



Summer 2009

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

81st Legislative Session

It was a remarkable session in many ways. The session had over 7,400 bills filed. This was an increase of almost 20% from the 2007 session. However, the constitutional requirement of 140 days for the session did not increase! More bills + same number of days = Crunch! A major piece of construction legislation for TCA was on the road to passing when the Voter ID debacle jumped up and caused the bill, along with many others, to die. Here is a summary of construction issues compiled by TCA staff.

TCA PRIORITY BILLS

Last versions of the bills can be found on the TCA web site, www.texcon.org, by clicking the Legislation tab and then TCABills.

HB669 - Mechanic's, Contractor's and Materialman's Lien Bill. Lien claimants now have some breathing room as this bill lessens significantly the exposure to liability of a mechanic's lien claimant under the Fraudulent Lien Act (Chapter 12, Civil Practice & Remedies Code.) This bill, authored by Rep. Burt Solomons and sponsored by Sen. Chris Harris, provides that a person claiming a lien under Chapter 53, Property Code (mechanic's lien statute) is not liable under the Fraudulent Lien Act unless the claimant files the lien with intent to defraud. Since the inception of the

act in 1997, lien claimants have been subject to severe civil penalties for inadvertent mistakes in a lien affidavit. This concern has increased since some adverse court decisions were issued. Subcontractors and suppliers have long contended that the penalties for improper lien filings in Chapter 53 of the Property Code are sufficient and the Fraudulent Lien Act should not apply to the mechanic's lien. With the passage of HB 669, the Texas Legislature has agreed.

SB 555. (HB 818) Indemnification in Construction Contracts. In the final days of the legislative session, the House failed to consider SB 555, the construction indemnification bill, thereby causing an unnecessary death to this important legislation.

On Tuesday, May 19, the House Calendars Committee placed SB555 in the number two position on the Major State Calendar for debate on Thursday, May 21. The Calendar is the schedule of bills the House debates on the House floor. With this position on the Calendar, the prospects for consideration and final passage were good.

On Wednesday, May 20, two controversial bills, the Unemployment Insurance bill (SB1569) and the 10% admission to universities bill (SB175) were up for debate. The House began debate on these bills, but did not finish on Wednesday. So these bills were carried over to the Thursday Major State Calendar ahead of SB 555. Thursday, May 21, brought long

debates on SB1569 and SB175. The House did not finish these on Thursday so SB555 was not reached for debate that day. Additionally, on Thursday night, a Major State Calendar was posted for Saturday, May 23. That Calendar contained SB362, the Voter ID bill. It and other major bills were behind SB555 on the schedule.

Ordinarily, being the second bill on a Major State Calendar with six days before the deadline for final consideration of all bills by the House, a vote on the measure will be taken, usually on the day it is originally scheduled or the following day. On Friday, May 22, prior to the consideration of the Major State Calendar, the House began a Local and Uncontested Calendar consisting of over 200 bills.

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Don't Print the License Number

HB 523 may impact your business. In an effort to combat identity theft, the bill prohibits a business from printing a customer's driver's license number on a

receipt for the sale of goods or services that is given to the individual. Violations are punishable by up to a \$500 civil penalty. ★

81st Legislative Session cont...

Usually these bills are passed with little debate as they are noncontroversial bills. The Local and Uncontested Calendar usually takes about 3 to 4 hours to consider all the bills on the calendar. However, with the Voter ID bill being placed on the Major State Calendar for consideration on the following Saturday, these bills became tools to drastically slow the legislative process to prevent later consideration of the Voter ID bill. Members are entitled to debate each bill on the Local Calendar up to 10 minutes on the Second Reading of the bill, and again up to 10 minutes on the Third Reading of the bill; thus each of the Local Calendar bills could be debated for nearly 20 minutes.

This is the practice of "chubbing" and is often employed at the end of the Session to slow the process and prevent consideration of bills further down the Calendar. The House does not allow filibusters, thus this is an alternative to a filibuster that House Members sometimes utilize. With over 200 bills on the Local and Uncontested Calendar, the "chubbing" continued through the following Tuesday which was the last day to consider any bill in the House. This time the art of "chubbing" was raised to a higher art form.

With the exception of one bill on the Major State Calendar, all bills on that Calendar, including the indemnification bill, died for lack of consideration. This comprised a total of over 30 bills placed on the

Major State Calendar because of their statewide importance. Bills dying included legislation continuing the existence of the Texas Department of Insurance, unemployment insurance involving the stimulus funding, and the Voter ID bill. Another 185 measures died that had been placed on the General State Calendar.

