



TEXAS

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BUSINESS REPORT



EPA Pursues Radical Regulation *Congress Continues To Fail In Governing*

While most of us were still cleaning up the Christmas gift wrappings and getting ready for another new year, the public comment period closed on the most recent chapter in EPA's frantic effort to force the regulation of greenhouse gases on American businesses and consumers. The proposed Greenhouse Gas Tailoring Rule will extend EPA's federal air emission permitting programs to include greenhouse gases, an action that will have devastating results on business, our economy and virtually every citizen.

This proposal follows closely on recent actions by EPA to find that greenhouse gases constitute a risk to public health and welfare, to regulate greenhouse gases from motor vehicles and to change previous federal policy for the purpose of regulating greenhouse gases the same way we regulate air pollutants, such as those that form ozone. EPA insists these actions are required in response to a Supreme Court decision that greenhouse gases, such as the carbon dioxide in our atmosphere, are "air pollutants" under the definition in the federal Clean Air Act.

Under the Clean Air Act, major air emission sources are authorized by certain. Facilities are subject to these federal permits if they emit more than 100 or 250 tons per year depending on the type of permit and the source. As clear evidence that Congress never intended for greenhouse gases to be regulated under the Clean Air Act, EPA acknowledges that adding greenhouse gases to the air permit



program under these thresholds would sweep millions of facilities into the program and bring effective regulation of air quality to a halt as the program collapses under its own bureaucratic weight.

But the new EPA leadership and environmental groups want to keep pressure on Congress

continued on page 3

WORKFORCE Q&A

Is an employee's electronic signature sufficient to establish that the employee received an employment policy?

(see page 2)

DEFICIT

Increasingly, even supporters are saying Mr. Obama cannot keep both his promise to bring deficits under control and his vow not to raise taxes on anyone making less than \$250,000.

*- New York Times
January 6, 2010
"Obama's Promise to Cut Deficit Is Grown Harder to Keep"*

TAB MISSION

To make the Texas business climate the best in the world.

WORKFORCE Q&A



Amy Karff Halevy
Bracewell & Giuliani, LLP

Is an employee's electronic signature sufficient to establish that the employee received an employment policy?

An electronic signature by an employee acknowledging receipt of a policy should be sufficient to demonstrate the employee's receipt and acknowledgment of the policy. There is no legal impediment under federal or Texas law for an employer to require an electronic signature to demonstrate receipt and acknowledgement of electronically delivered policies. However, it is recommended that employers provide employees with the option of acknowledging receipt of the policy in writing for employees who are unable to access

the policy by computer or who require a reasonable accommodation under the Americans with Disabilities Act.

It should be noted that Texas has adopted a Uniform Electronic Transactions Act, which, like its federal counterpart, provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. See Tex. Bus. & Comm. C. § 43.007 and 15 U.S.C. § 7001. Although these statutes do not specifically address the employment relationship, they provide additional support for instituting electronic signatures of policies.

Moreover, the HIPAA regulations provide guidance as to what is considered taking "reasonable measures" to ensure that an electronic system results in actual receipt of transmitted documents, including: (i) using return-receipt electronic mail features or notice of undelivered mail, and (ii) conducting periodic reviews or surveys to confirm receipt of transmitted information.

Finally, challenges have been raised by employees in cases involving electronic distribution of arbitration agreements. Based on these challenges, employers should consider taking measures to ensure that an electronic signature can be attributable to the employee. Some suggested measures include: (i) providing employees with clear written and/or verbal notice of the electronic distribution of the policy; (ii) ensuring that employees utilize unique passwords to access the employer's computer system; (iii) tracking the date and time an employee opens the e-mail containing the policy; and (iv) providing a box for employees to check confirming that they have received the policy. See *Kerr v. Dillard Store Services, Inc.* 105 F.E.P. cases 1298 (2009); *Campbell v. General Dynamics Government Systems*, 407 F.3d. 546 (1st Cir. 2005).

Employment Relations questions?

