

## Explanatory Paragraphs

***Question 1: Which NH Agency has jurisdiction over wage and hour, youth employment, and worker's compensation?***

**Answer: Department of Labor**

### Explanation:

#### In General

- Pursuant to RSA Chapter 275 the N.H. Department of Labor (“DOL”) has jurisdiction to enforce state wage and hour laws and youth employment laws.
- Pursuant to RSA Chapter 275-E, DOL also has jurisdiction to enforce the Whistleblower Protection Law.
- By virtue of RSA Chapter 281-A, the Department of Labor has jurisdiction over worker’s compensation cases.

#### Wage and Hour

- The DOL may initiate investigations or enforcement proceedings in wage and hour cases. Additionally, the employee may file statutory wage claims at the DOL. The Superior Court has jurisdiction over wage claim appeals from the DOL. Wage claim appeals are decided based on the record developed by the parties at the DOL. The scope of a wage claim appeal is limited to questions of law.
- The Superior Court also has jurisdiction to register a Department of Labor wage claim decision as a judgment and to issue writs and orders in aid of enforcing such a judgment.
- Additionally, a wage claim may be filed as an original action in court, either as a statutory claim (which would trigger statutory remedies including liquidated damages and attorneys’ fees) or as a breach of contract action.
- A wage claim based on violation of the Federal Fair Labor Standards Act may be filed with the U.S. Department of Labor or in state or federal court.

#### Whistleblower Protection Act

- The DOL may initiate investigations and enforcement actions under the Whistleblower Protection Act.
- An employee may file a Whistleblower Protection Act claim with the DOL. Appeals from the DOL are made directly to the New Hampshire Supreme Court.
- An employee may also file a Whistleblower Protection Act claim in court.

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### Workers Compensation

- Workers compensation claims may be brought before the Department of Labor. Appeals are to the Compensation Appeals Board.

### The Other Agencies

- The other agencies listed in the question have jurisdiction over the following matters:
  - N.H. Department of Employment Security: Unemployment Compensation (RSA 282-A)
  - N.H. Public Employee Labor Relations Board: State government collective bargaining law (RSA 273-A)
  - N.H. Human Rights Commission: N.H. Anti-Discrimination Laws (RSA 354-A)

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***Question 2: An individual is presumed to be an employee unless the employer can show that all 7 NH DOL criteria are met and include which of the following:***

**Answer: All of the above;**

- (a) The person is not required to work exclusively for the employer; (b) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations; and (c) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.)

### **Explanation:**

NH law (RSA 279:1, X) explains an individual is presumed to be an employee unless they are exempted by statute or meet all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

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**Question 3: If an individual was misclassified as an independent contractor, he civil penalty for lack of worker's compensation coverage for that individual is:**

**Answer: \$100 per employee per day of non-compliance**

### Explanation:

#### **281-A:7 Liability of Employer Failing to Comply. –**

I. (a)(1) An employer subject to this chapter who fails to comply with the provisions of RSA 281-A:5 by not securing payment of compensation may be assessed a civil penalty of up to \$2,500; in addition, such an employer may be assessed a civil penalty of up to \$100 per employee for each day of noncompliance.

IV. Any person on whom a penalty is imposed under this section may appeal as provided in RSA 273:11-c and 273:11-d.

#### **273:11-c Appeal. –**

I. A person on whom the commissioner has imposed a penalty pursuant to RSA 273:11-a may appeal by filing a notice of appeal with the penalty appeal board within 15 business days after the commissioner's order. If no such notice is filed within this time limit, the commissioner's order shall become final and no appeal may be taken.

II. The penalty appeal board shall hear appeals de novo and shall not be bound by prior findings or determinations of the commissioner. An appeal shall be filed and presented and the hearing conducted in accordance with rules adopted by the board pursuant to RSA 541-A. Such rules need not conform to common law or statutory rules of evidence or other technical rules of procedure. The place and time of a hearing shall be determined by the board. In no case shall a hearing proceed unless the chairman or alternate chairman is present.