During this past Session, SB 555 should have passed. The measure had only 2 negative votes against it as it passed 8 to 1 out of the Senate State Affairs Committee, the entire Senate passed the measure 30 to 1, and the House Judiciary and Civil Jurisprudence Committee passed the measure by a vote of 8 to 0. Additionally, the House Calendars Committee felt the importance of the bill justified a high placement on the Major State Calendar.

With the record of support in the Legislature and the hard work that so many subcontractors and suppliers have put into this effort over the years, TCA Members are challenged to renew their efforts during the interim to solicit the support of our State Senators and State Representatives to pass this legislation when they meet next Session. TCA Members have worked too long and with too much dedication not to see pass this legislation banning the uses of these unfair clauses in construction contracts. During the interim, and particularly the campaign season, we have to keep the issue before the individual legislators through

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Failed Unemployment & Workers' Compensation Issues

Two issues of concern for Texas construction companies.

One of the higher profile bills that failed to pass this session was **SB 1569**. The bill would have made numerous changes to our state's unemployment insurance system, which are required for Texas to draw down \$555 million from the Federal Unemployment Account under the federal American Recovery and Reinvestment Act of 2009. Among the changes the bill proposed was the adoption of an "alternate base period." A base period is the time period used to determine applicants' eligibility for unemployment insurance and amount of benefits for which they qualify. Under current law, Texas' base period is the first four of the last five completed calendar quarters before a claim was filed. SB 1569 would have allowed the four most recent completed calendar quarters to be used to determine the base period. The measure also provided for the



deletion of provisions requiring a lag in benefits of between six and 25 weeks for a person who lost a job due to a relocation of the person's spouse. Additionally, the bill would have allowed individuals who are seeking part-time work to be eligible for unemployment insurance, as well as those individuals who left work as a result of illness of an immediate family member. Finally, the bill would have eased documentary requirements for individuals who leave work due to domestic violence. Under current law, an individual is eligible for unemployment insurance if that individual left the workplace to protect themselves from family violence.

During the session, Governor Perry stated that he would veto the bill if it passed, saying that the long term cost of the changes would outweigh the one-time payment of \$555 million to the state's unemployment compensation's fund. To counter this argument, supporters of the bill argued that Texas' employers would face higher unemployment insurance assessments, in the short term, to increase the fund's shrinking balance. In addition, supporters cited the economic benefit the additional unemployment insurance funds would provide, saying that each \$1 of federal

funds accepted could generate up to \$2.15 of economic activity. Ultimately, SB 1569 failed to pass, falling victim to the same parliamentary tactics used to forestall debate on Voter ID legislation as SB 555.

Another bill that failed to pass was **HB 1657**, which addressed liability and protections under our workers' compensation system, specifically the Supreme Court's ruling on the case Entergy v. Summers. In that case, the Supreme Court ruled that a premise owner could be defined as a general contractor and be afforded protections under our workers' compensation system against third party lawsuits by an injured employee. The ruling was criticized by many members of the Legislature, who felt the Court misinterpreted the definition of general contractor and that premise owners should not receive the same protections, under our workers' compensation system as general contractors and subcontractors. To remedy this, HB 1657 proposed clarifying the definition of general contractor and subcontractor. HB 1657 passed the House and was then voted out of the Senate State Affairs Committee, but failed to receive a vote by the full Senate. ★

CHANGES MADE FOR SMALL PUBLIC CONTRACT BONDING

The Legislature also passed HB 2515, which address payment bonds for public contracts with municipalities and certain publicly operated airports. Under current law, a contractor is required to execute a payment bond if the contract exceeds \$25,000; this amount was last set by the Legislature in 1995.

Legislation was passed to allow municipalities and DFW Airport (the measure was proposed by DFW Airport) to raise the threshold to \$50,000 before a payment bond was required to be posted for the project. The \$25,000 threshold still applies to other local governmental entities.

TCA had an amendment placed on the measure to provide a lien on the moneys set aside for a person who provides labor or materials for municipal and DFW projects costing between \$25,000 and \$50,000. The

original legislation provided for the increase to \$50,000, but it failed to increase the corresponding lien right amounts. TCA also had placed an amendment on the bill simplifying the notice requirements.



