste of time." Rounding out the top 10 regretted phrases: "I'm too busy"; "Who cares?"; It's pointless"; "You're wrong"; "You're overreacting"; "I knew this would fail"; and "You always mess up."

The survey found that more than two-fifths of employees acknowledged their stress-induced words have spurred misunderstandings or conflicts in the workplace.

Preply found that 62% of employees surveyed said exposure to others' negativity at work decreased their motivation and job satisfaction, and two in five said their workplace culture is permissive toward such negative language.

The survey found that acceptance of negativity is most pronounced in industrial and manufacturing sectors and that acceptance results in employees adjusting their communication to align with the negative tone by engaging in complaints or gossip.

According to the survey, those in industrial and manufacturing environments are most likely to gossip, followed closely by retail and hospitality.

Challenges and drawbacks

In a report on workplace trends released in December, polling giant Gallup identified challenges and drawbacks related to hybrid work arrangements, which are expected to remain popular. Many of those challenges and drawbacks involve communication.

Among the greatest challenges identified by employees, Gallup found that hybrid arrangements can result in decreased collaboration among team members, an impaired working relationship with coworkers, and less cross-functional communication and collaboration.

Among the top drawbacks identified by leaders and managers, decreased workplace communication tops the list, followed by less collaboration, a negative impact on workplace culture, lower productivity, and decreased creativity or innovation.

Techniques for remote teams

How can employers tackle threats to effective communication? Internal communications provider Contact Monkey suggests some signs of poor remote team communication to watch for, signs such as having too many meetings that are too disorganized.

Also, a lack of communication channel norms causes problems. Team members need to know the best channel to use when asking management a question or collaborating with a team member. If employees don't know the proper channel—phone, email, messaging, etc.—they may skip communicating entirely.

Sometimes, workers who don't know which channel to use will use multiple channels, which leads to confusion or the message being ignored.

Employment website Indeed has posted tips for improving communication for remote workers. Establishing clear guidelines for communicating is among the suggestions. Such guidelines should include which communication channels are preferred for different kinds of information. Also, employees should understand the standard wait time for responses to messages and emails.

Indeed also urges setting boundaries for sending messages. Remote employees often feel like they're expected to be "always on." Therefore, setting a definition of "after hours" is important, as is letting people know when they should avoid sending messages. Keeping time zones in mind is also essential.

When using email, Indeed suggests ways to enhance communication:

- Make the subject line clear.
- Make the call to action clear to increase the likelihood that the recipient will do what's asked. For example, a call to action may be something like "Please complete this survey by (include deadline)."
- Know when to use email instead of another channel such as instant messaging or a phone call.
- Schedule emails to avoid disturbing people outside of work hours. ■

TEXAS EMPLOYMENT LAW LETTER (ISSN 1046-9214) is published monthly for $499 per year by **BLR®—Business and Learning Resources,** 5511 Virginia Way, Suite 150, P.O. Box 5094, Brentwood, TN 37024-5094.

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