

**WAGE AND HOUR LAW
HOLIDAY HIT LIST**
2010 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. We have again this year included the Top Ten FLSA (federal) wage and hour violations. The stakes for noncompliance with these wage laws are higher than ever before, so employers need to pay attention to these if they want to avoid being on these DOL “naughty” lists.

2010 Top Ten List of Federal (FLSA) Wage and Hour Violations

The US DOL is out there folks!

The US Department of Labor has reported that 70% of covered employers are not in compliance with FLSA. Some have speculated the percentage of employers who aren't in compliance is actually higher. That's not good. The US DOL has been more active with its workplace audits in recent years. With that stepped up enforcement, the number of citations for violations of federal wage laws and the wage payment orders have increased dramatically in recent years. Also, increasing is the number of FLSA class action lawsuits. By way of example, in the 1990's there were an average of just over 1,000 FLSA class action claims filed each year nationally. In the mid-2000's that average more than quadrupled to 4,500 FLSA class action lawsuits filed each year.

Penalties for violations of the FLSA include injunctive relief, back pay, front pay, attorney's fees, court fees, corporate and supervisor liability (up to \$10,000 for each willful violation) and prison sentences for repeat offenders. Talk about a naughty list!

The following are some of the top FLSA violations from 2010.

10. *“What kind of Mickey Mouse organization are you running around here anyway?”*

Violation: Inventory control clerks for a well-known resort and amusement park in Orlando, Fla. Food and Beverage Department were not paid for work activities before and after their normal shifts.

US DOL Enforcement: US DOL recovered more than \$433,000 in back wages for Walt Disney World employees, because while the Park had rules regarding off the clock work, managers weren't following this policy.

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, but pay them for all hours worked.

9. *“We are open 24/7. Our payroll, however, is capped at 40 hours per week. We couldn't afford to pay our employees 24/7, that's crazy!”*

Violation: A New Jersey petroleum company didn't pay overtime for work over 40 hours in a work week. They also didn't keep accurate time records.

US DOL Enforcement: US DOL secured nearly \$4 million in back wages and \$100,000 in fines for FLSA violations involving gas station attendants. Many of these employees were found to have worked as much as 100 hours per week without getting any overtime pay.

Recommendation: Comply with the FLSA which requires that covered employees be paid at least the federal minimum wage for hours worked, as well as one and one half times their regular rate for hours worked over 40 per week. The FLSA also requires that an accurate record of employees wage and hours of work be maintained.

8. *“You know, for a little extra work I can get you a pool- side view....”*

Violation: Covered employees of a Florida time share company weren’t paid the proper overtime amount as several non-discretionary payments were not included in the calculation of the regular rate.

US DOL Enforcement: US DOL recovered more than \$868,000 in back wages for employees who did tours for the Company and weren’t paid at least minimum wage for the time to conduct the tours. Also, while they did receive some overtime pay, the premium did not include commissions in the calculation of the regular rate.

Recommendation: Be sure to include all amounts required for the calculation of the regular rate and, as needed, go back and recalculate overtime payments (e.g., after annual and quarterly bonuses).

7. *“I put my pants on one leg at a time just like the next guy. I don’t expect to be paid for that....”*

Violation: Employees at national food processing plants weren’t paid for all hours worked as they weren’t paid for required donning and doffing (putting on and taking off of required gear and protecting clothing) or washing hands and sanitizing equipment.

US DOL Enforcement: The Company agreed to nationwide injunction requiring poultry workers to be paid for time spent putting on and taking off protective items, sanitization and between tasks.

Recommendation: Avoid pay and time keeping practices that are so rigid that this reasonable period for preliminary and post-liminary activities aren’t counted as hours worked.

6. *“Hey, I would love to pay you this week but we can’t always get what we want.”*

Violation: The FLSA found that an employer didn't pay its employees for all hours worked and payrolls weren't as frequent as required.

