

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

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LEGAL UPDATE

by

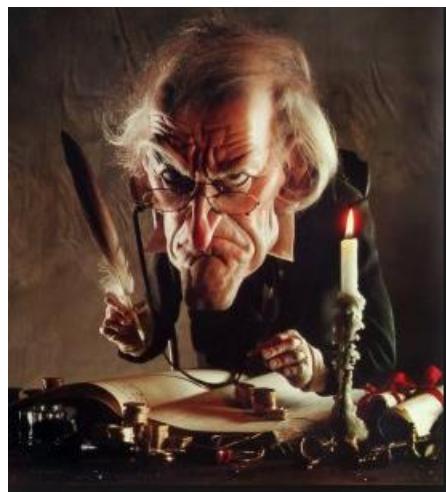
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2015 Top Ten List of Wage and Hour Violations in New Hampshire (and how to avoid them in 2016)



Introduction

Each year we review the Top Ten most common wage and hour violations in New Hampshire. Because the stakes for noncompliance under state and federal wage and hour laws are higher than ever before employers of all sizes and types need to pay attention to

these violations to stay in compliance and to avoid expensive civil penalties and wage adjustment orders from NHDOL.

It was another busy year for NH DOL

In FY 2015 there were 299 wage claims filed with NHDOL by individuals. Many of those claims went to hearings at NHDOL. While the total amount awarded as a result of those hearings isn't available other numbers from the NHDOL should cause employers to want to stay off of their *Naughty List*.

By way of example, in FY 2015, NHDOL inspectors conducted 910 on-site inspections at New Hampshire workplaces. As a result, NHDOL proposed civil penalties in the gross amount of \$2,342,650. Thankfully, through informal conferences and otherwise, the total amount of civil penalties actually collected by NHDOL was \$434,445. During that same period, the wage adjustments collected and distributed by NHDOL to individuals totaled \$569,794. Those amounts, once assessed, are rarely reduced. Also, in order to try to reduce proposed civil penalties through an Informal Conference at NHDOL, an employer must concede and pay the assessed wage adjustments.

In order to get some historical context we have outlined the statistics from NHDOL over the last five or so years. In FY 2009 the New Hampshire Department of Labor's Wage and Hour Division collected \$5,301,620 (\$3,479,973 in wage claims, \$368,892 in wage complaints/audits and \$1,452,755 in wage adjustments). That was an all-time high collection rate for NHDOL and that enforcement initiative sent shock waves throughout the state. Employers scrambled to comply with state wage laws. NHDOL also spent more time on education and training. Those efforts paid off as NHDOL's collection numbers decreased in FY '10 to \$2,569,662 (\$1,054,375 in wage claims, \$319,316.78 in wage complaints/audits and \$1,195,970 in wage adjustments). Those numbers decreased again in FY '11 to \$1,731,359 (\$982,018 in wage claims, \$225,465.24 in wage complaints/audits and \$523,876 in wage adjustments). In FY 2012 the downward trend in fines and collections continued as the Department collected \$1,195,970 in civil penalties and wage adjustments. In FY 2013 the fines and wage adjustments increased as the Department collected \$2,052,201. In FY 2014 the Department collected a total of \$1,275,134 (civil penalties and wage adjustments). As referenced above, in FY 2015 the Department collected a total of \$1,004,239 (civil penalties and wage adjustments). This is a decrease from FY 2014 the dollar total is still significant.

If you are one of those employers who have been on NHDOL's *Naughty List* you know that an unfavorable NHDOL audit or wage claim decision can be disruptive and expensive to your organization. If you have so far avoided a NHDOL inspection or wage claim, in the words of that holiday song, "You better watch out because [the Inspectors] are coming to town". In other words, the time spent on compliance before the NHDOL comes knocking, as you will see, is always time well spent.

