

Economic Update

Job openings have risen by more than 700,000 nationwide since they bottomed out in July 2009, one month after the recession ended. That's an increase of 31 percent. Analysts expect companies will start hiring soon, noticing that other data suggests the economy is improving. Consumers are spending more, layoffs are at pre-recession levels and Dow Jones industrial average is above 12,000. Also, a report from the National Federation of Independent Business on Tuesday said confidence among small employers is at the highest level since the recession began in December 2007. The number of people applying for unemployment benefits nationwide plunged to the lowest level in nearly three years, continuing a downward trend that suggests hiring could pick up this year.

U.S. workers have reason to hope for slightly better pay raises this year, a shift that could add momentum to the economic recovery. With corporate America sitting on large piles of cash and manufacturers seeing a surge in exports to fast-growing emerging markets, signs are mounting that some of the benefits will start trickling down to employees. This could mean average wage gains of as much as 3% in 2011, compared with 1.7% in 2010 – enough to boost consumer spending, which accounts for more than two-thirds of the economy, but not so much that it would stoke concerns of an inflationary spiral. Thus far in the recovery, companies have focused more on controlling costs than on sharing the fruits of rising profits and productivity with their staffs. In the past two years, productivity – measured as output per hour – has risen at an average annual rate of about 4%, and corporate profits more than 30%. But the average wage increased at a rate of less than 2%. A separate survey by the Society for Human Resource Management suggested the average increase could be closer to 3%. Per Joseph Carson, Director of Global Economic Research at AllianceBernstein in New York, “We do see some bottom forming on wages, but you're going to have to see a lot more job growth before you see wage growth pick up in a meaningful way.” This year should be better for job growth than last year. On average, economists polled in the most recent Wall Street Journal survey said they expected the economy to add 180,000 jobs a month in 2011, shaving several tenths of a percentage point off the unemployment rate, which currently stands at 9%.

The City of Houston's population likely crossed the 2.1 million mark late last spring, the metro area topped 6.0 million in mid-summer, and Houston overtook Philadelphia as the nation's fifth most populous metro area toward the end of last year. That's according to estimates prepared by the Greater Houston Partnership's Research Department based on historical data and the most recent estimates from the U.S. Bureau of the Census. According to official '10 census population counts recently released by the bureau:

- The State of Texas grew 20.6 percent over the past 10 years, adding 4.3 million residents. The state's population stood at 25.1 million on April 1, '10, the official date of the census, compared to 20.9 million a decade earlier.
- The Houston-Sugar Land-Baytown Metropolitan Statistical Area grew 26.1 percent over the 10 years, adding 1.23 million residents. The Houston MSA's population stood at 5.95 million on April 1, '10, compared to 4.72 million in '00.
- Harris, with 4.1 million residents, remains the most populous county in the metro area. Over the decade it gained nearly 700,000 residents, up 20.3 percent from '00. Fort Bend remains the second most populous with 585,000 residents, up 65.1 percent. Montgomery, up 55.1 percent, is still the third most populous at 456,000 residents.
- With 2.1 million residents, the City of Houston remains the state's largest city.

A more lengthy analysis might adjust annual growth rates based on factors that impacted Houston's population growth over the past 10 years:

- The '01-'02 recession, in which 36,000 local jobs were lost;
- The '05 influx of Katrina evacuees, which produced a one-time gain of 75,000-85,000 new residents;
- The '07 economic boom, when job growth exceeded 100,000 per year;
- The '08-'09 recession, which cut between 110,000 and 150,000 jobs from the local economy;
- Growth in the natural population increase (i.e., resident births minus resident deaths), which averaged 55,500 per year in the early '00s and rose to 63,900 per year in the late '00s; and
- Growth in net migration (i.e., people moving into the region minus people moving out), which averaged 47,700 in the early '00s and 63,600 in the late '00s.

Legal Update

Settlement In Firing Is Warning To Employers

Employers should think twice before trying to restrict workers from talking about their jobs on Facebook or other social media. On February 4, 2011, the National Labor Relations Board sued a Connecticut ambulance company that fired an employee after she went on Facebook to criticize her boss. They argue the worker's negative comments were protected speech under federal labor laws. The company claimed it fired the emergency medical technician because of complaints about her work. Under the settlement with the labor board, American Medical Response of Connecticut agreed to change its blogging and internet policy that barred workers from disparaging the company or its supervisors. The company will also revise another policy that prohibited employees from depicting the company in anyway over the internet without permission. Both policies

interfered with longstanding legal protections that allow workers to discuss wages, hours and working conditions with co-workers, the board said.

U.S. Supreme Court Holds that a Third-Party Has Standing to Pursue a Title VII Retaliation Claim

The U.S. Supreme Court, in *Thompson v. North American Stainless, LP*, recently held that Title VII's anti-retaliation provision provides a cause of action to any individual with an interest "arguably sought to be protected by [Title VII of the Civil Rights Act of 1964 ("Title VII)]." The Court's decision opens the door to third-party Title VII retaliation claims by a wide, but undefined range of employees who have never engaged in protected activity. In 2010, for the first time ever, retaliation surpassed race as the most frequently filed charge with the EEOC. The Thompson ruling will likely facilitate the filing of a new genre of retaliation claims that may continue this trend through 2011 and for years to come. While the U.S. Supreme Court provided limited guidance as to how an employer might reduce its exposure to such third-party retaliation claims, employers may want to consider:

- **Training of Managers/Supervisors on Third-Party Retaliation:** While managers/supervisors may have been trained that it is impermissible to retaliate against an employee who lodges an internal complaint/charge, these persons should understand that retaliation has a broader scope. Given the uncertain scope of the Thompson decision, managers and supervisors must understand that statutorily protected activity should not be used as a basis for retaliating against any employee.
- **Reviewing Retaliation Policies:** Employers should make sure that the language in their non-retaliation policies can be construed broadly enough to prevent retaliation against third-parties.
- **Review Policies Relating to Familial and/or Romantic Relationships Within the Same Work Unit, Location, Company:** While the decision to permit romantic partners, spouses, and other family members to work together is a function of workplace culture that implicates many issues beyond the retaliation context, employers should understand that the more closely family members work, the greater the risk for potential third-party retaliation claims. Employers are well-advised to review their policies in this area and ensure that they are being enforced and applied consistently. Because the concept of a third-party retaliation claim under Title VII and the application of the "zone of interests" standard is novel to lower courts, employers are wise to follow the jurisprudence that will arise from and further interpret the U.S. Supreme Court's ruling in Thompson.

Sources: Greater Houston Partnership; Houston Chronicle; Wall Street Journal; HR Houston