III. A full and complete record shall be kept of all proceedings in connection with an appeal, and all testimony at any hearing shall be recorded verbatim.

IV. Within a reasonable time after the board has heard an appeal, the chairman shall prepare a written decision which shall be sent by certified mail to the last known address of the appealing party. The decision shall set forth all the material findings necessary to support the conclusions and shall either affirm, reverse or modify the order of the commissioner.

#### **273:11-d Judicial Review. –**

I. A person who has appealed to the penalty appeal board and who is aggrieved by a final decision of the board may appeal that decision to the supreme court, but only if the notice of that appeal is filed with the court within 15 business days after the date of mailing of the decision and the notice of appeal is contemporaneously served on the commissioner and the board. The notice of

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appeal shall specifically identify each error for which review is sought. The filing of a notice of appeal shall not stay enforcement of the board's decision.

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**Question 4: In the context of a wage claim, the term “Liquidated Damages” refers to:**

**Answer: Additional Damages**

**Explanation:**

Pursuant to RSA 275:44, a terminated employee is entitled to be paid all wages due the employee within 72 hours of leaving employment. An employee who quits or resigns is entitled to be paid all wages due no later than the next regular pay day.

An employer who “willfully and without good cause” fails to fully pay a separate employee within these deadlines is liable not only for past due wages, but also for liquidated damages equal to 100% of the past due wages. (Technically, if the past due wages were paid less than 10 days late, then the liquidated damages would equal 10% of the past due wages times the number of late days, excepting Sundays and legal holidays.)

In some cases involving commissions and bonuses there are questions regarding the date on which an employee becomes entitled to wages. Commissions, for example, are usually earned when a sale is made. However, the employment contract may instead expressly provide that commissions will be earned only upon the employer’s receipt of the purchase price. So there are some cases in which an employee first becomes entitled to “wages” (i.e. commissions, bonuses, etc.) months after leaving employment.

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### **Question 5: An exempt employee must be paid:**

#### **Answer: On a salary basis**

#### **Explanation:**

The Fair Labor Standards Act of 1938, 29 U.S.C. § 203, et seq., divided the universe of employees into two categories: (1) non-exempt employees, who were subject to the minimum wage and overtime requirements of the FLSA, and (2) exempt employees, who were exempt from those requirements. Exempt employees generally fall into the following categories: (1) executive, (2) administrative, (3) professional, or (4) “outside salesperson.” Each category of exempt employee has its own test, with its own unique factors. Almost all of the tests, however, require that exempt employees are paid a salary of at least \$455/week.<sup>1</sup> Generally, exempt employees exercise discretion and independent judgment in their work and are employed in so-called “white collar” position, such as, teachers, doctors, architects, lawyers, etc. Non-exempt employees would include “blue collar” employees who perform repetitive operations with their hands, physical skill, and/or energy. Generally, non-exempt employees develop their skills through apprenticeships or on-the-job training.

In order to qualify for almost all the so-called “white collar” exemptions, the employees must be paid on a salary basis, whereas non-exempt employees may be paid on an hourly or salary basis. As explained above, in order to qualify for an exemption, such employees’ salaries must be at least \$455/week. Additionally, an exempt employee, generally, must be paid his or her entire salary if he or she performs any work during the pay period.<sup>2</sup> Failure to adhere to these salary requirements, such as docking pay for absences, could make the employer subject to the wage and hour requirements applicable to non-exempt employees. Non-exempt employees must be paid minimum wage, which in New Hampshire means the federal minimum wage of \$7.25/hour, and are entitled to overtime pay for work performed in excess of 40hours/week.<sup>3</sup> The basis for overtime pay is not the hourly wage but instead, the regular rate of pay. The regular rate of pay includes the hourly wage (or salary), non-discretionary bonuses such as those promised for attendance or performance, shift differentials, meal expenses, on-call pay, sick leave, and other payments required pursuant to a collective bargaining agreement.

