

**ANNUAL EMPLOYMENT LAW  
UPDATE**

**QUIZ ANSWERS**

with

**Attorney Jim Reidy**

**December 16, 2010**



**SHEEHAN PHINNEY BASS & GREEN P.A.**

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**Annual Employment Law Update**

**Today we will:**

- **Review new laws and regulations;**
- **Talk about a few interesting court decisions; and**
- **Consider pending cases and bills.**

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**This is also when we give you an  
HR Skills Test.**

- **Where we test your knowledge of basic, intermediate and complex HR issues;**
- **Confirm compliance issues; and**
- **Offer practical guidance.**

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**In keeping with tradition, we do  
this in a *game show* format  
where you can *laugh* and *learn*.**

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**But first, our Annual  
Employment law update and  
review.**



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**2010 was a year of more  
challenges for employers.**



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- **The economy was sluggish;**
- **Unemployment remained high;**
- **Hiring was cautious; and**
- **There were more laws and regulations to consider.**



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**The Highlights from 2010 included:**

- **Health care reform law adopted in March.**
- **New regulations for ADA.**
- **Supreme Court decision on electronic monitoring issued.**
- **Enforcement efforts focused on misclassification of workers.**
- **NLRB flexing its muscle on social media monitoring.**

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**2010 was also a year that included:**

**The HIRE Act (*hurry, time is running out*)  
and  
COBRA subsidies (*still handling the last of those, right?*)**

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**In New Hampshire there were a few things:**

- A new mini WARN Act went into effect;
- NH DOL stepped up enforcement activities;
- There were new regulations on pay deductions; and
- NH DOL and NHES focused on independent contractors.

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**What else was new?**

- Increase in the number of discrimination cases filed.
- Retaliation cases near top/most common.
- Breastfeeding accommodations in workplace.
- New definition of spouse for FMLA purposes.
- IRS issued a new independent contractor test.
- Confusion over health care reform requirements.

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**What can we expect in 2011?**

- Clarity on health care reform?
- More discrimination cases?
- Stricter enforcement of wage and hour laws.
- Looming crisis on unemployment funds.
- More workplace bills introduced in Concord and Washington.

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**Workplace cases before the U.S. Supreme Court.**

- **Background checks and privacy interests**
- **FLSA anti-retaliation**
- ***Cat Paw* employer liability for bad acting supervisor**
- **Inconsistency between benefits plan and SPD**
- **Certification of massive class action.** 13

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**Yikes! And you thought your job was tough before...**



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**Relax. You are among friends. Everything is going to be OK.**



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**ANSWERS**

**HR's Minute to Win It  
(or lose it)**



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*"And even little Cindy Lou cried  
boo hoo..."*



**Compliance with New  
Hampshire's wage and hour  
laws.**

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**NH Wage and Hour Law Compliance**

1. Where is the NH Department of Labor located?
2. Who is the Wage and Hour Administrator?
3. What is the current NH minimum wage?

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1. Concord, N.H.

2. Cynthia A. (Cindy) Flynn

3. \$7.25 per hour

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### NH Wage and Hour Law Compliance

4. How often does the biennial safety summary update have to be filed with NH DOL?

4. Every 2 years after initial plan is filed

5. What is the minimum reporting time pay required in New Hampshire?

5. 2 hours unless exceptions apply or in writing job could take less than 2 hours.

6. True or false: Employers may deduct uniform cleaning fees from wages?

6. True - if voluntary

7. Clock rounding is permitted in NH if you round to \_\_\_\_\_.

7. The nearest quarter hour (7 minute rule)

8. Under NH's mini WARN Act covered employers must notify employees 60 days in advance of a plant shutdown or layoff of at least 1/3 of the workforce constituting at least \_\_\_\_\_ employees.

8. 25 employees

9. Give me 3 of the 12 criteria NH DOL uses in their independent contractor test. \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_.

9. - SS# or Fed. tax id #

- control and discretion over work

- control over time to perform job

- hires and pays assistants

- in business for self

- business risk/liabilities

- success or failure tied to receipts

- compensation negotiated

- covers most expenses

- contractually responsible for quality of work

- provides tools

- not exclusive to one organization

10. The number 1, most common NH wage and hour violation again this year (2010) was

\_\_\_\_\_.

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10. Failure to provide written notice of pay rate, pay day, pay period and general description of fringe benefits.

*I'll be home for Christmas* –  
Managing sick leave and absenteeism



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1. True or false: Employers are required to provide sick leave under NH law?
2. True or false: Sick leave for salaried employees, if provided, may be unpaid?
3. When is sick leave due as a paid benefit to a departing employee?