The following are the 2015 Top Ten worst (most common) wage and hour violations in New Hampshire, along with tips on how to avoid these problems:

- 10. Failure to provide written notice to employees of their wage rate, pay period, pay day and a general description of fringe benefits when they are hired and in advance of any changes thereto.**

***RSA 275:49 and Lab 803.03**

Recommendation: This is an easy one but one where employers often get tripped up. When employers hire employees, they need to put in writing the employee's wage rate, pay period, pay date and a general description of fringe benefits. This applies to all employers in New Hampshire. When those terms change, the employer needs to put the change in writing. Employees need to sign an acknowledgment of receipt of these notices. Employers should keep copies of those signed notices in the employee's personnel file. This comes up in every NHDOL audit and it is easily remedied.

- 9. Failure to have a written safety plan, joint loss management committee and safety summary form, if required.**

***RSA 281-A:64 and Lab 602.01, 602.02, 603.02 and 603.03**

Recommendation: This was once a bigger issue on the *Naughty List*. However, as of January 1, 2013 employers with fifteen (15) or more employees (used to be 5) needed to have a joint loss safety committee to review and correct workplace safety problems. Also, employers, as of January 1, 2013, with 15 or more employees (used to be 10) must file a written safety plan with the state (NHDOL) and then file updates every two years. These reports can be filed with NHDOL electronically. Covered employers should check to be sure that their committee is organized, they properly maintain meeting minutes and their plans and reports are up to date. **Please note:** Employers can now update and submit their safety plans online.

- 8. Failure to pay minimum wage for all hours worked.**

***RSA 279:21**

Recommendation: Make certain that all employees are paid at least the correct (current) minimum wage for all hours worked and any exceptions provided for in the law (e.g. special rates for student learners, tipped employees, etc.) are carefully reviewed and followed consistently. Employers should remember that New Hampshire no longer has its own minimum wage. New Hampshire applies the federal minimum wage (currently \$7.25 per hour) as the threshold wage in this state. **Please note:** As of January 1, 2015, pursuant to an Executive Order, federal contractors need to pay a minimum wage of \$10.10 per hour. That amount is also subject to increases over time.

- 7. Improper deductions from wages. Not following list of approved deductions.**

***RSA 275:48 and Lab 803.02(b),(e),(f)**

Recommendation: The list of approved deductions from wages expanded with the August 2011 amendment to state wage law which provided that, in addition to the list of specific deductions permitted, employers and employees can now agree on deductions for just about any reason. However, the deduction must still be based on the employee's voluntary request and be for the employee's (not the employer's) benefit. Remember: These arrangements should be in writing before the deductions commence.

6. Employing illegal aliens (and others who don't have proper documentation on file).

***RSA 275-A: 4-a**

Recommendation: While this is commonly thought of as an issue involving federal law, many states, including New Hampshire, have laws prohibiting hiring or continuing to employ someone who is not a citizen of the United States OR someone who doesn't have a valid work authorization. NHDOL audits involve inspections of I-9 forms and all supporting documents. These are required for all employees, not just those who are here on work visas. All employers therefore should be certain that all required paperwork is completed and in place before the employee starts work and in the case of foreign guest workers that the employee doesn't continue to work beyond her/his visa/authorization's expiration date. **Please note:** With changes to this law, in case they weren't already doing so, many employers are now keeping I-9 support information to review with a NHDOL inspector in case of an audit.

5. Failure to secure and maintain workers compensation coverage for misclassified workers.

***RSA 275:42 I and II and RSA 281-A**

Recommendation: The NHDOL and NHES formed a task force to find misclassified workers. While their definitions of "employee" differ, they have several elements in common. With this task force the agencies are sharing information like never before. This means the likelihood of either Department discovering a misclassified employee has increased substantially. Likewise the potential fines and penalties have increased. Also, failure to provide workers compensation coverage to misclassified contractors can result in fines, insurance denials or dropped coverage and liability for uninsured claims. This is not just a state law issue. In 2011 the USDOL budget included an additional \$25 million as a part of its "misclassification initiative." In short, the time spent conducting an internal audit to identify and correct any misclassifications will likely prevent or significantly reduce potential fines and penalties. Just a hint, "But we've always done it that way" isn't a strong defense, especially in misclassification cases.