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Agents should send application to:
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This program is developed exclusively for TCA companies, including members of:

- American Subcontractors Association of Texas
- Central Texas Subcontractors Association
- D/FW Drywall & Acoustical Contractors Association
- Fire Equipment Distributors of Texas
- Mechanical Contractors Association of Texas
- National Electrical Contractors Association - Texas
- Plumbing-Heating-Cooling Contractors of Texas
- Precast Concrete Manufacturers Association of Texas
- Southwest Terrazzo Contractors Association
- Texas Council Painting & Decorating Contractors of America
- Texas Crane Owners Association
- Texas Fire Sprinkler Contractors Association
- Texas Glass Association
- Texas Iron Workers Employers Association
- Texas Masonry Council
- Texas Structural Steel Institute

Big Dividend

TCA's Workers' Compensation Group Earns \$2.7M Texas Mutual Dividend



On July 16, 2009, Texas Mutual Insurance Company, the state's leading provider of workers' compensation insurance, announced a **\$2,693,734** dividend to the Texas Construction Association purchasing group. The dividend is based largely on the group's favorable loss ratio. By committing to workplace safety and helping injured workers return to productive employment, the group

improves its chances of qualifying for future dividends. (Past dividends are not a guarantee of future dividends. The Texas Department of Insurance must approve all dividends.)

Texas Construction Association group members have shared in more than **\$7 million** in group dividends since 2005. Members are also eligible to participate in Texas Mutual's individual policyholder dividend program. The company has distributed more than \$670 million in individual dividends since 1999.

- Texas law allows employers in similar industries to buy their workers' compensation insurance as a group

- Group members get a discount on their workers' compensation premium and an industry-specific safety plan

- The Texas Construction Association purchasing group with Texas Mutual Insurance Company is open to qualifying subcontractors.

- Any licensed Texas insurance agent can submit clients for consideration

More information can be obtained by clicking the "Get Started Now" link in the blue border box on the TCA home page at www.texcon.org, or call your licensed insurance agent. ★

Bills Pass Concerning Workers' Compensation

This session, the Legislature passed eight bills that addressed workers' compensation. Although most of these bills address interactions between doctors, insurers, and injured workers, there are two bills that could directly impact your business.

SB 1814 makes permanent a workers' compensation return-to-work pilot program, which was created by Legislature in 2005. Under the pilot program, employers, with 2-50 employees, were eligible to be reimbursed up to \$2,500 for workplace modifications that enabled injured employees to

return to work. SB 1814 increases the amount to \$5,000 and allows employers to receive the money in advance of modifications being made, as well as giving the Commissioner of Insurance authority to expand the size of employers eligible to participate in the program. As of October of last year, only seven employers had applied for funds under the pilot program. Interested employers are encouraged to apply. More information is available on the Department of Insurance website at www.tdi.state.tx.us/wc/rtw.

Numerous studies have shown that

the longer an injured worker remains on workers' comp, the less likely that worker is to return to his or her job and previous income level. To facilitate a timely return-to-work, **HB 2574** allows an injured employee's treating doctor to request information from an injured employee's employer relating to the injured employee's scope of employment, job duties and work activities, as well as the availability of any other jobs the employer may have that the doctor can consider in determining whether the injured employee is able to return to work. This bill will only apply to employers with ten or more employees. ★

81st Legislative Session cont...

communications and provide support for those Legislators who have been key factors in our efforts.

SB 1551. Consolidated Insurance Programs. This measure regulated Owner Controlled Insurance Programs and Contractor Controlled Insurance Programs and set standards for these insurance programs. Despite support from most of the stakeholders involved in these programs, a consensus from all the stakeholders could not be reached. An attempt to add the measure to the Texas Department of Insurance sunset bill was throttled when that bill succumbed in the House to the Voter ID chubbing.

BILLS PASSED AFFECTING CONSTRUCTION INDUSTRY & SUPPORTED BY TCA

Despite disappointments on some major initiatives by TCA, the construction industry had some successes in addition to HB669 described above. The bills can be found on the TCA web site by clicking the Legislation tab and then Other Bills.

HB 987. Recovery of Attorney Fees. An amendment was added to this bill providing for recovery of attorney fees in a breach of contract suit against a local governmental entity. When the anti-sovereign immunity bill was passed a few Sessions ago, it provided that local governmental entities could recover attorney's fees in a breach of contract suit against the contractor, but contractors could not recover attorney's fees from the governmental entity. This amendment corrected the inequity.