24

1. False

2. False (assuming employee performed some work in pay period and this is not FMLA leave).

3. When it is employer's policy or practice to do so.

4. *True or false:* Employers can require employees to bring in a doctor's note to confirm their need to be out of work?

5. *True or false:* If an employee is out of work due to illness, you can insist he/she see a physician designated by the employer?

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4. True

5. False

6. If you have a PTO or ET policy, can you still insist on a doctor's note for sick leave?

7. *True or false:* Employers can ask applicants about the number of sick days they used with their last employer?

26

6. True

7. False (can ask about # of days missed and if person can meet employer's attendance requirements).

8. *True or false:* New Hampshire law requires employers to permit employees to carry over unused sick days from year to year?

9. When can you call the employee's doctor to get information about the employee's absence?

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8. False

9. When the employee authorizes the call/contact.

And...

10. Name 2 federal laws that may be claimed if you fire an employee for absenteeism attributed to the employee's illness? \_\_\_\_\_ and \_\_\_\_\_

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10. The ADA and the FMLA.

*"Peekaboo, I see you!"*

Workplace privacy claims.



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1. True or false: Employers can ask employees about their religion if they are required to work on Saturday or Sunday?

2. If NH employers ask about an applicant's criminal history, that has to be limited to \_\_\_\_\_.

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1. False (only if employee needs time off to attend services - only then about time needed.)

2. Arrests or convictions not annulled by a court

3. *True or false:* Applicants must consent to reference checks, if you want to use them in the hiring decision.

4. *True or false:* Email may be searched, but text messages are private.

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3. False (but it is a good practice)

4. False (if they are on the employer's equipment or network)

5. Video cameras may be used in the workplace except in \_\_\_\_\_ or \_\_\_\_\_) (one answer is acceptable).

6. *True or false:* Private sector employers can, like the TSA, search your backpack, purse and person.

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5. Bathrooms or lockers

6. True (but you need a very good reason to search a person)

7. Employers can administer polygraph exams only in cases of suspected \_\_\_\_\_.

8. *True or false:* Drug tests can be required before an employee is offered the job.

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7. Theft from employer (but the test and results cannot be used in court).

8. True (because it is not a medical test)

9. If an employee is arrested over the weekend for domestic violence, can you ask him/her about it?

9. Yes (if there could be an impact on the workplace)

10. True or false: The NLRB will decide whether non-union employees cannot be disciplined for social medial postings about their workplace.

10. True



*No man or woman is an Island:*

**Properly Classifying Independent Contractors**

1. True or false: Independent contractors are required to register at the local police department?

1. False

2. Name one government agency with an independent contractor test.

2. IRS, USDOL, NH DOL, EEOC, NHES, NLRB

3. True or false: You must have a written contract with an independent contractor for the relationship to be valid?

3. False (but its not a bad idea).

4. The IRS has a new \_\_\_\_ point independent contractor test.

5. *True or false:* If you satisfy the IRS test, Employment Security will accept that classification for unemployment purposes?

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4. 11 point test (down from 20 pt test).

5. False

6. Independent contractors have to pay their own \_\_\_\_\_ taxes.

7. *True or false:* If a worker uses a business card and invoice with his/her company name on it, he/she is more likely an independent contractor?

8. *True or false:* If a contractor performs work in your office, he/she is more likely an employee.

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6. Social security, FUTA, SUTA and income taxes

7. True

8. True

9. Name 2 government agencies that are part of a task force in NH to find misclassified workers.

10. The potential penalties for misclassified employment include \_\_\_\_\_ (provide 2).

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9. NHES / NH DOL

10. Back wages, overtime, taxes, penalties and interest

*Reach out and touch  
someone?*

**Dealing with sex  
harassment claims.**



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1. *True or false:* Sex harassment claims are the #1 most common discrimination claim in the U.S.?

2. "Quid pro quo" translated means \_\_\_\_\_.

3. *True or false:* Employers can prohibit hugs, pats or touching of any kind at the workplace?

1. False (Race/Retaliation tied for top slot.)

2. "This for that"

3. True (but the policy is hard to enforce).

4. In 2009 the most common form of sexual harassment involved \_\_\_\_\_.

5. In 2009 the number of men reporting sexual harassment by women increased to:

- Choose one: 1. 1%  
2. 5%  
3. 15%  
4. 30% of all claims filed.