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<sup>1</sup> The Obama Administration amended this requirement to increase the minimum salary amount to \$913/week, among other changes. 29 C.F.R. § 541.600. These amendments are subject to a nationwide injunction and have not yet taken effect.

<sup>2</sup> RSA 275:43-b details many of the exceptions that would allow employers to deduct pay from exempt employees’ salaries.

<sup>3</sup> There are some exceptions to the 40hour/week requirement in industries such as healthcare and law enforcement.

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Sources to look to for information on wage and hour requirements for exempt and non-exempt employees include, but are not limited to, 29 U.S.C. § 203, et seq., 29 C.F.R. § 541.600, et seq., RSA 279:21, RSA 275:43-b, and Lab 803.02.



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**Question 6: If a non-exempt employee works 30 hours in a work week and takes 16 hours of vacation time in the same workweek, how many hours of overtime are owed?**

**Answer: None**

### Explanation:

State and federal wage and hour law requires employers to provide non-exempt employees with overtime pay of at least one and a half times their regular rate for all time worked in excess of 40 hours per workweek. 29 U.S.C. § 207(a)(1); RSA 279:21, VIII; *see also* Lab 803.03(g). However, “time worked” is not synonymous with “time paid.” Therefore, absent a policy or contract to the contrary, employers are entitled to exclude hours for which employees are paid but during which they perform no work, such as paid vacation time or sick time, from the total “hours worked” for a particular work week for the purposes of calculating overtime. 29 C.F.R. § 778.218; *see also* Lab 803.04. Accordingly, in the example, although the employee received pay for 46 hours in the workweek, the 16 hours of paid vacation time during which no work was actually performed is not included in the employee’s total “hours worked” for the workweek and, thus, no overtime is due.

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**Question 7: After how many consecutive hours must an employee be given a 30-minute break?**

**Answer: 5 hours**

### Explanation:

**NH law (RSA 275:30-a)** requires employers to provide a 30 minute break after 5 hours of work. The employer can require that the employee take the lunch break at their workstation whether they choose to eat or not. The lunch break can be waived by the employee if both parties sign a waiver. If it is feasible for the employee to eat during the performance of work, the employer is exempt from the requirement to provide a lunch or eating hour.

There is a federal statute governing lunch breaks as well. If required to stay at the workstation the employee has to be given the time to use as they wish and the employer shall not require the employee to do any tasks. 29 CFR § 785.19.

The employer need not pay wages during the lunch break, but they can if they choose to do so. If the employer does choose to pay wages during a lunch break, they still cannot require the employee to do work during the lunch break.

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***Question 8: What is the minimum number of hours an employee must be paid when reporting to work?***

**Answer: 2 hours**

### **Explanation:**

The payment of wages statute, RSA 257:43-a, provides that when an employee reports to work at his or her employer's request, that employee shall be paid for no less than 2 hours at his or her regular rate. RSA 257:43-a. An employer who makes a good faith effort to notify an employee not to report to work is not liable to pay wages under this statute. RSA 257:43-a. If, however, the employee reports to work after the employer's attempt to notify him/her was unsuccessful or if the employer is prevented from making the notification for any reason, the employee that reports to work shall perform the duties that are assigned by the employer at the time the employee reports to work.

### **Exemptions:**

- County or municipality employees and ski and snowboard instructors at ski resorts are exempt from this requirement so long as they receive compensation that is—at a minimum—equal to that employee's rate of pay. RSA 275:43-a.
- **RSA 275:43-a** does not apply to employees who report to work and then request to leave on the basis of illness, personal or family emergency provided that a written explanation, initialed by the employee is entered on the employee's time slip or card. Lab 803.03(h).
- **RSA 275:43-a** does not apply to employees who are hired for positions with duties that consistently require that they will work less than 2 hours per work day and report to work with the understanding that they will work less than 2 hours per work day, provided that the employees are notified in writing, upon hire. Lab 803.03(i).
- **RSA 275:43-a** does not apply to health care employees of community-based outreach services providers who voluntarily make schedule changes to meet the needs of the physically or mentally infirm clients they serve and who sign a statement upon hire stating that they understand this job requirement. Lab 803.03(j).

