

# MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

## ARE YOU SMARTER THAN THE INVESTIGATOR?

January 8, 2008

### ANNUAL LEGAL UPDATE WITH ATTORNEY JIM REIDY

Sheehan Phinney Bass & Green, PA.

1000 Elm Street

Manchester, NH 03105

[jreidy@sheehan.com](mailto:jreidy@sheehan.com)

(603) 627-8217

**Disclaimer:** The following are the questions and answers from the January 8, 2008 presentation to MAHRA members by Employment Lawyer, Jim Reidy. This program, "Are You Smarter than the Investigator?," followed the annual review of recent developments in labor and employment law by Attorney Reidy. This presentation outline is general in nature and was not intended as specific legal advice. Follow up questions and requests for advice or assistance with particular matters or cases should be submitted to Attorney Reidy or your legal counsel.

### Questions & Answers

#### Level 1:

- 1 *Q. What is the current Federal Minimum Wage? What is the current state (New Hampshire) minimum wage;*  
**A. \$5.85; \$6.50**
- 2 *Q. What does FMLA stand for?*  
**A. Family AND Medical Leave Act.**
- 3 *Q. What does HIPAA stand for?*  
**A. Health Insurance Portability and Accounting Act.**
- 4 *Q. How many employees do you have to have to be covered by COBRA?*  
**A. 20 employees.**
- 5 *Q. How many employees do you need to be covered by the state's employment discrimination law: RSA 354-A?*

A. **6 employees.**

6 *Q. How many employees do you need before you have to do I-9 forms?*

A. **One employee.**

7 *Q. Who is the Wage & Hour Administrator in New Hampshire?*

A. **Cynthia A. Flynn.**

\*\*\*\*\*

**Level 2:**

1 *Q. When will the Federal Minimum Wage next increase?*

A. **July 24, 2008 (and July 24, 2009).**

2 *Q. What will the State of New Hampshire's Minimum Wage be on September 8, 2008?*

A. **\$7.25 per hour.**

3 *Q. What does COBRA stand for?*

A. **Consolidated Omnibus Budget Reconciliation Act.**

4 *Q. When an employee quits work with an New Hampshire employer, when is his/her last paycheck due?*

A. **The next regular payday, unless more than one week's notice is given.**

5 *Q. What is the name of the evil HR Director in the Dilbert comic strip?*

A. **Catbert.**

6 *Q. What is the name of the mild-mannered HR Director on the television show, The Office?*

A. **Toby.**

7 *Q. Under New Hampshire law, after how many consecutive hours in a work day must an employer permit an employee a meal break?*

A. **Five.**

\*\*\*\*\*

**Level 3:**

- 1 *Q. Can a private sector employer provide compensatory time to employees instead of overtime?*  
**A. No.**
  
- 2 *Q. How much workers' compensation leave may one employee take and still be guaranteed re-instatement to his/her job under New Hampshire law?*  
**A. 18 months.**
  
- 3 *Q. Can you charge employees for uniform rental under New Hampshire law?*  
**A. No.**
  
- 4 *Q. Under the FLSA, what is the minimum number of hours an employee must be paid for reporting to work?*  
**A. None. Zero.**
  
- 5 *Q. Under New Hampshire law, how much time can an employee take for leave from work due to pregnancy?*  
**A. As much as medically necessary.**
  
- 6 *Q. Can you use Google to do background checks on employees?*  
**A. Yes, but don't just rely on that resource.**
  
- 7 *Q. How many employees do you have to have to be covered by the state's jury duty law?*  
**A. One.**
  
- 8 *Q. When are wages due to an employee who is terminated in New Hampshire?*  
**A. Within 72 hours.**

\*\*\*\*\*

**Level 4:**

1 *Q. Is it illegal under Federal law to ask someone's age on your employee application?*

**A. No, but you should have a good reason for asking.**

2 *Q. How far back can you ask an applicant about his/her criminal history?*

**A. As far back as you want.**

3 *Q. Can an employer refuse to provide information to the New Hampshire Department of Employment Security if the employer isn't contesting the unemployment benefits claim?*

**A. No.**

4 *Q. What is a New Hire Report and where is it filed?*

**A. Information on a new employee filed with the New Hampshire Department of Employment Security.**

5 *Q. How do you determine whether another office of the company is within 75 miles for determining if the employee is covered by FMLA?*

**A. Most direct surface routes.**

6 *Q. What does USERRA stand for?*

**A. Uniformed Services Employment and Re-Employment Rights Act.**

7 *Q. How long do you have to keep I-9's on applicants?*

**A. You don't keep I-9's on applicants.**

1 *Q. How long do you keep I-9's?*

**A. Three years or one year after the termination, whichever is longer.**

\*\*\*\*\*

**Level 5:**

1 *Q. What is a BFOQ?*

**A. Bona Fide Occupational Qualification, something used to justify a job requirement that otherwise might seem discriminatory.**

2 *Q. What do you do if an employee covered under USERRA doesn't notify the employer of his/her intent to return to work from military leave in the time specified under that law?*

**A. Apply your absence or attendance policy/rules.**

3 *Q. Can private employers conduct polygraph exams with the employee's consent?*

