

WAGE AND HOUR COMPLIANCE IN TOUGH TIMES

Trying to Make Cents of It All: Increased Scrutiny and the Need for Increased Compliance With Labor Laws



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INTRODUCTION

This has been a challenging year, especially for employers. The recession hit New Hampshire nearly a year ago and the economy has not stabilized yet. Organizations of all types and sizes have reduced expenses, trimmed payrolls and eliminated positions in an effort to keep the doors open and the lights on. In the meantime, Congress and the New Hampshire legislature have created new obligations for employers and wage complaints by employees have increased. According to a United States Department of Labor representative, "When there is an economic downturn with high unemployment, the Wage and Hour Division has seen an increase in wage violations."¹

The stakes are higher than ever for employers. In addition to employee wage claims, inspectors for federal and state departments of labor have been active in their workplace audits and inspections. Civil penalty assessments have been climbing. In 2007, New Hampshire civil penalties per cited violation (per violation/employee per day) increased

from \$1,000 to \$2,500.² In 2008, the NHDOL collected over \$1.4 million in wages due employees. 2009 may see an increase in penalties and wages due. The USDOL also has stepped up its enforcement actions. Those added costs could be devastating to employers. This article will discuss recent developments in federal and New Hampshire state wage and hour laws to help employers and their representatives navigate this ever-changing and often vexing area of labor law.

LAWS THAT APPLY AND TO WHOM

Federal

The United States Department of Labor Wage and Hour Division (WHD) of the Employment Standards Administration (ESA)³ is responsible for enforcing federal wage laws regarding the minimum wage, overtime pay, record-keeping and youth employment. The Fair Labor Standards Act (FLSA)⁴ establishes the federal minimum wage, overtime pay requirements, child labor restrictions and recordkeeping standards applicable to most private and public employees.

The FLSA applies to all employees of covered enterprises, which are "engaged in interstate commerce, producing goods for interstate commerce or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person."

⁵ Covered entities must meet one of the following criteria:

1. have annual gross volume of sales made or business done not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated); or
2. engage in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or
3. engage in activities of a public agency.⁶

The FLSA also may apply to individual employees of organizations which are not covered enterprises, if the employees are themselves engaged in interstate commerce, in the production of goods for interstate commerce, or in any closely related process or occupation directly essential to such production. These include employees who work in communications or transportation; regularly use the mails, telephones or telegraph for interstate communication; keep records of interstate transactions; handle, ship or receive goods moving in interstate commerce; regularly cross state lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

The FLSA excludes certain interstate businesses or employees, so employers should review the statute and regulations to determine if they fall under one of the exemptions. For example, truck drivers covered by U.S. Department of Transportation requirements do not receive the protections of the FLSA.

New Hampshire

In New Hampshire, the Department of Labor (NHDOL) monitors employers to ensure their compliance with NH minimum wage, overtime, safety and workers compensation laws. The NHDOL administers wage and hour laws which include: RSA 273 "Department of Labor," RSA 275 "Protective Legislation," RSA 276-A Youth Employment, and RSA 279, "Minimum Wage Law." New Hampshire Administrative Rule Chapter Lab 800 further interprets and outlines wage payment requirements for employers.

The NH statute relating to wage payments defines employer as "an individual, a partnership, an association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor or any of the same, employing any person, except employers of domestic labor in the home of the employer, or farm labor where less than 5 persons are employed."⁷

INSPECTIONS AND AUDIT

New Hampshire

RSA 273:9 grants the NHDOL broad authority to investigate compliance with state labor and employment laws.

The commissioner shall, at such times as he shall deem it necessary, and without notice, visit the manufacturing, mechanical and mercantile establishments in the state, so far as practicable, for the purpose of ascertaining whether the laws with reference to employment are complied with, and for the further purpose of ascertaining if reasonable sanitary and hygienic conditions are maintained, calculated to promote the health and welfare of the working people.

RSA 275:51 specifically authorizes the commissioner to investigate wage and hour law violations.

