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Failing to Keep Accurate Records of All Hours Worked

Employers must keep an accurate record of all hours worked by employees and all wages paid. These records must be kept for a minimum of four years. While this is the most common violation, it's also the easiest to avoid, Reidy says. "All employers must ensure that their employees (except salaried, overtime exempt employees) keep track of their hours each day. That includes the actual time work started, work ended and any bonafide meal break or personal break greater than 20 minutes in duration" he says. Records can be kept in a variety of forms-paper, e-mail, time cards, or punch clocks-as long as it is accurate and the employee initials any changes to the entries, Reidy says. These records must then correspond to payroll/paycheck records, he says.

Weiss Ford says The NH Department of Labor finds employers frequently are unaware of the specific regulations relating to keeping accurate records, and as a result, this has been the number one violation for years. "I advise employers to be familiar with not only the applicable New Hampshire statutes, but to also understand the applicable regulations promulgated by [Labor Department]," she says, adding employers should conduct periodic HR trainings for payroll personnel on this issue. She also suggests regular self-audits of payroll to ensure compliance and develop forms so rules are consistency followed.

Discrimination Cases Rise

Discrimination cases may not make the top 10, but they are increasing, particularly age discrimination, and they can be costly. "In this economy-since September 2008-there's been an explosion of these kinds of claims," Reidy says.

Though NH has a 6 percent unemployment rate compared to just over 10 percent nationally, the unemployed tend to look closely at why they are out of a job. "All lawsuits are economic," Reidy says. "In that, if you're an employee and you've been laid off, you're thinking, 'I've lived up to my end of the deal. I came to work on time, I did my job.' Then you're thinking about your mortgage, tuition, cost of living, car payments." And as it remains difficult to find a job, Reidy says people may think, it must have to do with age,

gender or some other discrimination. "They don't do it to extort money from the company, but people panic," he says.

The most common complaint is gender-based and that generally breaks down into two categories: sexual harassment and pregnancy discrimination, says Esperian of the NH Commission for Human Rights. "Sex is always first and disability is always second, followed very, very closely by age discrimination," she says.

Of late, pregnancy discrimination is edging out sexual harassment and gender discrimination. "Once a woman has given birth and had her maternity leave, she is entitled to come back to the same or similar job at the same rate of pay," she says. "But a lot of employees don't realize that.

Also there are assumptions made-often with the best of intentions-that end up interfering with a woman's right to work, Esperian says, citing examples that include employers deciding a pregnant woman can't lift things.

"Unless a woman has a doctor's note that says she can't do something then she shouldn't be treated any differently than anyone else who has a temporary disability," Esperian says.

That's true for benefits too, she says. Some women may be eligible to collect short-term disability benefits during maternity leave in addition to any benefits under the Family and Medical Leave Act, a federal law applying to companies employing 50 or more employees.

Adding to employers' responsibility is a provision in the new health care reform requiring employers to provide reasonable break times for nursing mothers to express breast milk for one year after her child's birth. The employer must also provide an appropriate space and it cannot be a restroom, even a private one. A temporary space is fine as long as it is shielded from view and "free from any intrusion from co-workers and the public," according to the law. The employee does not need to be compensated for each break, unless she uses a regularly scheduled break.

Deciding Violations

Esperian says far more complaints reaching her office end up with findings of "no probable cause" than of "probable cause." She says her office strives to interview both employee and employer, gather documentation and reach an independent conclusion. Of the cases that move forward, most end up getting settled through the free mediation process offered by the commission. She says few end up in superior or federal courts.

The process is not much different for wage and labor disputes. While most inspections start with an employee complaint, labor inspectors can randomly audit companies, says Flynn of the NH Department of Labor.

Once an inspector takes on a claim, employers are notified there will be an inspection or audit, Flynn says. If the inspector finds no violations, the process ends. If a violation is found, the employer is notified in writing. The employer then has a choice of an informal conference, usually with Flynn, or a formal hearing.

Flynn says a reasonable outcome can generally be worked out. After all, the goal is compliance, she says.