HB 1513. Texas Construction Trust Fund Act. This measure made some changes in the Texas Construction Trust Fund Act (TCTFA), Chapter 162, Property Code to correct a couple of Appellate Court decisions. The first change

provided that funds subject to the TCTFA (these are monies that have been set aside or paid to contractors on construction projects) are not subject to a subsequent claim by a bankruptcy trustee. In other words, if the money has been paid or set aside for a contractor, a bankruptcy trustee subsequently cannot reclaim the funds if an upstream payor enters bankruptcy.

The second change corrected a decision denying the protections provided to the contractor by the TCTFA involving a public project. The particular case held that the only remedy for a contractor for failure of payment on a public project is the payment bond. The contractor, who had relied upon a three-party check to provide payment, had already passed the deadlines required to perfect a claim under the payment bond. The Court held that the contractor could not invoke the provisions of the TCTFA. The change in the bill provides that the remedy provided by the TCTFA was available to the contractor in addition to the payment bond remedy.

ADDITIONAL BILLS PASSED RELATING TO CONSTRUCTION

The bills can be found on the TCA web site by clicking the Legislation tab and then Other Bills.

HB 1410. Plumber Licensure Changes. This bill set standards and requirements for responsible master plumbers. Late in the Session it became a vehicle for previously dead House bills (or at least bills on life support) which were amended onto the measure. One bill added allowed plumbers to become licensed to provide residential fire sprinkler systems. A second amendment prohibited municipalities from adopting ordinances or codes that would require fire sprinkler systems to be installed in one or two-family dwellings.

HB 1758. Plumbers Apprentices.

This measure, promoted by the Plumbing-Heating-Cooling Contractors of Texas, authorizes plumber's apprentice applicants for a plumber's license to apply up to 500 hours of classroom training as a credit towards the total number of hours or work experience to sit for the tradesman or journeyman plumber's license examination. HB 1758 authorizes an apprentice to sit for the license examination if he or she has received an associate of applied science degree from a plumbing technology program that includes on-the-job training.

HB 2082. Local Preferences for Competitive Bidding.

This measure provided that the local preferences given to bidders within 5% of the lowest bid who reside in the municipality is limited to expenditures of less than \$100,000. Presently the amount is unlimited.

HB 2515. Payment Bond Requirements for Cities and DFW Airport.

DFW Airport filed legislation raising the minimum amount before a payment bond is required on city and DFW Airport projects from \$25,000 to \$50,000. TCA was instrumental in getting an amendment placed on the bill that provided that a contractor was entitled to a payment lien up to the amount of \$50,000 from the present limitation of \$25,000. This change assured that the rights to a lien matched the payment bond changes.

HB 2667. Standards for Plumbing Fixtures.

This measure provides standards for plumbing fixtures including some conservation standards for the fixtures.

HB 2730. DPS/School Criminal Background Checks.

An amendment was added to the Department of Public Safety sunset bill that clarified that each employer





on a school project is responsible for making the background checks of its own employees. This was probably the current practice although the statute was unclear. Additional legislative change is needed to eliminate duplicate background checks for each employee at each school and make the system more efficient and less costly. Work on this will be done during the interim.

HB 3129. Home Consumer Transaction Involving Plumbers, Air Conditioning Contractors and Electricians. Several sessions ago, the Texas Home Solicitation Act was passed allowing a consumer the right to cancel a home solicitation transaction within three days occurring at a consumer's residence. Plumbers, air conditioning contractors and electricians are subject to the Act and a consumer could cancel and require re-installation of the old product. This bill provides that the Act does not apply to a good or service if the transaction involving the goods or service is initiated by the consumer. This measure was supported by plumbing, air conditioning and electrical contractor groups.

SB 627. Criminal History Check of Employee Providing Residential Services. The requirement of a criminal history check of an employee providing residential services is satisfied if the employee is licensed and a criminal history check is performed by the licensing agency as a requirement of licensure.

Franchise Tax aka Margins Tax Revision. SB 4765. This measure raises the minimum revenue requirement for tax liability from \$300,000 to \$1,000,000 dollars before any margins tax is due subject to the passage of a smokeless tobacco tax which did in fact pass. This change expires on

December 31, 2011. After that date the minimum revenue requirement for tax liability becomes \$600,000 with discounted tax amounts through a revenue ceiling of \$900,000.

Immigration Bills. This Legislature chose not to address substantive bills dealing with illegal immigration during this Session. They took the position that this was a federal issue with the state having limited authority to pass immigration laws.

Texas Residential Construction Commission. This Legislature chose not to continue in existence the Texas Residential Construction Commission. The TRCC will now wind down its affairs and cease operations.