***Don't forget to call TAB's Employment Relations Hotline
for your next HR Question
1.800.856.6721, ext. 164 or E-mail smcgee@txbiz.org***

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EPA Pursues Radical Regulation

continued from page one

to stringently regulate greenhouse gases under proposed cap-and-trade legislation. So, in order to avoid the catastrophe of regulating millions of new facilities, while still maintaining the threat of regulation of greenhouse gases, EPA proposes to “tailor” the thresholds in the Clean Air Act. Under EPA’s proposed tailoring rule, the 100 or 250 tons per year that Congress wrote into the Clean Air Act as the thresholds for regulation of pollutants under federal permits would be replaced in EPA rules with either 10,000 or 25,000 tons per year.

The problem for EPA is that Congress gets to “tailor” (amend) statutes, not administrative agencies. EPA’s justification is that since regulation of greenhouse gases under the federal Clean Air Act results in such a total calamity, then Congress did not really mean for the thresholds to apply and therefore EPA has discretion to change them. In other words, EPA creates a pending disaster on the one hand by proposing to regulate greenhouse gases under an inappropriate statute in a way Congress never intended, but then saves us from the terrible fate on the other hand by illegally re-writing federal law in an administrative rule.

Regulating greenhouse gases under federal Clean Air Act permits accomplishes nothing of value. Air pollutants are regulated under federal permits by establishing air quality standards that must be met, designating which areas do not meet the standards and then ensuring that sources of emissions use the appropriate control technologies to limit emissions. But there are no control technology standards

applicable to greenhouse gases, nor are there any ambient air quality standards promulgated. A program to prevent the significant deterioration of air quality in attainment areas, when the entire planet will be a non-attainment area for greenhouse gases, makes no sense. Regulating greenhouse gases under the Clean Air Act will have no appreciable effect on global greenhouse gas levels or global temperatures. It will have one significant effect, however. It will divert resources from industry, state regulatory agencies and local governments struggling to address the reduction of real air pollutants that are related to real public health risks.

Congress has struggled to move legislation that would address greenhouse gas regulation without crippling the economy. Thankfully, many members of Congress are appropriately critical of cap-and-trade provisions.

Some members of Congress, however, continue to insist that legislators must act on cap-and-trade legislation because the regulatory alternative that EPA says it must pursue is so much more damaging. But EPA’s answer is to allow an administrative agency to re-write federal law by rule.

Every member of Congress, regardless of their position on greenhouse gas regulation and energy policy, should remember their responsibility under the Constitution to make the law. Each member should insist that EPA stop its attempts to re-write federal law and defer to Congress to properly address this issue in a meaningful way.

Who’s On The Ballot?

The *Texas Tribune* has compiled a comprehensive list of the candidates running for statewide office in Texas. The candidates listed will square off in March for their party’s primary nomination. For each race, an asterisk indicates the current incumbent.

Governor

White, Bill (D)
Shami, Farouk (D)
Locke, Star (D)
Glenn, Clement E. (D)
Dear, Bill (D)
Alvarado, Felix (D)
Aguado, Alma Ludivina (D)
Perry, Rick (R) *
Medina, Debra (R)
Hutchison, Kay Bailey (R)
Daiell, Jeff (L)
Nichols, Steve (L)
Smith, M.J. (L)
Tidwell, Edward (L)
Glass, Katherine Youngblood (L)

Lieutenant Governor

Katz, Marc (D)
Earle, Ronnie (D)
Chavez-Thompson, Linda (D)
Dewhurst, David (R) *
Minor, Todd (L)
Jameson, Scott (L)

Attorney General

Radnofsky, Barbara Ann (D)
Abbott, Greg (R) *
Roland, Jon (L)

Comptroller

Combs, Susan (R) *
Ruwart, Mary J. (L)

Land Commissioner

Uribe, Hector (D)
Burton, Bill (D)
Patterson, Jerry (R) *
Holder, James L. (L)

For full list of candidates, please visit www.texastribune.org

MEMBER PROFILE

Who Needs Skilled Workers?

BGI Enterprises, Inc.