Typically, resolution means money owed to the employee and payment of a civil penalty. Flynn says penalties depend on the cooperation of the employer, the seriousness of the violation and the employer's history of previous violations.

Less than 10 percent of the cases inspected by the Department end up in a formal hearing or in court since the department introduced the informal hearing process about five years ago. However, even with willing parties, the claims process can last up to two years, and longer if the case actually goes to court.

Preventing Problems

The list of potential violations is long, but there are easy things employers can do to keep out of trouble.

Both Reidy and Weiss Ford say much of the work they do happens before there is a problem. This includes making sure company handbooks are current with changing employment laws and trends—from sexual harassment to social media policies. Reidy says he also tries to help clients resolve potential problems with employees before they lead to a complaint with the Labor Department or Human Rights Commission.

Both Flynn and Esperian say state agencies are willing to work with employers not only during the complaint process, but also before. Both women suggest employers treat the commission and the Department of Labor as a resource, since both can offer training and information on current law.

Esperian also says it's a good idea for employers to take the time to sit down with a labor attorney at least once a year to review the company's policies, books and filings. She also says if an employer isn't sure of a law to call an expert. "If (employers) are not sure, don't guess," Esperian says. "We will help. We want New Hampshire businesses to stay on the right side of the law. It's a difficult practice area and business owners don't have a lot of time to keep up with every change or to go through the process of an investigation. We want them to keep doing what they do best. So we are here to help."

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Failing to Pay All Wages Due

Employers must pay all wages, fringe benefits and pay for breaks that are less than 20 minutes. In 2009, the department collected \$5.3 million in owed wages for employees, up from \$1.7 million the year before.

Weiss Ford of Jackson Lewis says she has seen the most growth in complaints in this area. "Many employers are unaware there is a problem," Weiss Ford says. "It often surprises them when they get the outcome of an audit."

She says many NH employers, particularly those located elsewhere, don't know that they must provide a final pay check to an employee within eight days of his or her last day of work.

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Failing to Give Written Notice of Pay and Benefits

Among the top three most frequent labor complaints is an employer failing to provide in writing an employee's wage rate, pay period, pay and a general description of fringe benefits when they are hired.

In addition, employers must outline any deductions. Having it in writing ensures that both employer and employee understand what compensation will be.

Reidy suggests keeping notices in each employee's personnel file with proof that the employee received a copy.

Weiss Ford adds many employers should also be aware that they must notify employees in writing of any promotion, demotion and changes in pay.

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Failing to Pay Minimum Wage

Next on the list are employers failing to pay minimum wage, which as of Sept. 1, 2008 is \$7.25.

Minimum wage violations made up 41.2 percent of total 2009 violations and brought in \$90,489 in civil penalties, according to department statistics.

As of July, there is also a new change to minimum wage law. Under Senate Bill 416, employees who "customarily and regularly" get more than \$30 a month in tips from customers have to receive a base wage of at least 45 percent of the minimum wage.

If the employee can show he or she did not make at least that minimum in a month, the employer has to make up the difference, according to the law.

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Illegal Deductions

Payroll deductions are numerous and common these days, but they also come in fifth on the list of common labor law violations. It's therefore worth learning the rules when it comes to this convenient accounting tool.

According to the labor department, the only deduction an employer can make from a paycheck without permission is taxes. Employees must provide written authorization for insurance premiums deductions or contributions to a charity.

Under a law that went into effect in August, employers can, with written permission, withhold money for required clothing not covered by the definition of a uniform as well as legal and identity theft plans.

However, any garment the company requires with a logo or that has a distinctive design must be provided at no cost to the employee. If those clothes are not returned, the employer cannot make a deduction from the final wages of the employee, according to the DOL's Web site.

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Failing to Pay the Minimum Two Hours

The sixth most common labor violation in NH is employers failing to pay the required minimum time when an employee shows up for work. An employee who reports to work at the employer's request must be paid for a minimum of two hours, at their regular rate unless the employer contacts the employee prior their arrival.

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Illegally Employing Minors

Child labor conditions get a lot of attention in third-world countries, but many people are surprised to learn that labor laws applying to workers under the age of 18 are among the most common violations in NH. In 2009, NH businesses paid more than \$248,435 in civil penalties related to youth employment violations.

