

UNEMPLOYMENT LIENS - SUMMARY
AND SUPPORTING MATERIALS

Unemployment Liens - Summary

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RSA 282-A:14, III(b) makes the employer liable in some scenarios for restitution of unemployment compensation benefits which are found to be overpaid as a result of the payment of back pay. The Oudens decision (in materials) permits the employer to withhold the amount for which it is liable from the wage portion of the settlement. Claimant liability determinations are generally issued under RSA 282-A:165, but it is rare that an informed employer does not use its right to withhold. This is because NHES will pursue repayment from the employer if it cannot collect from the claimant and the employer will end up paying the same money twice.

The commissioner determines reasonable allocations to wage and non-wage damages. The allocations in settlements are not controlling on the department. Parties sometimes endeavor to allocate almost nothing to wages in an effort to use the unemployment benefits to subsidize settlements. RSA 282-A:14,III(b) uses the term, "reasonably deemed." RSA 282-A:14,III(a) says, "as the commissioner may find can be reasonably said to apply."

Parties are generally not put to their proof in allocations of up to 50% of the net, after subtracting attorney's fees and costs, to non-wage damages. Beyond that, the elements of a case that occasionally justify a greater allocation of the net after attorneys' fees and costs to non-wage damages normally include:

- 1) Actual physical/ mental/ emotional damages; or
- 2) Other causes of action, such as defamation or privacy, which based on the facts of the case are stronger than the wrongful discharge case.

A narrative explaining allocations, along with any supporting documents such as claims before the HRC, are welcome.

Back pay is generally allocated pursuant to Emp 502.07(b), though the actual calculation can be more difficult for those with irregular earnings.

Emp 502.07 Application of Wages.

(b) Wages as defined at RSA 282-A:14, III(a) shall, when paid in a lump sum to an individual or payable in a lump sum but for the individual's election otherwise, be prorated following the individual's last date of employment with the employer, based on the individual's usual weekly pay, not including overtime.

Liability of the employer under RSA 282-A:14,III(b) does not preclude the joint and several liability of the claimant under RSA 282-A:165, but the best practice for an employer that does not want the possibility of paying the same money twice is for the employer to make payment to NHES out of the wage portion of the settlement.

Confidentiality agreements cannot be used to preclude NHES from having the information it needs to make a correct decision. E.E.O.C. v. ASTRA USA, INC., 94 F.3d 738 (1st Cir. 1996)

Employers often 1099 NHES for the amount sent to pay the overpayment.

NHES is more than willing to provide information estimating the amount of anticipated overpayments during settlement negotiations. Whether during negotiations or after settlement/trial, please allow time for NHES to perform calculations. Though not guaranteed, 3-5 business days are generally sufficient for an initial response.

Use of the back pay punch list will generally result in a faster response (attached).