MEASURES RELATING TO THE CONSTRUCTION INDUSTRY FAILING TO PASS

HB 1005. Employee Leave for Child Related Activities. This measure would have required employers to grant leave to employees to attend school related activities involving their children.

HB 1657. Workers' Compensation Statutory Employer. This bill was an attempt to overturn the Texas Supreme Court decision in *Entergy Gulf States Inc. v. Summers*. That case provided that an owner providing workers' compensation on a construction project can be considered a general contractor for the purpose of workers' compensation and thus avail itself of the workers' compensation bar to liability.

HB 1807. Regulation of Cranes. This measure would have required certification of crane operators and others involved in the use of cranes on construction projects.

HB 1854. Registration of Roofers. The measure would have

required roofing contractors to be registered.

HB 1971. Registration of Fire Sprinkler Technicians. This multi-session measure died again.

HB 2091. Electrical Work on Motors in Unincorporated Areas. This measure would have allowed unlicensed individuals to work on electric motors in unincorporated areas.

HB 2600. Licensing of Sheet Metal Workers. Licensure of sheet metal workers failed to pass.

HB 2670. Interest Paid Under Prompt Pay Act by Governmental Entities. This measure would have relieved public entities from paying interest on late payments when there was a dispute between the parties.

HB 3913. Dispute Resolution. The measure would have provided for a dispute resolution process between owners and general contractors on construction projects, but would have limited involvement of subcontractors.

SB 222. Arbitration and Arbitration Agreements. The measure would have limited the use of arbitration by contractors and others.

SB 1110. Procurement Standards Bill. This measure would have set standards and procedures for the various forms of procurement used by public entities. ★



TCA Payroll Card Program

By offering direct deposit and the Money Network payroll distribution service you can deposit all pay electronically while meeting state payroll requirements that employees have the option of a paper check!

ADVANTAGES TO EMPLOYERS:

Eliminate paychecks completely or use in conjunction with paper checks.

Eliminates: buying checks, printing costs, distribution costs, employees' wasted time getting checks, and replacing lost checks.

Use as a per diem card for out of town employees instead of tying up credit cards.

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Convenient to use: Electronic process for payroll card or direct deposit employees. Integrate your current payroll system.

ADVANTAGES TO EMPLOYEES:

Fast: your paycheck goes straight to your card so you can access it immediately.

Easy: Buy virtually anything, anywhere and get instant access to your money at ATMs by simply using your card.

Safe: Stop carrying around large amounts of cash on payday. Rest easy knowing your money is safe from theft and fraud.

Now: Employees are automatically approved to get the card. No credit or background checks.



Texas Construction Association has partnered with Money Network Financial and FirstData to make this outstanding program available to TCA Members.

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Need more information? Call the TCA office at 512-473-3773.

Special Session

THEY CAME. THEY VOTED. THEY LEFT.

The Texas Legislature reconvened at 10 AM, Wednesday, July 1, passed two bills and adjourned slightly before 5 PM, Thursday, July 2. This was shortest Special Session in the last 22 years. According to research by Senator Jeff Wentworth, the shortest Special Session in history was a one hour affair in 1919.

The Legislature passed two of three measures placed on the agenda by Governor Perry. SB 2 continued in existence for the next two years five state agencies, including the Texas Department of Insurance and the Texas Department of Transportation. These agencies will be considered again in the sunset review process and legislation will need to be passed in 2011 continuing the agencies.

In addition the Legislature passed HB 1 providing for the issuance of two billion dollars in bonds already approved by the voters. The proceeds from these bonds will be used for the construction of road projects. A provision was added to the bill preventing officials from

converting existing free lanes into toll roads.

The measure on which the Legislature could not reach agreement involved the extension of the Department of Transportation's authority to enter into contracts with private entities to develop and construct toll roads. It appeared that most Legislators felt that this was an issue not affecting current projects and could await a closer review during a Regular Session of the Legislature.

While there were a few bills filed involving issues listed on the agenda by the Governor, none of these bills were consider by the Legislature. No amendments were considered to the bills that passed except those germane to the particular legislation.