4. email/texting

5. #3 15%

6. Employers need \_\_\_\_\_ employees to be covered by NH's anti-discrimination laws.

6. At least 6 employees

7. True or false: As a matter of law, employers are required to conduct annual training on sexual harassment?

7. False (NH) True (Mass)

8. True or false: Same sex harassment claims are recognized under federal law?

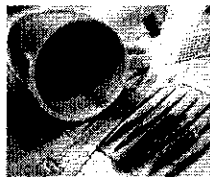
8. True (not sexual orientation)

9. Under state law, claims for sexual harassment should be filed within \_\_\_\_\_ days of the last event of claimed discrimination.

9. 180 days of last event of discrimination

10. The most common legal claim to accompany a sex harassment claim is \_\_\_\_\_.

10. Retaliation



*Papers Please.*

**I-9 compliance and related issues.**

1. True or false: You only need I-9's if you hire foreign workers?

2. Employers with \_\_\_\_ employees should have employees complete an I-9 form.

3. True or false: Only full-time employees need to complete I-9 forms?

1. False

2. One

3. False

4. Employees hired since 19\_\_ need to have an I-9 form of file.

5. True or false: I-9 forms, as a matter of law, employers are required to keep copies of supporting documents.

6. Name 2 documents on the I-9 support document lists: \_\_\_\_\_ and \_\_\_\_\_.

4. 1986

5. False (but if you keep them you need to be consistent)

6. Drivers License, passport, SS Card

7. Where should employers keep I-9 forms?

8. How long should employers keep I-9 forms?

9. When an employee leaves employment and then returns to the same employer within a year, do you need a new I-9?

7. Separate and secure location

8. 3 years after hire or 1 year after termination whichever is longer

9. No.

10. True or false: If you don't have I-9's in place now, you need to complete them for all employees?

49

10. False (only employees hired after 1986).

*Defining essential functions shouldn't be a hardship.*

**Understanding the Americans with Disabilities Act.**



50

1. What does the ADA stand for?
2. The number of employees for an employer to be covered by the ADA is \_\_\_\_\_.
3. The federal agency that enforces the workplace section of the ADA is \_\_\_\_\_.
4. The term used for adjustments to work hours, duties and conditions to help a disabled employee perform his/her job is \_\_\_\_\_.

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1. The Americans with Disabilities Act

2. <sup>at least</sup> 15 employees (for 20 or more weeks in current or preceding calendar year).

3. EEOC

4. Reasonable accommodation

5. The term used when the cost and impact upon the organization to make an accommodation required is too much \_\_\_\_\_.

6. *True or false:* With the 2009 amendments to the ADA, medication, medical supplies and other mitigating measures can no longer be considered in determining if an employee is disabled?

7. The amendments to the ADA broadened OR narrowed to the definition of disability?

52

5. Undue hardship

6. True

7. Broadened

8. Name at least 2 major life activities under the ADA's definition of disability.

9. Can a person with an illness which is dormant and in remission still be considered disabled?

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8. Walking, eating, sleeping, working, talking, etc...

9. Yes

10. If an employee is now out of work due to a broken bone that is expected to heal OR a serious, but non-chronic gastrointestinal disorder, does an employer have to accommodate the absences under the ADA?

54

10. No

*We are family...*

**Taking the Dysfunction out  
of the FMLA**



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1. True or false: The FMLA originally stood for "Forgive My Last Absence"?

1. False

2. The number of employees an organization needs to be covered by the FMLA?

At least  
2. 50 employees (in 20 or more weeks in current or preceding year).

3. To be eligible for FMLA leave benefits, the number of hours an employee would need to work in the last year is \_\_\_\_\_.

3. 1,250

4. The maximum number of weeks of standard FMLA (not related to military service) leave an employee can get in one year. \_\_\_\_\_

4. 12 weeks

5. Employers can calculate their FMLA leave benefit year in either a calendar year or \_\_\_\_\_ basis.

5. Rolling

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6. How much paternity leave time can a new father take after his new child arrives?

7. Under recent amendments to the FMLA the family of injured returning military service members, who helps care for that person, can take up to \_\_\_\_\_ weeks of leave in a year.

58

6. 12 weeks (unless child's mother also works for same employer - then total of 12 for both).

7. 26 weeks.

8. Under those same amendments, reasons for exigent (service member deployment) leave include (name two reasons).

9. Employees out on FMLA leave must be reinstated to their jobs except when \_\_\_\_\_.

10. Employers may seek medical recertification of an employee's need for FMLA leave every \_\_\_\_\_ months.

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8. Moving; going to meet w/ lawyer; setting up school or day care arrangements etc...