US DOL Enforcement: US DOL investigation collected more than \$1.3 million in back wages for 187 employees of a large pharmaceutical company because the company missed or was in arrears for 14 pay periods from late 2009 through 2010.

Recommendation: Pay all wages due for hours worked in the pay period and make all wage/payroll payments on time. If you miss a payroll, you may buy a call to the Department of Labor. That can be an expensive call.

5. *“Through rain, snow, sleet or hail... What? Our wages don't prevail?”*

Violation: USPS mail haul contracts are subject to the prevailing wage and fringe benefit provisions of the Federal McNamara-O'Hara Service Contract Act. That law requires contractors and subcontractors working on federal contracts in excess of \$2,500 to pay servicing employees no less than the wage rates and fringe benefits found prevailing in that area for the classification of work performed. This contractor failed to pay those wages and, thereby, put its contractor status in jeopardy.

US DOL Enforcement: US DOL moved to debar Long Island, New York mail hauler contractor from federal contracts and recovered \$1.8 million in back wages for 500 employees because the employer didn't pay the required prevailing wages.

Recommendation: Confirm if you or your subcontractors are covered by this or other federal contracts and strictly comply with wage payment obligations and reporting requirements.

4. *“Hello! Hello, any one home? The lights are on but nobody is here.”*

Violation: As federal contractors and a FLSA covered employer, DC Security Guard company failed to pay all wages due for hours worked and stopped paying wages because they went out of

business. The US DOL can seek back wages from parent corporations, owners and investors.

US DOL Enforcement: USDOL collected \$1.78 million in back wages for 700 Washington, DC security guards. The employer in that case failed to pay guards for work in September and October 2009. They thought they had no duty to pay once they were out of business. They were wrong.

Recommendation: If your business is shutting down, be sure to comply with all applicable notice provisions and make arrangements for all required wage payments for all hours worked up to the date the company shuts down.

3. *“Meeting time is really more of a social time. Work time is work time. Clear? Now pass the donuts, will ya?”*

Violation: The FLSA counts required pre and post shift meetings, as well as meetings during the work day, as hours worked. This employer failed to account for that time in their records, pay wages for that time, and overtime when the employees worked over the OT threshold.

US DOL Enforcement: US DOL ordered an Arizona County Sheriff’s office to pay offices and sergeants for pre-shift meetings. Those meetings were part of the daily routine for officers at the county detention facilities, but the employees were only paid for their actual shifts.

Recommendation: Pay for all hours worked including required pre and post shift meetings.

2. *“When I was a kid I used to walk 5 miles to school, all uphill and then walk another 5 miles to work at the slaughter house downtown...”*

Violation: Under a tougher penalty structure from US DOL, employers who illegally employ children ages 12 and 13 will face a penalty of at least \$6,000 per violation.

US DOL Enforcement: US DOL announces stiffer penalties for the illegal employment of children. A national survey found many employers are not adhering to youth employment laws which restrict the ages, hours of work and types of work for minors between the ages of 14 and 18. Generally, 12 and 13 year olds are not permitted to work. (*Exceptions include newspaper delivery, casual babysitters, child actors and working for some family businesses.*)

Recommendation: Strictly comply with all youth employment laws. These violations are rarely forgiven and these fines are rarely abated.

1. *“Lunch time? Lunch time? Really? Next you will want bathroom breaks. Hey, this isn’t a country club, you know.”*

Violation: The FLSA counts breaks less than 20 minutes in duration as hours worked and in this case, employees were not paid for their missed breaks. The FLSA also requires an accurate record of hours worked, and the company’s automatic deduction for lunch breaks without regard to whether the break was taken was improper.

US DOL Enforcement: US DOL recovered \$4.2 million for 603 workers at an Oregon Chemical Plant. In that case, the employer was found to have underpaid its workers as it automatically deducted meal breaks even though employees were routinely not permitted to take the breaks. The US DOL found similar violations at another plant in Arkansas operated by the same company.

