



WAGE AND HOUR LAW HOLIDAY HIT LIST 2008 Top Ten Wage and Hour Violations

by
Attorney Jim Reidy
Sheehan Phinney Bass + Green PA
1000 Elm Street
Manchester, New Hampshire 03105
603-627-8217
jreidy@sheehan.com
<http://www.sheehan.com>



Each year we review the Top Ten wage and hour violations in New Hampshire. This year, in addition to that list, we have included the Top Ten FLSA (federal) wage and hour violations. The stakes for noncompliance are higher than ever before, so with each outline we have provided some guidance on how to avoid being on these DOL “naughty” lists.

2008 Top Ten List of Federal (FLSA) Wage and Hour Violations

**by
Attorney Jim Reidy**

- 10. Violation: Misclassifications in the gray areas. Overtime misclassifications in the borderline administrative and management jobs.**

Problem: Classification is always much clearer at the top of the pay scale – people who manage the department – and at the lower end – people on production lines and in other routine jobs. The problem areas are the administrative staff or mid-level managers.

Recommendation: Be sure to check overtime exemptions using the new (August 2004) guidelines and periodically audit compliance.

- 9. Violation: “Suffering” unpaid work. Like independent contractors, there are very few “true” volunteers out there.**

Problem: If you permit or “suffer” (the legal term) people to perform work for your organization, you have to pay them. Even if they voluntarily want to work late or through lunch without pay, they must be compensated.

Recommendation: Keep an accurate record of all hours worked and pay employees their regular rate for all of that time.

- 8. Violation: Failing to meld state with federal requirements. “You are not in Kansas anymore.”**

Problem: For example, in California, workers are entitled to overtime after eight (8) hours in a day and double-time after 12 hours in a day, whereas federal law requires overtime only after 40 hours in a week and does not require double-time under any circumstances. New Hampshire has different rules for pay upon termination or deductions from salary than under the FLSA.

Recommendation: Be aware of both federal and state wage laws and note that, if the state offers greater protection to employees, those laws will apply.

7. **Violation: Miscalculating travel time. “You can’t get there from here”.**

Problem: Travel issues arise because federal law is odd (non-exempts only get paid for travel hours that coincide with their normal work hours) and because state laws may have differing requirements. (For example, in California, you have to pay for all travel hours, whether or not they coincide with normal work hours.) That is not the case in New Hampshire but start times and hours of work do vary. NHDOL watches “on call” or “stand by” time closely.

Recommendation: Follow the FLSA rules, unless your state offers more protection for the employee. Watch for the exceptions and obey state time clock and payroll change rules.

6. **Violation: Donning and Doffing. (Hint: These are not an Eastern European juggling act from Vegas).**

Problem: Preliminary and “postliminary” tasks (as DOL sometimes refers to them) also cause problems. For example, if works have to check in and then travel to a worksite or if they have to don and later doff special safety garb or elaborate uniforms/costumes, that time may be compensable.

Recommendation: Inform employees of shift/schedule start and end times. Be realistic about and pay for prep and breakdown time. Watch time records and payroll changes!

5. **Violation: Not keeping up with changes. “Who forgot to oil the mimeograph machine again?”**

Problem: Today’s rapid changes in the way business is conducted mean rapid changes for jobs too. A typical example would be job that used to make decisions about how to manage the task, now the computer does it. The formerly exempt job may now be non-exempt.

Recommendation: Revisit FLSA OT exemptions on all exempt employees. Document your audit and rationale. Avoid historic assumptions and misconceptions about exemptions; avoid exemptions based solely on salary payments.

4. **Violation: Failure to count extra compensation for overtime. “Now, this is when a bonus is really a bonus!”**

Problem: When calculating overtime rates, employers must include such extra compensation as non-discretionary bonuses and lodging as part of the weekly total on which overtime is calculated.

Recommendation: Revisit bonus and other nondiscretionary payments to limit your exposure and re-calculation efforts.

- Violation:** Making agreements with employees. “Hey, we shook hands on this in 1978, remember?”

Problem: It’s tempting to make an agreement with employees (for example, to set up a compensatory time arrangement instead of paying overtime), but in the private sector, this is not legal, even if the employee happily agrees or even requests the time off.

Recommendation: Carefully track hours and pay all overtime when due. Also, private agreements between employer and employee that contravene the purposes of wage law are deemed null and void.

- Violation:** Ignoring the woes of your competitors. “It can’t happen here, can it?”