I. The commissioner shall enforce and administer the provisions of this subdivision and the commissioner or the commissioner's authorized representatives are empowered, on his or her own motion or on an employee complaint, to hold hearings and otherwise to investigate

charges of violations of this subdivision and to institute actions for penalties hereunder, and to entertain and adjudicate claims for wages due under the provisions of this subdivision.

II. The commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they may deem appropriate, to determine whether any person has violated any provision of this subdivision or any rule or regulation issued hereunder or which may aid in the enforcement of the provisions of this subdivision.

The NHDOL inspector usually arrives at an employer's place of business unannounced and will present a "Notification of Inspection." The notice will include a list of requested records, such as payroll records, time records, cancelled payroll checks, youth employment certificates, benefits policies, individual employee files, workers' compensation policy and tax ID number. Although the employer may properly classify and pay its workers, failure to adequately record time worked, to secure the appropriate youth employment approvals and to provide the required notices to employees can constitute the bases for separate violations. These record-keeping violations are among the most common reasons for a citation. A finding of wage and hour violations is usually followed by an assessment of civil penalties and required wage adjustments. The time taken to ensure compliance and avoid these assessments can be time well spent.

A NHDOL wage audit follows a specific course. The inspections generally take one to three days and may entail requests for additional information or confidential interviews with employees. Following completion of the audit, the inspector will provide the employer's representative with a copy of the inspection report and will request a signed receipt indicating that the employer has received the report. This report will include a list of violations. A separate letter from the NHDOL follows within a few weeks and that letter includes a summary of the violations (number of violations by chapter of the statute) and a calculation of wage adjustments and proposed civil penalties.

The Wage and Hour Administration will also send a summary letter of violations found and the proposed wage adjustments and civil penalties. Employers have a right to request an informal conference with the Wage and Hour Administrator. This is an opportunity to resolve matters without the necessity of a formal hearing. If the matter is unresolved, the employer may request a hearing. The employer has a right to appeal decisions on wage adjustments after the hearing to the Superior Court and decisions on civil penalties to the DOL Compensation Appeals Board.⁸

Federal

The WHD also conducts similar inspections to enforce the FLSA and it is increasing the number of wage and hour investigators by a third.⁹ The WHD's authorized representatives determine compliance with the law by investigating employment practices and gathering data on wages and hours. When violations are discovered, the WHD representatives may recommend changes in employment practices to bring an employer into compliance and will calculate any wages due.¹⁰ In recent years, especially since the overhaul of FLSA regulations in August 2004, the Boston and

Manchester offices of the USDOL have been much more active in their wage and hour investigations. Their focus has been on overtime exemptions and misclassification of employees.

REMEDIES AND PENALTIES/FINES

New Hampshire

RSA 275 allows both criminal and civil penalties for violations of wage laws. An employer who willfully pays less than the required wages is guilty of a misdemeanor.¹¹ Likewise, an employer who willfully violates the requirements on the frequency and method of wage payment or violates a wage order by the Labor Commissioner is guilty of a misdemeanor.¹²

RSA 275 also provides a civil remedy for employees and the NHDOL to recover wages due.¹³ The statute of limitations for these claims is now three years from the date the wages were due.

The employee who believes he/she is owed wages has two routes for collecting the wages. The employee may file an administrative Wage Claim with the NHDOL, requesting the wages, perhaps including liquidated damages. If the employer objects to the claim, the employee may request a hearing before the NHDOL, which will issue a written decision within 30 days after the hearing. If the employer does not object to the Wage Claim, a wage order will be issued. The NHDOL decision or order may be enforced as a court judgment and serve as a lien on the employer's property.¹⁴ Any party aggrieved by the NHDOL decision may appeal to the superior court not later than 20 days.

Employees also may file a lawsuit in superior court to collect wages due. The suit can ask for the wages that should have been paid and court costs and attorneys' fees.¹⁵ The employee need not file a Wage Claim before filing suit. However, he cannot do both for the same wages.