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***Question 9: Given the required signed written authorization from an employee, an employer may withhold the following expenses from an employee's wages:***

**Answer: All of the above**

- (a) Housing & utilities; (b) Voluntary cleaning of uniforms and non-required clothing; and (c) Legal plans and identity theft plans without financial advantage to the employer.

**Explanation:**

RSA 275:48 addresses withholding of wages. While certain taxes may be withheld from an employee's wages, most deductions must be authorized by the employee via a signed written release. Some common deductions that are made pursuant to a signed authorization are:

1. Health insurance,
2. Union dues,
3. Payments into savings funds held by someone other than the employer,
4. Child care fees,
5. Certain parking fees, and
6. Voluntary payments for the employee's use of a health facility (gym) that is sponsored by the employer for its employees' benefit and that is located within its facility or workplace.

In certain cases, if an employer who makes a deduction from an employee's wages does not actually make the payment relative to the deduction on the employee's behalf, and the employee loses a benefit or fails to meet an obligation caused by such failure, the employer will be liable for such lost benefit or failed obligation. See RSA 275:48, II.

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**Question 10: employer policy or practice determines whether which of the following are considered wages?**

**Answer: All of the above**

- (a) Vacation time; (b) Holiday pay; and (c) Severance pay

Although not required by law, most New Hampshire employers provide their employees with various types of paid leave, including vacation, sick time, and/or personal time. Such leave is considered a “fringe” employment benefit. Under New Hampshire law, employers may, but are not required to, treat such benefits as a form of compensation that is earned by (and thus owed to) an employee, even where the employee is terminated or resigns before utilizing the paid leave as time away from work. *See* RSA 275:43, V (“Vacation 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, or both, shall be considered wages pursuant to RSA 275:42, III, when due.”). In other words, it is permissible under New Hampshire law for employers to establish a clear policy or practice of treating sick days and/or other fringe benefits as merely a benefit to be utilized during the course of employment, and, where an employer has done so, the New Hampshire Department of Labor will not treat such unused, but accrued benefits as “wages” to which an employee is entitled upon separation from employment.

Under New Hampshire law, all employers must provide their employees with *written* notice of their policies and practices related to fringe benefits. RSA 275:49, III; Lab. 803.03(b). In addition to identifying what specific types paid leave benefits are being provided, how much leave is provided to the employee at what frequency, and the terms on which such leave can be used, those policies or practices should also clearly address how the employer treats the paid leave benefit upon termination – i.e., whether unused, accrued leave will be paid out to the employee as wages upon termination or whether such leave will be forfeited on termination. Additionally, at the time of hire and prior to any subsequent changes, New Hampshire employers are required to provide employees with notice in writing as to the employee’s rate of pay or salary, whether by daily, weekly, biweekly, semi-monthly, or yearly, or by commissions, as well as the day and place of payment and the specific methods used to determine wages due pursuant to RSA 275: 49. Lab 803.03(a). Failure to provide employees with written notice of the employers policies and practices with regard to fringe benefits and pay may subject employers to a civil penalty under RSA 273:11-a.

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***Question 11: When an employee is fired, all wages are due:***

**Answer: Within 72 hours of termination**

**Explanation:**

The 72-hour deadline is set forth in RSA 275:44, I. If an employee quits or resigns, the employer must pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least 1 pay period's notice of intention to quite the employer shall pay all wages earned by the employee within 72 hours. See RSA 275:44, II.

In general, a salaried employee must receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked. See RSA 275:43-b.

Employers must generally pay employees on a weekly or biweekly basis. See RSA 275:43, I. If employers want to pay employees less frequently than that, they must provide various types of information to the Department of Labor for its consideration. See Lab 803.01(b). It will then be up to the Department or commissioner to grant or deny the employer permission to pay employees less frequently than required by RSA 275:43, I, consistent with Lab 803.01(c) and 803.01(d).