9. Job elimination - would have been RIF'd anyway

10. 6 months (unless certification expires sooner)

*Over time, I have forgotten the details of federal wage laws.*

**Checking FLSA Compliance.**



60

1. The FLSA stands for \_\_\_\_\_.

2. True or false: To be covered by the FLSA, employers need 25 employees?

3. Name 2 of the FLSA overtime white collar exemption categories.

61

1. Fair Labor Standards Act

2. False

3. Executive : Business Admin  
Administrative : Highly compensated  
Professional : Outside Sales

4. To satisfy one of these OT exemptions the employee's job has to meet the exemption requirements and be paid a salary of least \$\_\_\_ per week.

5. The overtime threshold for most organizations is \_\_\_\_\_ hours per week.

62

4. \$455 per week

5. 40 hours

6. The term used for paid time off instead of collecting overtime pay. \_\_\_\_\_.

7. When an employee works 2 jobs for the same employer, the overtime rate can be one of these methods of calculation.

8. True or false: An employee can waive overtime payments when the employer is having trouble meeting payroll? \_\_\_\_\_

6. Compensatory time

7. Weighted average  
or rate at the time

8. False

9. *True or false:* If an employer pays an annual bonus they must recalculate overtime paid over the course of the last year?

10. In the event an employer refuses to pay overtime, US DOL can go back up to \_\_\_\_\_ to collect unpaid wages.

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9. True (if non discretionary)

10. 3 years.

*"Yo! Gina! How you doin'?"*

**GINA** is the Genetic Information Discrimination Act.

GINA makes it unlawful for employers to request, require or purchase \_\_\_\_\_ with regard to an employee or \_\_\_\_\_.

65

genetic information

family members.

*"Hey, that file is personal!"*

**Personnel files** in NH include documents created and maintained by an employer about an employee but do not include \_\_\_\_\_.

*(Name one item)*

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- privileged or confidential info
- letters of reference
- peer evaluations
- notes not generated by employer

***“Is what he’s doing legal?”***

***Donning and doffing*** are not names of Santa’s Reindeer OR members of an ‘80’s boys band. They refer to this activity which should be counted as hours worked for wage purposes. \_\_\_\_\_

67

Donning: putting on work gear, clothes or equipment  
Doffing: Taking it off

***“These Two Yutes”***

Before a 16 year old is permitted to work in New Hampshire, employers should have these documents completed and on file. \_\_\_\_\_ and \_\_\_\_\_

68

Youth Certificate (school)  
Parental Consent

***“You can pick your friends but you can’t pick your...”***

Under New Hampshire insurance law “a spouse” may include \_\_\_\_\_

69

Civil union partner  
Same sex marriage / spouse

**COBRA:** "Ah, the nemesis of Mongoose."

Name 2 *qualifying events* that trigger COBRA rights and obligations.

\_\_\_\_\_ and \_\_\_\_\_

70

- Substantial reduction in work hours.
- termination of employment
- death of covered employee
- divorce or legal separation

**"I'm just a bill on Capitol Hill."**

Which two of these four workplace bills did Congress consider this year:

- The Paycheck Fairness Act
- The Healthy Workplace Act
- Title VII of the Civil Rights Act of 1964
- The Workplace Flexibility Act

These two

**"Hey, The Dude Abides."**

**True or false:** If you have employees on a sales commission plan, the terms must be in writing or the employee gets his/her reasonable expectation of commission long after his/her employment ends.

72

True

***To Legit to Quit:***

If an employee abandons his/her job claiming his/her boss was *mean and demanding*, can he still get unemployment benefits?

73

True (Standard - employee unemployed through no fault of employer)

***Detour and Frolic:***

*True or False:*

Two employees decide to deviate from their delivery route during the work day and watch the last 20 minutes of a game at a local bar. That time could be counted as "*hours worked*".

74

False (while under 20 minutes presumably not work or for benefit of employer)

***The Lambada: The Forbidden Dance.***

If an employee **drinks** too much holiday punch at the **after hours** company party and **strains his back** while dancing, can he claim this is as a workers' comp injury? Will the injury and time lost be covered?

75

Might claim it but likely denied -  
Voluntary and not required by employer

***Debit or Credit?***

Which of the following is not permitted under state wage law:

- **Pay cards** with some fees;
- Deductions for **child care** provider fees;
- Deductions for **parking fees**;
- Deductions for the **use of a fitness facility**; or
- **Deductions for voluntary contributions to not for profit groups**

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*only for charitable contributions*

**Hope you had a good time.**



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**Thanks for playing  
HR's Minute to Win It**

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**Happy New Year!**



**Let's be careful out their folks.**

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**Thank you.**

**Jim Reidy**



**SHEEHAN PHINNEY BASS + GREEN PA**  
ATTORNEYS AT LAW

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