



WAGE AND HOUR LAW HOLIDAY HIT LIST
2009 Top Ten Wage and Hour Violations
(and how to avoid being on the Naughty List.)

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Introduction

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

2009 Top Ten List of Federal (FLSA) Wage and Hour Violations

by
Attorney Jim Reidy

- 10. Violation: “Professional? Yes, all of our employees are professional and courteous, kind and obedient.... They are, therefore, exempt from that silly overtime stuff.”**

Problem: FLSA overtime exemptions are specific and an employee's salary¹ and job duties must fit squarely within one of the established exemption categories. Remember, job duties change and people change their jobs, so FLSA exemption classifications can change over time.

Recommendation: Review all of the positions in your organization, especially the ones classified as overtime exempt, and document confirmation of their exemption. Don't assume because a person receives a salary, or is highly compensated, that he/she is exempt from overtime laws.

9. **Violation:** "The laptop and cell phone are ours. If you want to see that salary without any unfortunate dings, cuts or deductions, you'll return them safely to us by noon tomorrow."

Problem: While you can insist that employees take proper care of company property, the USDOL has issued an opinion letter that says it is a violation of the FLSA salary payment test to make wage deductions from exempt employees² salary for damage to, or failure to return company property.

Recommendation: Make employees aware of your expectations. Consider getting insurance on more expensive pieces of equipment to cover some losses and add to discipline or termination checklists the return of all company property. Also consider equipment loan agreements with tough collection provisions.

8. **Violation:** "Lunch is for wimps. I have a protein shake in the morning, a power bar at noon and five shots of espresso by 3:00 p.m. and just look at me. Now, it looks like you're done with what you are eating, so can you do this now please? And, mind the crumbs!"

Problem: Interrupting an employee's meal break so he/she doesn't get at least 20 minutes of uninterrupted break/relief from work duties – making the entire time count as "hours worked."

Recommendation: Give employees a meal break of at least 25 to 30 minutes free from work and interruption. This meal break can be unpaid. Make employees aware of this policy and maintain daily meal break records for overtime eligible (nonexempt) employees.

7. **Violation:** "Here we stress a work-life balance. We encourage you to take time off to rest and relax. That is as long as we can still reach you at all hours of the day and night."

¹Some FLSA overtime exemptions permit payment on an hourly basis (e.g. doctors, lawyers, post-secondary level teachers, and certain computer professionals), but most overtime exemptions require payments on a salary basis of at least \$455.00 per week.

² While you can't deduct from salary for lost or damaged property or condition wage payments on the return of company property, you can insist upon return of that property upon separation or within a reasonable period of time thereafter. Equipment loan agreements and company property policies can be enforced in court. Having employees sign acknowledgments of receipt of these policies and confessing judgment for the collections and costs will help, too.

Problem: All hourly and salaried, nonexempt employees must be paid for all hours worked and that means all hours they are “suffered or *permitted*” to work. This means time spent checking e-mails on a computer or via hand-held devices (Blackberry, iPhone, etc.) or checking voicemails, text messages or taking calls outside of the workplace and beyond normal work hours.

Recommendation: Remind employees about work hours and expectations as well as time keeping requirements. Monitor work hours, e-mails and calls. Correct situations where employees are working beyond anticipated hours, with or without authorization.

6. **Violation:** “Him? Oh, he’s our computer guy. By definition he works ridiculous hours. Thank goodness he is exempt from overtime.”

Problem: Not all employees who work on your organization’s computer systems are overtime exempt. They must fall within one of the established overtime exemptions. It is important to note that the computer professional exemption under the FLSA only applies to employees involved in the design, development, documentation, analysis, creation or modification of computer systems or programs.

Recommendation: Look again at these positions and exemptions and, where appropriate, re-classify positions to fit squarely within established exemption categories (e.g. computer professionals or professional exemption categories).

5. **Violation:** “Ok, our time is up and we are going to have to flip all of the cards. Why don’t you clock out now and then finish up that last big stack of work? Don’t forget to shut off the lights on your way out.”

Problem: Inefficiency is a problem that is best dealt with by using performance management techniques and not by artificially capping time clock hours. Nonexempt employees need to be paid for all hours worked.

Recommendation: While you can set work hours and insist that employees not commence work before a certain time and that they not work beyond a certain time, without approval, employees must be paid for all hours worked.

4. **Violation:** “Wait, we already paid you overtime and a bonus, now you want more?”

Problem: Not including all required amounts into the calculation of regular rate and therefore not paying or later properly adjusting overtime pay.

Recommendation: Be sure to include incentives and other premium payouts in overtime payments or adjustments.

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

Problem: Travel issues arise under the FLSA because federal law is fairly strict (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 very 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.

2. **Violation:** “Oh, she’s not our employee, she’s just an independent contractor. I think she’s been here since the 70’s. That was long before I got here. If you need anything, just ask her, she knows where everything is.”

Problem: Misclassifying employees as independent contractors and therefore not properly withholding from wages. Not providing benefits and not paying all wages when due.

Recommendation: Look at all independent contractor agreements and arrangements and confirm the proper classification for each individual.

1. **Violation:** “But this is how we’ve done it for years and this is how everyone else in our industry does it.”

Problem: Following historical practices or industry standards is not defense to liability under wage and hour laws. The USDOL has been very active in recent years going after whole industries in enforcement initiatives or class actions to correct years and millions of dollars of past problems

Recommendation: Conduct a wage and hour audit comparing FLSA requirements (with state requirements, too) with your organization’s pay and record keeping practices. Where there is a problem, be sure to correct it. Industry standards or historical reasons for pay practices or polices are helpful to know, but they are generally not good reasons to fail to comply with FLSA (or state wage law) requirements. Remember, ignoring the problem won’t make it go away. Finally, “But we’ve always done it this way” or “Everyone in our industry does it this way” are not good defenses and they might even make the problem worse.

Disclaimer

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

2009 Top Ten List of Wage and Hour Violations
in New Hampshire

by
Attorney Jim Reidy
(with thanks again to NHDOL)

Top Ten Most Common New Hampshire Labor Law Violations

10. **Failure to keep accurate records of all hours worked. (Not recording meal breaks taken).**
**RSA 279:27 and Lab 803.03*
9. **Failure to pay all wages due for hours worked (e.g. Breaks less than 20 minutes, etc.).**
**RSA 275:43 RSA 275:44 and Lab 803.01*
8. **Failure to get NHDOL approval for pay periods greater than weekly.**
**RSA 275:43 and Lab 803.01*
7. **Improper deductions from wages. Not following list of approved deductions.**
**RSA 275:48 and Lab 803.02(b),(e),(f)*
6. **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)*
5. **Failure to secure the proper youth employment paperwork or not abiding by work hours limitations or hazardous environment prohibitions for workers under age 18.**
**RSA 276-A: 4 & 5 and Lab 1002.01-1003.01*
4. **Failure to have required or properly completed I-9 documentation in place.**
**RSA 275-A: 4-a*
3. **Misclassifying employees as independent contractors or volunteers and failing to pay wages and fringe benefits due on securing Workers Compensation insurance.**
**RSA 275:42, I & II, and RSA 281-A:5*
2. **Failure to have a written safety plan, joint loss management committee and safety summary form filed biennially, as required.**
**RSA 281-A:64 and Lab 602.01, 602.02, 603.02, and 603.03*

AND THIS YEAR'S BIG WINNER . . .

...The Number One Worst Wage and Hour (NH) Violation From 2009...

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.

**RSA 275:49 and Lab 803.03*

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!

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and the Labor and Employment Group at Sheehan Phinney Bass + Green PA

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