The NHDOL may collect civil penalties. Maximum penalties range from \$1,000 to \$2,500, depending on the violation. For example, an employer willfully failing to reimburse expenses is subject to interest and a civil penalty of up to \$1,000 per violation.¹⁶ Additionally, the Labor Commissioner may subject employers to a civil penalty of up to \$2,500 for a violation of other New Hampshire wage laws.¹⁷

Federal

The FLSA provides the WHD with civil and criminal remedies.¹⁸ The statute of limitations for unpaid minimum or overtime wages is two years. In the case of a willful violation, the statute of limitations is three years.¹⁹

An employee may collect wages due in several ways. He could call the WHD and complain about the employer's failure to pay wages. This can trigger an informal inquiry or inspection by WHD of the employer. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages or may obtain an injunction to restrain any person from violating the FLSA.²⁰ An employee has a private right of action for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.²¹ He need not file a complaint or exhaust his remedies with the WHD to file suit. However, an employee may not bring suit if he or she has accepted back wages under the supervision of the WHD or if the Secretary of Labor has already filed

suit to recover the wages.²²

In addition to claims for unpaid wages, costs and attorney fees, employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation.²³ Violators of the youth employment provisions are subject to a civil money penalty of up to \$11,000 for each employee who was the subject of a violation.²⁴ The FLSA prohibits an employer from firing or otherwise discriminating against an employee for filing a complaint or for participating in a legal proceeding under FLSA.²⁵ Willful violations may be prosecuted criminally and the violator fined up to \$10,000.²⁶ A second conviction may result in imprisonment.²⁷

HOT ISSUES FOR NHDOL AND USDOL

Minimum Wage Increases

Employers must comply with the recent changes to the minimum wage rates. Effective July 24, 2009, the federal minimum wage increased to \$7.25 per hour. The state minimum wage had increased to \$7.25 on September 1, 2008.²⁸ The employer must pay the higher of the state or federal minimum wage, if it were covered by both laws.

Employers should assure their posters have been updated to reflect the changes to the minimum wages. Both federal and state laws require employers to post notices of the applicable minimum wages and these posters need to be current.

MOST COMMON (AND EXPENSIVE) NEW HAMPSHIRE WAGE AND HOUR VIOLATIONS

Although the wage and hour laws present many potential landmines for unwary employers, several violations occur all too often. One common violation occurs when employers misclassify employees as independent contractors.²⁹ Employers are in danger of violating numerous state laws when they neglect to determine if a worker truly meets the tests for status of independent contractor, such as the new 12-point independent contractor tests for state wage and hour matters.³⁰ Employers should carefully determine if a person qualifies as an independent contractor under all applicable state and federal laws.

Employing illegal aliens and failing to maintain proper work-authorization documentation are common violations. These violations expose employers to penalties up to \$2,500 for each day of noncompliance.³¹ NHDOL takes the position that failure to have valid I-9s violates this statute, even if the employee is not an illegal alien. Employers must strictly comply with federal I-9 requirements on all employees,³² and must maintain I-9 forms and support documents for all employees for three years after date of hire or one year after termination, whichever is longer.³³

Another common violation continues to be the failure to obtain proper youth certificates and parental consents for workers under age 18. These forms must be in place *before* the youth commences any work for the employer. Employers should not expect penalties to be abated for these violations by NHDOL.

Finally, employers face penalties for paperwork violations. An employer must inform each employee of his wage rate, pay period, pay and a general description of fringe benefits when they are hired or in advance

of any change.³⁴ The notice must be in writing signed by the employee. The employer should place the signed notice in the employee's personnel file. The NHDOL also regularly cites employers for changing time records without having the employee initial the record acknowledging and effectively consenting to the change.

CASES UNDER NEW HAMPSHIRE WAGE LAWS

The NHDOL must produce evidence of specific violations in order to succeed against an employer. In *Appeal of Dan's City Auto Body*, 158 N.H. 28 (2008), the court refused to uphold the Penalty Appeal Board's (PAB) finding on violations of record keeping and wage payments. The employer had appealed nearly 1,000 violations and won before the PAB on 90 percent of them. The court, however, refused to affirm the PAB's holding on those violations. It held that NHDOL had failed to prove each of the specific violations by employee, by day and time. The court further refused to remand the case to the PAB and dismissed the violations outright.

