

Remedial Legislation: Wage Claims

I. EMPLOYMENT AT WILL

Welcome to “employment at will.” It means what it says. People who call me are constantly amazed: “Well you have no rights, you have the right to be paid and to see your personnel file. You have the right to not be treated illegally.” “But I was fired and no one told me why!” Yes: employment at will. As stated in other articles on this page: there are many ways around it. But to explain your rights, it helps to explain when you do have rights. If the State wants to take your driveway: you have rights. You have the right to notice and opportunity to be heard: that is due process. You have the right to be paid a fair price for your driveway. If you get arrested: you have rights. You have the right to a speedy trial, the right to confront your accusers, etc. These are constitutionally safeguarded rights. In employment, other than in the context of State benefits such as the Department of Security (DES): there are no constitutional rights. It is that simple.

Our Legislature has enacted RSA 275. This law is entitled Protective Legislation. The New Hampshire Department of Labor (DOL) administers the law. Title XXIII contains provisions for other employee protection: you have the right to be paid minimum wage, safety and health, worker’s comp and DES benefits. Specifically under RSA 275 you have the right to smoke as long as you comply with the employer’s smoking policies. We are a strange state indeed. That being stated you do have other rights under the Protective Legislation of RSA 275. You have the right to equal pay, but be careful here as if you file with DOL before you file with the New Hampshire Commission for Human Rights, you can preclude yourself from what can be better damages. You have other rights under RSA 275: the right to see your file, the right to be protected if you qualify as a whistle blower and you have the right to be paid wages.

This article will focus on: the right to be paid. Our Supreme Court has tangled with the laws and with minor exceptions has refused to narrow the “broad remedial purpose” of the legislation. Today we concentrate on Wage Claims.

II. WAGE CLAIMS:

I think I have filed or appeared at over 50 of these. I love them. Its “down and dirty” you will either win or you will lose. This is what I call the Wild West of practicing law. There is no provision for discovery: which can wear out your funds. There is a right to double your damages too under the liquidated damage provision of this law. You are entitled to recover up to 10% per day the wages are not paid up to double the amount. You must allege and prove that your employer’s failure to pay was “willful and without good cause” to win the liquidated damages.

A. How Where and When to File

The term “wages” is defined in at least 2 provisions of RSA 275. Wages include salary and hourly, commissions, severance, sometimes vacation and sometimes sick leave.

Basically, if you were promised pay and you work but do not receive all or a part thereof, you may have a wage claim. If you were told you make a certain amount but are paid less: you have a wage claim. If you are a salaried employee and are terminated for other than true misconduct (my interpretation as this is a “new” part of the law) you have the right to be paid for the whole salary period. If you were paid less than minimum wage you can also file for the shortfall. These are examples, as there are too many variations to list them all here.

You can bring your claim in Superior Court or at DOL itself. The choice of forum depends on the type of claim. If you will need information and the claim is large, Superior Court has its appeal. In addition under DOL rules you must file within 18 months of each failure to pay while the Superior Court gives you three years. Note well too if you are in DOL for a gender wage claim the period of time is one year. Be careful of the deadlines. If you were due wages say on April 10 and your claim gets filed one day after 18 months from that date you lose the claim for the April 10 wage. As of January 1, 2006, the date at DOL changes to three years. However the choice of which forum must be considered.

My choice of forum for its speed and simplicity is usually DOL. The very process is an attempt to get a quick hearing and a quick result. If the employer loses, they frequently file an appeal in Superior Court. This appeal must be filed within 20 days of the date of the decision. These are extremely difficult cases to win on appeal, as the standard is question of law. The Hearings Officer’s written decision is hard to find an error/question of law and the Superior Court won’t second guess the Hearings Officer on issues of fact.

Thus if it’s a standard simple case, and the decision is to stay with DOL you can go to <http://www.labor.state.nh.us/> and download the form. You can even file electronically.

Once the form is filed the employer is notified and allowed to pay, which they rarely if ever do. If they object, the DOL will notify you and then you can ask for a hearing. The hearing is scheduled usually within one to two months. Each side is allowed to “continue” the hearing one time. At this point if not sooner you should collect your evidence. Remember you need to “prove” you are owed wages. You cannot win a case without proof. Proof is discussed elsewhere herein. But proof generally comes in two forms: documents and witnesses who have direct knowledge. A few days before the hearing (5 if there will be medical evidence, which has not occurred in any of my claims) you should comply with Labor Hearing Rule: Lab 204.06 Conduct of Hearing. “(a) All parties to a dispute subject to this chapter shall disclose to all parties in advance of the hearing all medical evidence within 5 calendar days of the scheduled hearing. The parties submitting non-medical evidence shall make all parties aware of the nature of such evidence and submissions to be presented prior to the hearing.” I generally fax to both the DOL and the employer or their counsel if they have one, the documents I intend to submit and my witness list.

This rule is easy to comply with. What really trips you up is when the other side does not comply. Suddenly the employer comes in with boxes of documents and hordes off

witnesses. This is manifestly unfair. I would object, as I did not have the ability to review such with my client and to do so at the hearing is too time consuming and I ask for a continuance. If it's fairly minor in amount, I simply make a request that I be given 10 days to respond to anything. This is generally granted as the Hearings Officer wants a fair hearing but the rule is pretty loose.

Note well that in certain cases, such as unpaid overtime the Federal Fair Labor Standards Act may be applicable and will be the forum that you need to deal with.