**A. No (unless it is a case of economic loss and you have reason to believe the employee is responsible for the loss).**

4 *Q. Can you fire a person after you receive a "No Match" letter from the SSA?*

**A. No, you have to notify the person and give them a reasonable period of time (90 days) to get it straightened out.**

5 *Q. How many days after termination do you have to send a COBRA notice to an eligible employee (if you are the administrator)?*

**A. 60 days from the effective date of the qualifying event.**

6 *Q. Is New Hampshire a Right to Work State?*

**A. No.**

7 *Q. When there is an accidental overpayment of wages in New Hampshire, what is the maximum you can recover from an employee's wages in a pay period?*

**A. 20%.**

8 *Q. Can an employer require an employee to work on a legal holiday in New Hampshire?*

**A. Yes.**

\*\*\*\*\*

**Level 6:**

1 *Q. Where can an employee file a wage claim under state law and what is the statute of limitations (the time to file those claims)?*

**A. With the New Hampshire Department of Labor or with Superior Court. The statute of limitations is now 3 years in wage claims.**

2 *Q. How many employees must an employer have in order to be covered by the Federal mass layoff/plant closing notice law (WARN)?*

**A. 100 employees.**

3 *Q. Can an employer charge a new employee for the cost of post-offer, pre-employment medical exams and drug/alcohol tests?*

**A. No.**

4 *Q. If an employee punches out a co-worker, but later it is discovered that the employee had a diabetic episode causing him to be irritable, would EEOC encourage you to dismiss the incident because of his disability?*

**A. Maybe, but misconduct causes an employee to lose the protection of the ADA.**

5 *Q. Can an employer insist that men have short hair and wear no jewelry, but not have the same requirements for female employees?*

**A. Yes.**

6 *Q. If an employee tears his Achilles Tendon while walking and jogging at an after-hours breast cancer research fund drive event, while voluntarily participating in a company-sponsored team, should this injury be covered under the company's Workers' Compensation Policy?*

**A. No, not if this is truly voluntary activity but the Company's sponsorship will be reviewed.**

7 *Q. If your insurance carrier offers you a significant premium break if none of your employees smoke or use any other tobacco products, can you refuse to hire smokers or charge smokers more money for health premiums?*

**A. No to both.**

\*\*\*\*\*

**Level 7:**

1 *Q. If an employee's job requires travel during the week and on weekends, do you have to count hours on planes and in airports as hours worked for wage and overtime purposes?*

**A. No, only hours during the work day. Travel outside of those hours doesn't have to be counted as hours worked.**

2 *Q. If an employee who is supposed to work weekends requests Sundays off because of religious reasons, does the company have to agree to and accommodate that request?*

**A. Generally, employers should try to accommodate sincerely held religious beliefs, but full days off are rare.**

3 *Q. When sending COBRA notices to a separating employee, do you need to send separate notices to his/her spouse, or will a letter to the employee suffice?*

**A. Yes, you must send a separate notice to the spouse, too (if he/she is a qualified beneficiary).**

4 *Q. If, when an employee requests a copy of his/her personnel file, he/she discovers that there may be information in another employee's personnel file that could be helpful to his/her claims against the company, can the employee ask for copies of another employee's file or parts of that file?*

**A. Sure, ask all you want, but no, he/she doesn't have a right to get that information.**

5 *Q. When an employee is hired, what information does NHDOL require employers to give in writing to employees?*

**A. A written statement of their wage rate, pay period, pay day and a general description of fringe benefits.**

6 *Q. Can private work places search an employee's backpack, purse, brief case, locker or desk without advance notice?*

**A. Yes, but there should be a legitimate business interest for doing so.**

\*\*\*\*\*

**Level 8:**

1 *Q. If wage claim decisions from NHDOL can be appealed to any Superior Court in the state, is the same true for appeals from decisions from the New Hampshire Commission for Human Rights?*

**A. No, they are appealed to the New Hampshire Supreme Court.**

2 *Q. The #1 worst wage and hour violation from the NHDOL Top Ten List from 2007 (covered at our last meeting) was:*

A. *Failure to pay employees final wages, in full, when due;*

B. *Youth employment violations (youth certificates or hours of work);*

C. *Failure to keep accurate records of all hours worked for covered employees.*

**A. C: Failure to keep the time records required by RSA 279:27 and Lab. 803.04.**

3 *Q. Can a person who is a bystander or witness of conduct, such as sexual harassment of another employee, file a claim under state or federal discrimination law?*

**A. Sure, but unless this is in California or the person can claim harm to himself/herself, the claim will likely be dismissed.**

4 *Q. Can a health care employer ask a new surgical RN (post-offer, pre-employment) if he/she has HIV/AIDS, Hepatitis B or any other blood borne disease?*

**A. Yes, if that is a BFOQ.**

5 *Q. If you have an employee at your new facility who resides in Massachusetts, do you have to deduct Massachusetts's income tax from the employee's wages?*

A. A. No, unless the employee requests the withholding.  
The employee would , however, still owe the tax in Massachusetts.