TCA staff closely watched the session's proceedings to see if there were any cracks to allow for amendments favorably to TCA interests. Regrettably, the legislators keep the issues tight and focused, thus preventing any opportunity for such amendments.★



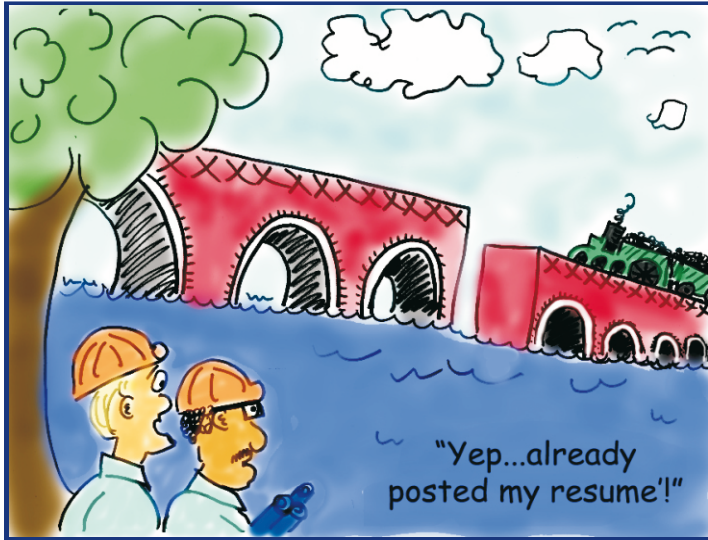
Texas Supreme Court Hands Victory to Subcontractors & Suppliers

On July 3, 2009, the Texas Supreme Court released its opinion in the case of *Dealers Electrical Supply v. Scoggins*. The well reasoned opinion overturned a Texas appeals court, which had decided that the Government Code Chapter 2253, also cited as the McGregor Act, is the sole remedy for unpaid claims by subcontractors or suppliers.

The Supreme Court said that upholding the appeals court would contravene the purpose of the McGregor Act and another statute, the Texas Construction Trust Fund Act. Thus, the court confirmed that both laws are available for claimants who have not been paid.

The national affiliate of TCA Member Association, the American Subcontractors Association of Texas, filed an *amicus curiae* brief in the case supporting the position of Dealers Electrical Supply. ★





TCA Career Center

As construction projects continue in Texas, so does the need to employ talented workers. TCA members can use the TCA Career Center to post jobs on the TCA website and search a collection of resumes stored in a resume database. The TCA Career center is free to all job seekers and allows potential employees to search job postings and apply directly online.

The Advantage of using the TCA Career Center over other mass market approaches is unlike other major commercial job boards. The TCA Career Center provides a forum specifically targeted toward the construction industry and thus provides resumes of candidates interested in the construction field. So although you may find fewer applicants than those who apply to mass-market job boards like Monster or Career Builder, those who use the TCA Career Center will much more likely match your requirements.

The Benefits of using TCA Career Center include providing reports that show how many individuals have viewed their job posting, applied online and even how many times a company's job posting has been "emailed to a friend." A company can also set the criteria for an "ideal job candidate" and our system will email you when new resumes match your specified criteria.

The Cost allows TCA members to receive a great discount when using the TCA Career Center. Most mass-market job boards charge between \$400 and \$500 for the most basic job posting. The TCA Career Center is much more competitively priced and allows its users to list their position under as many categories as they would like for the same price.

TCA Career Center pricing and packages:

Single 30-day Online Job Posting Package:

<i>Members</i>	\$200
<i>Non Members</i>	\$350

Three 30-day Online Job Posting Package:

<i>Members</i>	\$540
<i>Non Members</i>	\$975

Five 30-day Online Job Posting Package:

<i>Members</i>	\$800
<i>Non Members</i>	\$1,495

Ten 30-day Online Job Posting Package:

<i>Members</i>	\$1,520
<i>Non Members</i>	\$2,795

The Featured Employers option enables an employer to promote the company even if they do not have an active job to post by taking advantage of the

The Basic Package and The Premiere Package.

The Basic Package offers banner advertising that will randomly rotate with other featured employers on the Job Seekers pages.

<i>Members</i>	\$500
<i>Non Members</i>	\$700

The Premiere Package also offers banner advertising that will randomly rotate with other featured employers, as well as an exclusive non-rotating banner advertising with a link to the poster's employer page where content can be added to promote the poster's company.

<i>Members</i>	\$875
<i>Non Members</i>	\$1050

The Featured Jobs option allows employers to highlight their job posting on the job seeker main page, as well as bold and star their job posting on the research results page. This feature is only available in combination with any of the Job Posting Packages.

<i>Members</i>	\$100
<i>Non Members</i>	\$175





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> > > > TCA's Career Center is a premiere resource for online employment connections. Here, employers and recruiters can access the most qualified talent pool with relevant work experience to fulfill staffing needs.

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- Special introductory offer



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