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**Question 12: An employer can require that an employee:**

**Answer: None of the above**

- (a) Refrain from disclosing the amount of his or her wages; (b) Sign a waiver or other documents that purports to deny the employee the right to disclose the amount of his or her wages, salary or paid benefits; and (c) Be fired or disciplined if he or she disclosed her wages, salary or paid benefits

**Explanation:**

NH law (RSA 275:38-a) is very clear that no employer can in anyway discriminate against an employee because he or she “inquired about, discussed, or disclosed his or her wages.” This applies to information about your own wages/benefits or the wages/benefits about another person. However, section II of the statute is clear that the law does not apply to an employee who has access to *confidential* wage information of another employee as part of his or her job. For example, an employee that works in payroll or human resources can be disciplined for sharing confidential wage information about a third person. But not all wage information is confidential; for example, wage information for state employees is public information.

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***Question 13: If an employer discovers that it is paying employees of one sex at a rate less than that paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions in violation of NH's Equal Pay law, it can do all of the following except:***

**Answer: Decrease the wages of the employee who is paid more**

### **Explanation:**

RSA 275:37 prohibits pay discrimination on the basis of sex. It provides that no employer “shall discriminate between employees on the basis of sex by paying employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions.” It carves out a handful of exceptions, however. Those exceptions include where the pay disparity is caused by “(a) a seniority system; (b) a merit or performance-based system; (c) a system which measures earnings by quantity or quality of production; (d) expertise; (e) shift differentials; (f) a demonstrable factor other than sex, such as education, training, or experience.” The statute further provides that where payment discrimination is detected, an employer cannot correct the discrepancy by reducing the wage rate of any other employee. Thus, an employer who detects or faces charges of payment discrimination must either increase the pay of the discriminated employee(s) to match those of similar situated employees of the opposite sex or justify the discrepancy through one of the enumerated exceptions.



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***Question 14: An employee who has not previously been employed by the employer must be presented with a non-compete agreement:***

**Answer: Prior to the employee's acceptance of employment**

### **Explanation:**

NH RSA 275:70 provides that an employer that requires a new employee to sign a noncompete agreement as a condition of employment must provide a copy of the agreement to the potential employee **prior** to the employee's acceptance of the offer of employment. Employers should be mindful that if the only consideration for the agreement is employment and the terms and conditions of the employee's employment are reduced, a court could find a lack of consideration for the agreement. If the noncompete agreement has not been disclosed prior to acceptance of employment, the agreement will not be enforceable against the employee. However, all other provisions in the agreement will remain in full force and effect. In practice, employers are focusing protections on confidential and proprietary information and less on restricting employment.

On October 1, 2018, a new non-compete law came into effect in Massachusetts (MGL c. 149, § 24L). Under the new law, non-compete agreements must be in writing; must not extend beyond one year; must be given to the new employee with the formal offer or within 10 business days before the start date, whichever is earlier; must be signed by both the employer and employee; must expressly affirm the employee's right to consult with counsel prior to signing; and must expressly state the "Garden leave clause" (payment of 50% of salary during the restricted period) or other mutually agreed upon consideration that is specified in the agreement. The new law is vague as to the amount of money that meets "other mutually agreed upon consideration." A non-compete agreement may not be enforced against the following types of employees and independent contractors: Non-exempt employees under FLSA; Undergraduate or graduate students who are engaged in short-term employment; Employees who have been terminated without cause or laid off (this would include an exempt employee with an otherwise enforceable non-compete agreement); or Employees who are 18 years old or younger. Certain circumstances are exempt from the requirements of the new law and will be analyzed under MA common law: Non-compete agreements made in connection with the sale of a business; Non-compete agreements made in connection with the cessation or separation of employment (employee has to be given at least 7 days to rescind acceptance); Non-solicitation covenants; Customer/client/vendor non-solicitation covenants; and Non-disclosure of confidential information agreements.

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