Problem: Prominently publicized FLSA settlements or lawsuits and NHDOL informal action, especially when they relate to your business practices, should raise red flags: government inspectors may be targeting your company next.

Recommendation: Time to audit!!!

- Violation:** Docking exempt employees. *(With apologies to Otis Redding)* “Just sittin’ by the dock in his pay....”

Problem: Improper deductions from salary (and the rules vary under FLSA and state law) can destroy FLSA OT exemptions. The window of correction and company policies to correct deductions made in error don’t provide complete or wide ranging protection.

Recommendation: Treat salary as a near absolute. Suck it up for that pay period. Follow state rules precisely and, when in doubt, call your employment lawyer.

Disclaimer

This outline is merely a guide. It is not intended as specific legal advice. Those questions should be directed to your employment lawyer.

2008 Top Ten List of Wage and Hour Violations in New Hampshire

**by
Attorney Jim Reidy
(with thanks again to the NHDOL)**

10. Violation: Illegal employment of workers under age 18.

Problem: Not having proper paperwork, hours violations, or working in a hazardous environment.

RSA 276-A and Lab 1000

Recommendation: Strictly comply with Federal and State youth employment laws and regulations.

9. Violation: Failure to pay employees final wages, in full, when due.

Problem: Not paying the full wages (e.g., salary and hourly wages) and other forms of compensation (e.g., bonuses and commissions and vacation pay, if due).

RSA 275:44 and Lab 803.02(e)-(g)

Recommendation: Pay all wages due within 72 hours (for involuntary terminations) or by *next pay day* (for voluntary terminations).

8. Violation: Illegal or improper deductions from wages.

Problem: Making improper or unauthorized deductions for uniforms, vacation advances, accidental overpayments, etc.

RSA 275:48 and Lab 803.03

Recommendation: Only deduct what is permitted by statute and follow required steps for authorization and notice of deductions.

7. Violation: Failure to pay required reporting time.

Problem: Not paying employees at least the minimum of two (2) hours at their regular rate of pay on a given day that an employee reports to work at the request of the employer.

RSA 275:48 and Lab 803.03

Recommendation: Strictly comply with reporting time requirements and carefully apply exceptions.

6. Violation: Failure to pay all wages when due.

Problem: Automatically deducting for lunch periods not taken.
RSA 275:43,I and Lab 803.05

Recommendation: Keep accurate records of time each day for all nonexempt employees, including time in at start of day, time out at end of day, all bona fide meal breaks and any other breaks over 20 minutes in duration.

5. Violation: Failure to pay all wages when due.

Problem: Not paying employees who take work breaks that are shorter than 20 minutes in duration.
RSA 275:43 and Lab 803.5

Recommendation: Manage break time and generally pay that time “as hours worked”.

4. Violation: Failure to keep accurate records of all time worked.

Problem: Inaccurate time records or changes to time not initialed by the employee. *RSA 279:27 and Lab 803.04*

Recommendation: Keep daily time records and maintain them along with corresponding payroll records for at least four (4) years.

3. Violation: Misclassifying employees as independent contractors.

RSA 275:42, I & II and Lab 803.01

Problem: Not carefully managing these relationships and not specifically following all applicable statutory guidelines including the new 12 point (January 2008) independent contractor tests for state wage and hour matters.

Recommendation: Carefully determine if person is really an independent contractor under all applicable state and federal laws. Here’s a hint: Many independent contractors can’t satisfy these tests.

2. **Violation: Employing Illegal Aliens: the unwelcome guest workers.**

**Problem: Not having proper work authorization documentation on file.
RSA 275-A: 4-a**

Recommendation: Strictly comply with federal I-9 requirements on all employees. Have an I-9 form and support documents for all employees and maintain them for as long as required by law (3 years after DOH; 1 year after termination, whichever is longer).

AND THIS YEAR'S BIG WINNER . . .



...The Number One Worst Wage and Hour (NH) Violation From 2008...

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

Recommendation: Keep all of these notices in personnel files. Maintain some proof that each employee received a copy of the notice.

That's it. That's the list. How did you do? Remember: You better not shout, you better not cry, you better not pout, I'm telling you why, cause the DOL is comin' to Town



Happy Holidays!

Jim Reidy

[Jim Reidy is an employment lawyer with Sheehan, Phinney, Bass + Green, Professional Association in Manchester, New Hampshire (603-627-8217) jreidy@sheehan.com]

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