A.B. Bernard, a native of Beaumont, began his career in management at Bethlehem Steel Corporation, where he started out as a laborer and rose up the ranks to become the corporation's first African-American facility manager. When Bethlehem closed its facilities in 1990, Bernard began plans to start his own business. In 1991, BGI Enterprise ("BGI") and United Marine Enterprise were established. The primary business consisted of operating as a marine contractor in ship repair and drilling rig repairs. In 1992, the company began operating as United Marine Shipyard and established a ship-yard located in Port Arthur, Texas on Texaco Island. Then in 1994, BGI Enterprise diversified under BGI Contractors and started working as a general contractor providing services to the petrochemical and refining industries in Texas and internationally. They provide services to Texas' most historical industries: marine, refining, and petrochemical and take great pride in being part of industries that have made Texas one of the most dynamic coastal states.

As a general contractor, BGI has recognized changes in the construction industry - nearly 75% of shipyard activities, both new construction and repairs, have gone to foreign shipyards. This type of activity depletes the workforce and eliminates jobs in Texas and the United States.

Like most southeast Texas businesses, BGI has a constant need for a skilled workforce. It is an everyday challenge trying to find people with the requisite skills for this demanding industry. Although there are many training

programs available within universities, private training schools, and workforce initiatives, these programs are too short to properly train craft personnel for today's job market. Our entire country needs to develop collectively a program that will provide apprenticeship systems to exist in order to train and develop first class craft persons. The average craft person used in the petrochemical industry is 50 years old. Most of the highly skilled craft workers gained their talent by apprenticeship programs through union affiliations. BGI is concerned that if something is not done soon our workforce will become impotent and dependent on foreign labor.

"I see TAB as an invaluable resource on issues that impact Texas business. I appreciate that TAB works for the good of the entire business community and not a special interest."

***A.B. Bernard
Founder
BGI Enterprises, Inc.***

BGI is a member of both the Greater Beaumont Chamber of Commerce and the Port Arthur Chamber of Commerce and feel that the chambers provide the right atmosphere for businesses in their communities to network and be informed of the issues that affect their operations locally. The chamber has systemically involved local business in the efforts toward encouraging economic development.

Mr. Bernard feels that Texas offers business a very dynamic climate because of its diversified business attraction such as coastal waterways, which contributes to offshore drilling and seaport capabilities.

Texas has continuous job creation because of expanding business needs and the growth of the refinery and petrochemical industries. Additional benefits include its potential natural resources, agriculture, and outdoor sports activities.

Mr. Bernard said, "I see TAB as an invaluable resource on issues that impact Texas business. I appreciate the fact that the TAB works for the good of the entire business community and not a special interest."



In The Spotlight: *2010 Texas Association of Business Executive Board*

TAB proudly introduces the 2010 Executive Board Officers.

Board Chair Gray Mayes serves as the Director of Public Affairs for Texas Instruments (TI). In that capacity, she manages federal, state and local government relations for Texas Instruments.



“TAB is a vitally important and effective advocate on behalf of matters that affect businesses

with operations in the State of Texas. With the challenges many employers are facing in this new and changing economy, the organization is needed more than ever to represent Texas companies in Austin and in Washington.”

Prior to joining TI, Gray worked for 11 years on Capitol Hill in both the House and Senate, and subsequently moved to Texas where she was appointed North Texas Director for U.S. Senator Kay Bailey Hutchison.

She serves as Secretary of the Board of the YMCA of Metropolitan Dallas. She is also a member of the Board for the World Affairs Council of Dallas, the Dallas Breakfast Group and the Plano Chamber of Commerce. She formerly served on the the North Texas Regional Center for Commercialization and Innovation Board and in 2008 she was appointed by Texas Governor Rick Perry to his Competitiveness Council. Gray has also served on the President’s Advisory Committee of Dallas Center for Performing Arts Foundation; and is a Past Chair of the Dallas

Friday Group. Gray has also chaired public policy committees for AeA Texas, TechNet Texas, the Metroplex Technology Business Council and the Greater Dallas Chamber’s International Advisory Board.

Gray is a member of the Leadership Dallas Class of 2000 and the Leadership Texas class of 2005, and was recognized as one of the 21 Leaders for the 21st Century in Collin County, Texas.

Chair-elect Larry Simmons is a partner at the law firm of Germer Gertz, LLP in Beaumont. Larry specializes in employment & labor and civil litigation defense. In 2007, he was named a Texas Super Lawyer, one of the highest accolades in the state’s legal community. Larry frequently hosts employment law information seminars on behalf of the organization.