Severance pay can constitute wages, if the employer's practice or policy establishes that benefit. In *ACAS Acquisitions (Precitech), Inc. v. Hobert*, 155 N.H. 381 (2007), the employee claimed the employer failed to pay him all wages due, i.e., severance benefits, as required by RSA 275:44. Wages include "(v)acation pay, severance pay, personal days, holiday pay, sick pay and payment of employee expenses, when such benefits are a matter of employment practice or policy..." RSA 275:43,V. The court upheld the superior court's decision that severance pay did not meet this definition, because the employer had no policy or practice of paying the benefit.

The case of *Demers Agency v. Widney*, 155 N.H. 658 (2007) points out the importance of employers paying final wages when they are due. The court upheld a NHDOL finding that the employer failed to pay a bonus to an employee when he left his job. It also upheld the order for payment of liquidated damages, because the evidence showed the employer knew the bonus was owed and the employer failed to pay it because the agency was upset with the employee for leaving and not because of the difficulty in determining the bonus.

FEDERAL VIOLATIONS

In the midst of this economic crisis, employers are facing increased scrutiny from federal labor authorities. Statistics from the WHD indicate that it is vigilantly enforcing wage and hour laws. In fiscal year 2008, WHD collected more than \$185 million in back wages.³⁵ The agency concluded 28,242 compliance actions and assessed over \$3.1 million in civil penalties.³⁶ Interestingly, of the minimum wage and overtime actions concluded, 88 percent of the violations involved failure to pay overtime.³⁷

To prevent legal issues, employers should conduct their own audits of pay practices. Clearly, the most frequent violation involves misclassifying nonexempt employees as exempt from overtime. Employers also should note that improper deductions from an employee's salary can destroy FLSA overtime exemptions.³⁸ Company policies to correct deductions made in error do not provide complete or wide-ranging protection. The solution to this problem is to avoid tinkering with salaries. They should be treated as a near absolute and deductions should be made only if

allowed specifically by the FLSA.

RECENT CASES: FEDERAL/CLASS ACTION CLAIMS

In recent years courts have seen a significant increase in FLSA class action cases. These cases have involved various industry groups including the financial services industry, delivery drivers, registered nurses, supermarket workers, telecommunications workers and computer software employees. In 2008, there were several class action decisions across the country.

For example, in *Baden-Winterwood v. Life Time Fitness, Inc.*³⁹ the Sixth Circuit held that deductions made by a health and fitness center employer from the base salaries of department managers were improper. The managers had filed this suit as a class action. These deductions were taken to recover portions of paid bonuses when the employees' performance fell below a level of the incentive-based bonus compensation plan. The court concluded that the employees were not paid on a salaried basis; therefore, the workers were non-exempt under the FLSA.

A recent settlement also cautions employers of the consequences of wage and hour law violations. On December 23, 2008, Wal-Mart announced that it would settle 63 wage and hour lawsuits in approximately 42 states involving state and federal claims for off-the-clock work and failure to pay overtime.⁴⁰ The total amount of payments could be between \$352 million and \$640 million.⁴¹

LIFE WITH LEDBETTER: A FRESH LOOK AT PAY EQUITY ISSUES

President Obama fulfilled a campaign promise when he signed the Ledbetter Fair Pay Restoration Act of 2009. This law deals with discrimination in wages and is not an FLSA case. It, however, reminds employers of liability that can lie hidden in compensation systems and decisions. This Act reversed the 2007 U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*⁴² and addresses discrimination claims where long-past unlawful discrimination accounts for current disparities in pay.

The connection to wage and hour issues is the requirement for adequate documentation and record retention. This new law should cause employers to take a fresh look at their pay policies and records retention practices. They should ensure they have complete pay records showing how wages are determined. Employers should consider auditing their pay practices to ensure there is sufficient documentation supporting compensation decisions. Business-related reasons underlying such decisions, e.g., performance based criteria or policies, disciplinary records and performance assessments, will play a more important role than ever, as they will be needed to defend against a wage disparity claim. Employers should reconsider the length of time they maintain pay records and supporting documents. Given that claims of discrimination could conceivably reach back decades, employers need to develop a system for the long-term record retention of pay and related records.