Recommendation: Make certain time records of hours of work are accurate, breaks are properly recorded and automatic meal break deductions are avoided.

Disclaimer

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

2010 Top Ten List of Wage and Hour Violations in New Hampshire

It was a busy year for NH DOL

The Recession may be over according to some politicians and news outlets, but the lingering effects are still seen in important statistics from NH DOL. In FY 2008 there were 280 employers found to be in violation of state wage laws. The Department collected \$1,715,938 (\$1,104,715 in wage claims, \$234,918 in wage complaints/audits and \$376,305 in wage adjustments). Those numbers ballooned in FY '09 to \$5,301,620 (\$3,479,973 in wage claims, \$368,892 in wage complaints/audits and \$1,452,755 in wage adjustments). While the NH DOL FY 2010 enforcement statistics are not out yet (because they use a biennial report format), it has been reported that the NH DOL's enforcement numbers increased again in FY '10.

The following are the Top Ten Worst (most common) wage and hour violations in New Hampshire:

10. Failure to keep accurate records of all hours worked. (Not recording meal breaks taken).

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

Recommendation: Employers 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 non-exempt (FLSA/OT) employees. Meal waivers are possible, but exceptions must be noted on time records.

9. 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***

Recommendation: Employers should not permit youth workers (ages 15 to 18) to start work before securing the required permits/certificates. Once these certificates are on file, youth

workers should be restricted in the number of hours, days or work and types of work established under state law.

8. **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*

Recommendation: Employers with more than five employees need to have a joint loss safety committee to receive and correct workplace safety problems. Employers with 10 or more employees must file a written safety plan with the state (NH DOL) and then file updates every two years.

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

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

Recommendation: Even if the employee authorizes deductions from his/her wages, the deductions may only be for the purposes approved in the statute and following the requirements outlined in the statute and administrative rules.

6. **Failure to pay 2 hours minimum pay at the employee's regular rate of pay on a given day when he/she reports to work at the request of the employer.**

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

Recommendation: Notify employees when they are not needed at work. If the notice is unsuccessful and the employee reports to work, pay the employee two hours pay for reporting to work or put them to work. 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.

5. **Failure to get NHDOL approval for pay periods greater than weekly.**

**RSA 275:43 and Lab 803.01*

Recommendation: The pay period required by state law is weekly. The statute permits employers to pay less frequently (e.g. bi-weekly, semi-monthly or monthly) with approval from NH

DOL. Employers can and should request approval for a longer pay period on-line at the NH DOL website.

- 4. 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***

Recommendation: To avoid costly fines and wage adjustments, employers should be certain to properly classify employees. For wages, benefits and workers' compensation purposes, employers should follow the statute's 12 point test to confirm whether the individual is an employee or an independent contractor.

- 3. Failure to properly compensate employees where tips are involved. Not properly classifying tipped employees or improperly using tip pools.**

****RSA 279:21 Lab 803.102***

Recommendation: The statute is clear as to which employees can be paid a subminimum wage because that employee receives tips from customers to supplement wages. To avoid civil penalties and wage adjustments, hotels, restaurants and related workplaces should be sure tipped employees are properly classified and tip pools, if used, are truly voluntarily.

- 2. Failure to pay all wages due: Failure to pay overtime rates, commissions and bonuses when due.**

****RSA 275:43, RSA 279:21 VIII and Lab 803.01***

Recommendation: While New Hampshire has an overtime statute, state law refers to the FLSA and for key definitions. State law also requires employees to be paid all wages due. For overtime purposes, the FLSA overtime rates include nondiscretionary payments from the employer. Employers should include all required amounts when calculating the overtime premium due for nonexempt employees.

AND THIS YEAR'S BIG WINNER . . .

...The Number One Worst Wage and Hour (NH) Violation From 2010...

Again, this year ...

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: This is an easy one. 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. 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.

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