Treasurer Brett Graham is the owner of Graham International, a franchised international truck dealership; Graham Truck Centers, a truck tire dealership; and Texmex Adventures, a booking agency that assists anglers in planning fishing excursions. In addition to his successful businesses, Brett is a key asset to TAB as he works tirelessly for the Association. He also chairs BACPAC, TAB’s political action committee.

Secretary Rudy Oeftering has been active in TAB leadership since 2006. He owns and operates Oeftering Properties, a successful real estate company specializing in property turn around. Rudy is involved with local chambers in the Metroplex and throughout Texas, and is devoted to public service. Rudy previously served as a TAB Board Member, Small Business Committee Chairman, and a BACPAC/CIVIC Director.

TAB To Make Big Online Splash

Over the coming weeks, the Texas Association of Business will begin to transition much of the way we communicate to our new Web site.

The revamped www.txbiz.org has already been launched, and features the quality, in-depth content you’ve come to depend on from TAB.

TAB has cultivated a following on Twitter and Facebook, with our material being utilized by statewide campaigns, the US Chamber of Commerce, National Association of Manufacturers, our local chambers and syndicated political columnists.

We will, of course, continue to build upon our success on those platforms. However, one of the most exciting features we launched with the new Web site is the TAB Network, our own social networking site dedicated to the issues important to the business community.

You can share your thoughts on the important issues of the day, and join the conversation in how TAB will develop its legislative priorities for the legislative session that begins next January. This work is time-consuming and input we get from the business community is valuable.

We will begin a concerted push to make our Web site a first-class place for the business issues in Texas. In an effort to streamline the amount of e-mail we send, we will begin providing a daily brief that will be located on our Web site of the business and political stories important to you. Look for this new feature starting soon.



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Talk **About** Business

Success of Texas Business Hinges on Education



Bill Hammond, TAB President

Unemployment trends are reversing and, thankfully, more of our state's employers are opening their doors to new employees. However, in order to restore jobs lost during the recession and to prepare for those ready to enter the job market, Texas must create over two million jobs in the next decade. Adding two million new jobs will not be easy, but the good news is that we are starting to make progress. A key factor in Texas achieving this job growth target is having educated employees ready to fill jobs as they become available.

A recent article in *The Economist* noted that while Texas enjoys the best business climate in America, future problems related to education could erode that status dramatically.

The business community pays for two-thirds of the cost of educating our children and will be the ultimate consumers of their knowledge when companies seek to fill jobs. As such, the Texas business community must step up to the plate as a critical friend of education by demanding first-class education and first-class results.

We must implement honest accountability, encourage going to college and create a results-based higher education finance system.

The current academic accountability system is reminiscent of Enron in many ways. For example, the system rewards schools for the academic performance that they expect to happen, but that has not yet actually occurred. This backwards process has caused a false-positive spike in the number of schools rated "Exemplary" or "Recognized," now at 61%. The current education system will not allow Texas to remain globally competitive.

If Texans were unflinchingly honest about how our students are truly performing, we would be able to fully address the scope of the issue. The ball is in the court of the Texas Education Agency to account for the real numbers.

In conjunction with these changes, our students must be engrained with a college-going culture that provides children with the expectation that they will attain post-secondary education while at the same time providing them with the information and tools necessary to do so. The Texas Higher Education Coordinating Board is already taking important steps in educating Texans about the financial options available for students and

their families who worry about how they will pay for academic options.

Texas must also alter the funding formulas it uses for higher education and base it on the successful completion of courses, not simply classroom attendance. Adult basic education and remedial education must be funded along similar lines in order to ensure that the money is being used in the production of results, not just to support education bureaucracy.

Through a great deal of time and effort, TAB has emerged as a powerful voice in speaking out on how our State educates its children. The biggest threat to our business climate is a future workforce that is ill-prepared to meet the demands of an increasingly sophisticated job market. If our students fall short of employer expectations, industries will simply leave Texas and go to a state that has a steady supply of educated young adults prepared to fill their expectations. Stakeholders must fight to heighten our education standards, otherwise Texas, and its students, will be left behind. Addressing our education system must be priority number one.