Minors can't work in any hazardous occupation, except in an apprenticeship, vocational rehabilitation, or training program approved by the NH labor commissioner. No one under age 16 can work without a certificate except if they are working for their parents, grandparents, or guardian; doing work defined as casual (employment of no more than three calendar days for any one employer); or as farm labor.

Also, those under 18 have specific time allotments. No one under age 16 can work earlier than 7 a.m. or later than 9 p.m., more than three hours per day on school days, and more than 23 hours during school weeks. (On nonschool days, those workers can work eight-hour days and, during vacations, work 48 hours per week.) Children under 12 cannot work except for parents, grandparents, or guardian; and only at work defined as casual; or delivering newspapers door-to-door.

Youth who are 16 or 17 years old and enrolled in school cannot work more than six consecutive days or more than 30 hours during a school week, and cannot work more six consecutive days or 48 hours per week during vacations, including summer.

Even 16- or 17-year-olds who have already earned a high school diploma cannot work unless the employer obtains and maintains on file a signed written document from the parent or legal guardian permitting their employment.

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Employing Illegal Aliens

While a hot button issue in recent elections, hiring illegal immigrants can land employers in hot water as it violates both state and federal laws. Getting an I-9 form from an employee, which documents that new employees, both U.S. citizens and noncitizens, are authorized to work in the United States, is a federal requirement. Completed I-9 forms must be retained for three years after the date of hire or one year after the date employment ends, whichever is later. I-9s may be signed and stored electronically. The bottom line, says Reidy, is obtain proper paperwork.

Reidy says Immigration and Customs Enforcement cases are not common in NH. "I think that is because of higher unemployment, more U.S. workers seeking work on all levels thereby eliminating or reducing demand for jobs once filled by illegal aliens, greater I-9 enforcement, and somewhat tighter border controls," he says.

But it's not just proper documentation that can land employers in trouble when it comes to immigration issues. Employers also need to be careful they don't discriminate against immigrants who are here legally. Joni N. Esperian, executive director of the NH Commission for Human Rights, which handles NH discrimination claims, says she is seeing increasing tension towards immigrants in the workplace. "I think they are having an enormously difficult time," she says. "Particularly because of the language barriers."

Esperian says immigrants here legally are being turned away from jobs because they need help filling out job applications, and even when they get jobs, they are often given the "heaviest work, the dirtier work."

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Misclassifying Employees

Though misclassifying employees was infrequent in 2009, it is moving up the charts says Debra Weiss Ford, managing partner at Jackson Lewis, a Portsmouth law firm specializing in employment. "Be careful classifying independent contractors. This is a large issue in New Hampshire and other jurisdictions," she warns. "The Department of Labor is really cracking down on this."

Under a law that took effect in January, there is a 12-part test to determine whether a person is an independent contractor, and all 12 criteria must be met, Weiss Ford says. The criteria includes the person having control and discretion over the means and manner for performing the work; the person (and not the employer) having control over the time when the work is performed unless they reach an agreement otherwise; the person designating that they are their own business; the person receiving compensation for work or services performed, not a predetermined salary or hourly wage; and the person not being required to work exclusively for one employer.

Adding fuel to the fire surrounding this issue is another law relative to independent contractors that went into effect in June. This law changes how the relationship between an employer and the contractor is proven.

"Current law says if the employer intended to use a written agreement between the employer and the employee to misrepresent the relationship, the (department) may assess a penalty of up to \$2,500 and \$100 per employee," says James P. Reidy, labor attorney with Sheehan, Phinney, Bass + Green in Manchester. "This bill changes the evidence required to simply the employer misrepresented the relationship."

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No Written Safety Plan

Under state law, employers with 10 or more employees must prepare a written safety program that includes specific rules and regulations regarding worker safety. Among other things it must outline a process for warnings, suspensions and terminations for safety rule violations.

Employers with five or more employees must establish a joint loss management committee made up of an equal number of management and labor representatives.

The committee must meet regularly to develop and implement work safety programs that help injured employees return to work and create safety education programs for employers and employees.

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