4. Illegal employment of workers under 18 (not having proper paperwork, hours violations, or working in a hazardous environment).

***RSA 276-A and Lab 1000**

Recommendation: This perennial top 5 violation slid down the list this year. That being said, NHDOL still takes this very seriously and as a result rarely abates fines for these violations. Employers should not employ younger workers (ages 15 to 18) unless they strictly comply with these laws and regulations. Workers who are under age 16 cannot start work before securing the required parental certificates. Once these certificates are on file, these and older youth workers must be restricted in the number of hours, days of work and types of work established under state (and federal) law. Occupations, hours of work, days of work and working conditions are particularly limited for 15 and 16 year olds.

- 3. Failure to pay 2 hours minimum pay at their regular rate of pay on a given day that an employee reports to work at the request of the employer.**

***RSA 275:43-a and Lab 803.03 (h),(i),(j)**

Recommendation: This is also known as the “bad weather rule”. This applies principally to hourly employees in the private sector. Employers should notify hourly employees when they are not needed at work on a particular day. If the notice is unsuccessful and the employee reports to work and his/her services aren’t required, the employer must pay the employee a minimum of two hours pay for reporting to work or put the employee to work and then pay for the hours worked. One exception is when the employee’s job or task requires less than two hours of work that day. The employee, in those cases, only needs to be paid for the time worked but this arrangement needs to be in writing in advance.

- 2. Failure to keep accurate records of all hours worked. (Not recording meal breaks taken; not paying for breaks of less than 20 minutes in duration).**

***RSA 279:27 and Lab 803.03**

Recommendation: Does the NHDOL really care if employees get a lunch break? Maybe, but they care more about the proper payment of wages than rest or nutrition. As you know, employers in New Hampshire must permit employees to take a 30 minute (unpaid) meal break after five consecutive hours of work in a workday. Meal breaks must be recorded on daily time sheets just like the start and end time for all hourly and salaried non-exempt employees. Meal waivers are possible, but exceptions to those waivers must be noted on time records.

Time keeping is the employer’s obligation but the daily record is kept by the employee. Therefore, employers have to be sure the daily time records entered by employees are accurate and changes are only permitted if initiated by the impacted employee.

The issue with meal breaks is that if improperly handled employers could face the imposition of fines for not permitting the breaks as well as wage adjustment orders for unpaid overtime and other wage liabilities. If the NHDOL looks back at all of your covered employees for each work day over the last 18 to 24 months

these fines and wage adjustments can really add up. This can be both expensive and unnecessary (because the employees likely took the breaks).

Be careful to avoid automatic meal deductions because NHDOL usually doesn't consider that to be an accurate time record for each employee. Employers should also educate their employees about meal breaks and time keeping policies as well as train supervisors to monitor meal breaks, waivers and time records. Remember, while meal breaks can be unpaid, if employers don't follow this law NHDOL says there's no such thing as a free lunch!

Finally, in keeping with the FLSA, work breaks of less than 20 minutes in duration must be counted as hours worked.

AND
...The Number One Worst Wage and Hour (NH) Violation
From 2015...



- 1. Failure to pay all wages due for hours worked (including paid short breaks, overtime, shift differentials and fringe benefits due).**
***RSA 275:43 and Lab 803.01**

Recommendation: If time isn't properly recorded how can the proper amount of wages be paid? In addition, with the advent of smartphones and remote access, employees are working more time off the clock that should be counted as "hours

worked.” Finally, as the U.S. Supreme Court continues to focus on preliminary and postliminary activities, as well as donning and doffing issues, employers in New Hampshire still have issues knowing when the clock starts and stops and therefore, some employers don’t always pay all wages and fringe benefits due to some employees based on the actual hours they worked. Requiring employees to seek approval in advance for extra work is helpful but they should also alert supervisors when they perform additional work so time records can accurately reflect hours worked and employees can be paid for all that time.

Now let's be careful out there!



[Our thanks again this year to Michele Small and the staff from NH Department of Labor as they provided useful information from the Department]

*This outline is intended as a general summary only
and is not a substitute for specific legal advice.*