B. Independent Contractors

If you are truly an independent contractor you cannot file a wage claim with the DOL. This however is an issue of fact. The tests are codified as follows:

"employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VII(b) or any person who meets 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 achieving the result of the work.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this criterion does not prohibit the employer from reaching agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person holds himself or herself out to be in business for himself or herself.

(e) The person is not required to work exclusively for the employer.'

Unless the employer can show that you meet *every* one of these tests: you are an employee. Thus if you meet every test but you are required to work exclusively for your employer: you are an employee. These are factual determinations to be made by the Hearings Officer and the Courts should not second-guess this on an appeal. It is not a question of law.

Similarly, the law provides that you must be "permitted, required, or directed" to work. I was informed that at one time the Department was so strict in its interpretation of this that Not For Profit boards of directors were considered "employees". I believe they have loosened up a bit on that however the words: "permitted, required, or directed" are still powerful. Claims that you worked as a friend do not "fly" particularly when you can show that you had regular hours, and were told what to do, when and how by the employer.

B. Illegal Deductions

These can be fairly subtle. Offsets against pay due to receipt of Worker's Compensation, or tuition reimbursement are two obvious examples. I had a case one time where the employer did not want to pay my client overtime, so he paid him his straight 40-hour week and made all overtime payable as straight pay and not time and a half to a member of the employee's household. This was a good example of an illegal deduction and we were able to make the claim that it was the employee who should have been paid all those sums, and at time and a half. It was an easy case on the liquidated damage standard of "willful and without good cause."

In any case the law is clear even if the situation is not.

RSA 275:48 provides: "Withholding of Wages. – I. No employer may withhold or divert any portion of an employee's wages unless:

- (a) The employer is required or empowered to do so by state or federal law, or
- (b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner,
- (c) The deductions are pursuant to any rules or regulations for medical, surgical, or hospital care or service, without financial benefit to the employer and openly, clearly, and in due course recorded in the employer's books."

Lab 803.03(c) further states: "Prohibitions.

(c) Pursuant to RSA 275:48, I, no employer shall withhold, make use of any portion of or require any employee to remit any portion of an employees wages except:

- (1) For payroll taxes, or as otherwise required by statute;
- (2) When the deduction is authorized in writing by the employee for:
 - a. Installment payments of legitimate loans made by the employer to the employee;
 - b. Union dues;
 - c. Health, welfare pension and apprenticeship fund contributions;
 - d. Strictly voluntary contributions to charities;
 - e. Housing and utilities;
 - f. Payments into savings funds held by someone other than the employer;
 - g. Voluntary rental fees for non-required clothing;
 - h. Voluntary cleaning of uniforms and non-required clothing
 - i. For the employee's use of a demonstrator vehicle covered by RSA 261:111, III;
- (3) For medical, surgical, hospital and other group insurance benefits having no financial advantage for the employer, when the employee has given his/her written authorization and deductions are duly recorded; and
- (4) For required clothing not covered by the definition of "uniforms" in Lab 802.14."

C. How Do I Prove My Case

This should be called: how do I prove my case and do I need a lawyer. As noted above you need evidence to prove your case. Recently I did this from the "absence" of evidence

to a certain extent. My client during the 1st month of his employment made regular deposits of wages to his bank. After that his employer refused to pay, and promised him something else in lieu of wages. The “something else” never occurred and then was reneged. My client’s bank statements showed one month of regular wages deposited and then month upon month of next to nothing thereafter. It worked and was all we needed. Also on occasion I have requested an audit of an employer by DOL. The law mandates the employer to keep payroll records and their failure to do so weighs heavily against them, particularly when it comes to liquidated damages. Sometimes the audit will produce the evidence. If not, the lack of evidence of pay should be construed against the employer.

In other words, your simple claim that you were not paid or illegal deductions were made, will not win your case. You need proof. The burden of proof is on you and when it comes to that hearing day you must have legible copies of documents in triplicate for your hearing. Do not despair if you do not have much. There are ways around it.

Now do you need a lawyer? Classic lawyer response: it depends. Each wage claim case that comes my way is different. I have seen employees do a better job than a lawyer as they have taken the time to know the law and regulations and amass their evidence, produce it in a spectacular and convincing manner and they win. (see <http://www.gencourt.state.nh.us/rsa/html/indexes/275.html> and <http://www.gencourt.state.nh.us/rules/lab.html>) However suppose they did not include the request for liquidated damages? This happens frequently and on occasion when hired after the filing of a claim I try to “amend” which should be allowed. The Department frequently does not allow this for liquidated damages. Instead they allow you to file another wage claim. I consider this as unduly burdensome, but they do not care what I think. Hopefully you are within your 18 months to do so. In addition, due to recent Supreme Court decisions the granting of liquidated damages has become more complex. Certainly if you win and the employer files an appeal, you should get counsel. The good news here is you are eligible to attempt to collect your legal fees.

Again and always the Department does not care what I think. However it is my interpretation of case law that tells me that the DOL SHOULD be allowing your legal fees even at a DOL hearing. I get regularly shut down on this. However if the employer files an appeal then it is fair game to go for such.

In addition, if you do utilize counsel make sure they know wage claim law: the wildest west of law. Recently I had a case where the employer sold the business. Upon learning this I amended timely to name the original owner individually as the law allows me to do this.

Finally the law is changing by Court interpretation on a consistent basis and it is important to keep an eye on the case law. That being stated: DOL is a user-friendly method to recover your wages wrongfully withheld. It is protective legislation at its best.

And of course a disclaimer: this article is not intended as legal advice. It is intended to empower you with information and resources.

In a world where too many employees suffer harm, the wage claim law is a powerful method to achieve a just result.