CONCLUSION

Wage and hour laws were created to protect employees. Employers have the obligation to understand what laws and regulations apply to

them and to comply with all applicable obligations. The stakes for non-compliance are higher than ever. Care should be taken to avoid costly mistakes or claims later.

Note/Acknowledgement

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ENDNOTES

- 1 The Bureau of National Affairs, Inc., "DOL Adds Investigators to 'Reinvigorate' Enforcement," 186 LRR 138 (2009).
- 2 RSA 273:11-a.
- 3 See <http://www.dol.gov/esa/whd>
- 4 29 U.S.C. §§201-219.
- 5 U.S. Department of Labor, "Handy Reference Guide to the Fair Labor Standards Act," July 2007, available at: <http://www.dol.gov/esa/whd/regs/compliance/hrg.htm>.
- 6 *Id.*
- 7 RSA 275:42, I.
- 8 Sean Gorman, "Stop making Cents" How to Respond to Wage Adjustments and Proposed Civil Penalties Arising Out of NHDOL Audits," presented at the Sheehan Phinney Bass + Green PA Employment Law Review and Update, May 28, 2009.
- 9 The Bureau of National Affairs, Inc., "DOL Adds Investigators to 'Reinvigorate' Enforcement," 186 LRR 138 (2009).
- 10 U.S. Department of Labor, "Handy Reference Guide to the Fair Labor Standards Act," July 2007, available at: <http://www.dol.gov/esa/whd/regs/compliance/hrg.htm>
- 11 RSA § 275:52. Each week on any day of which an employee was paid less than the required wage, and each employee paid less than the required wage, is a separate offense. RSA § 279:28.
- 12 RSA § 275:52.
- 13 In *Labor Ready Northeast, Inc. v. New Hampshire Dept. of Labor*, 147 N.H. 721 (2002), the Court held that "[n]othing in the statutory framework, . . . authorizes the commissioner to pursue a wage adjustment claim absent express assignment from the employee." However, in 2003 the legislature amended RSA 275:51, V to permit the department to independently initiate and adjudicate a wage claim on its own motion.
- 14 RSA § 275:51.
- 15 RSA § 279:29.
- 16 RSA § 275:57.
- 17 RSA § 273:11-a.
- 18 29 U.S.C. § 215 – 216.
- 19 *Id.* § 255.
- 20 U.S. Department of Labor, "Handy Reference Guide to the Fair Labor Standards Act," July 2007, available at: <http://www.dol.gov/esa/whd/regs/compliance/hrg.htm>.
- 21 29 U.S.C. § 216(b).
- 22 *Id.* § 216(c).
- 23 *Id.* § 216(e)(2).
- 24 *Id.* § 216(e)(1) and (a)(1).
- 25 *Id.* § 216(a)(3).
- 26 *Id.* § 216(a).
- 27 *Id.*
- 28 The FLSA poster can be downloaded at no charge from the USDOL website: <http://www.dol.gov/esa/regs/compliance/posters/flsa.htm>. The updated NH poster can be downloaded at no charge from: <http://www.labor.state.nh.us/INS-Poster-NHMinimumWageLaw.pdf>.
- 29 *Id.*; See RSA § 275:42, I & II; Lab 803.01.
- 30 RSA § 275:4, II (2008).
- 31 RSA § 275-A:5.
- 32 RSA § 275-A: 4-a.
- 33 The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a(b)(E)(3).
- 34 RSA § 275:49.
- 35 U.S. Department of Labor, 2008 Statistics Fact Sheet, available at <http://www.dol.gov/esa/whd/statistics>.
- 36 *Id.*
- 37 *Id.*
- 38 The rules vary under FLSA and state law.
- 39 566 F.3d 618 (6th Cir. 2009).
- 40 BNA, "Wal-Mart Will Settle 63 Lawsuits; Payments Could Total \$640 Million," 185 LRR 258 (January 19, 2009).
- 41 *Id.*
- 42 550 U.S. 618 (2007).

Authors



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