6 Q. Under NAFTA visa rules, how long can a qualified Canadian work in New Hampshire under a TN visa?

A. TN visas are granted for one year, but they are renewable indefinitely as long as the eligibility conditions are maintained.

5 Q. When an older (over 40) employee is laid off with several others and is asked to sign a general release in order to get severance, how many days does the employee get to consider the agreement if it contains a release of potential age claims?

A. 45 days under the OWBPA, with 7 days to revoke his/her acceptance.

6 Q. If an employee borrows PTO in advance of earning the time, what should you do to ensure it is paid back?

A. Have the employee acknowledge in writing that:

- a. the request was voluntary;
- b. the employee will pay the time back by staying and earning the time;
- c. the leave isn't for illness;
- d. if the employee leaves before the time is earned back, he/she authorizes a deduction from his/her final wages;
- e. any balance due after the deduction will be paid within 30 days.

7 Q. Who is the new Executive Director of the New Hampshire Commission for Human Rights?

A. Joni Esperean

\*\*\*\*\*

**Level 9:**

1 Q. Which one of the following is not an overtime exemption under the FLSA?

- A. a. Executive;
- b. Inside sales;
- c. Computer professional.

A. B. – Inside sales.

2 *Q. What was the #1, most common type of discrimination claim filed nationally with EEOC in 2007?*

**A. Race discrimination claims (35% of all claims filed).**

3 *Q. Under the FMLA, if an employee has been with the company for 7 months on a full-time basis, often working more than 40 hours per week, how much time off would she get for the birth of her child?*

**A. As much as medically necessary, even though the FMLA doesn't apply.**

4 *Q. Under New Hampshire Youth Employment laws, what things are required before a 16 year old comes to work for you?*

**A. a. A Youth Certificate on file from the school;  
b. A Parental Consent to the work;  
c. Confirmation that the nature of the worked and the hours involved comply with state standards.**

5 *Q. If an employee is injured at work and files a Workers' Compensation claim, do you need to get their consent before releasing information about the injury and his/her treatment to third parties under HIPPA?*

**A. No. Workers' Compensation claims are not covered by HIPPA privacy rules.**

\*\*\*\*\*

**Level 10:**

1 *Q. How long does an employee have to work for an employer in New Hampshire before he/she may claim that employer was the most recent employer for unemployment purposes?*

**A. 5 weeks.**

2 *Q. If you meet with a non-union employee to discuss discipline or discharge, can the employee request a witness be present during the meeting?*

**A. Sure, but you don't have to permit it. Non-union employees don't have Wiengarten Rights.**

3 **Q.** Which of the following is not permitted as an automatic deduction from salary under state law (New Hampshire) during a pay period?

- A. If the employee requests time off before it is earned.
- B. If the employee receives a disciplinary suspension under the FLSA;
- C. If the employee takes FMLA leave;
- D. If the employee requests a full day or more for bereavement;
- E. If the employee is terminated for misconduct;
- F. If the employee was accidentally overpaid in the pay period before.

**A. F. To recover an accidental overpayment (without the employee's consent first).**

4 **Q.** Name at least five of the new 12 criteria for independent contractors under state wage laws (as of 1/1/08):

- 1. Person has federal employer identification number;
- 2. Person has control and discretion over performance of work;
- 3. Person has control over time when work is performed;
- 4. Person hires and pays assistants;
- 5. Holds him/herself out as a business;
- 6. Has continuing or recurring business liabilities;
- 7. The success of the business depends on the relationship between receipts and expenses;
- 8. Receives compensation for work performed;
- 9. Contractually responsible for work performed;
- 10. Responsible for his/her business expenses;
- 11. The person provides his/her own tools and equipment;
- 12. Not required to work exclusively for one employer.

5 **Q.** If an employee dies, how are his/her wages paid under New Hampshire law?

**A. If not in excess of \$300.00, they can be paid, upon demand to a spouse or immediate family member. If more than \$300.00, they must be held and paid after notice from Probate proceedings.**

6 **Q.** If you pay sales employees a commission and permit draws against those anticipated commissions, what are you required to do under state law to inform the employee of this arrangement?

**A. Provide a written description of how the commission is calculated, what the offsets or deductions are, when commissions are due to be paid, what is due upon termination, how long commissions continue after termination, and how negative balances for draws will be handled; negative balances may be carried forward but not deducted from final paychecks.**

- 7 *Q. When seeking to enforce a non-competition/non-solicitation agreement in New Hampshire, what are the limits courts favor?*
- A. A. Agreements with key employees;
  - B. The geographic scope and time period is limited;
  - C. The scope of non-solicitation of clients and customers is limited to people/entities who the employee had actual contact;
  - D. All support the legitimate business interests of the company.

\*\*\*\*\*END\*\*\*\*\*

[Bonus questions if we have more time]

**Disclaimer.** This program, “Are You Smarter than the Investigator?,” followed the annual review of recent developments in labor and employment law by Attorney Reidy. This presentation outline is general in nature and was not intended as specific legal advice. Follow up questions and requests for advice or assistance with particular matters or cases should be submitted to Attorney Reidy or your legal counsel.

: