

RECENTLY PASSED NH LAWS ON EMPLOYMENT

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As the legislative session draws to a close, we begin our look at new laws that affect the employer-employee relationship. This week, we focus on a new law regarding non-compete and non-piracy agreements, a change in the definition of "employee" for purposes of several State statutes, and modification of the Workers' Compensation safety program requirements for small employers.

Non-Compete and Non-Piracy:

Effective **July 14, 2012**, RSA 275 is amended to add a new Section 70, which provides:

Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable.

Under the new law, a non-compete agreement will not be enforceable unless the employer provides a copy of the agreement to the new employee either before or concurrent with an offer of employment. The rationale for this law is fairness to new employees, whom the Legislature believes should be apprised of any non-compete restrictions at or before the commencement of employment, not after they have already begun employment and foregone other employment opportunities.

It is less clear whether the legislation is intended to require an employer to issue a new non-compete whenever an employee has a "change in job classification." Presumably, the intent on the law is to require disclosure of non-compete/ non-piracy agreements if the change in job classification would put the employee into a job where such agreements are required and would not require that an employee already subject to such agreements re-execute them when their classification changes. The term "job classification" is not

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defined in this legislation, so it is unclear whether this provision applies to any promotion, lateral move, demotion or change in job title. Until the term is defined by regulation court decision, employers should consider issuing a new non-compete/non-piracy agreement, or re-sign and date an existing agreement, whenever an employee is offered or transferred to a new position, the employer is to give the employee a new non-compete to consider and execute.

Even less clear is what this law means by the term “non-piracy” agreements. Presumably, “non-piracy” was intended to mean patent, trademark, copyright, trade secrets and other intellectual property, but could also be read to include agreements prohibiting solicitation of employees or customers. “Non-piracy” agreements also could be read as including confidentiality and other non-disclosure agreements intended to prevent former employees from disclosing or making use of other information to which they had access as an employee. The intent of this statutory language will remain unclear until the New Hampshire Department of Labor issues clarifying regulations or the New Hampshire courts issue a decision explaining the meaning of “non-piracy”. Until then, employers are advised to have new employees or employees moving into a job for which the employer will require the employee to sign an agreement that potentially could fall under the “non-piracy” heading execute the agreement(s) before or at the time they start working in the new job.

Change in the Definition of Employee

Effective August 6, 2012, the Legislature has replaced the current twelve (12) part test used to determine whether an individual is an employee or an independent contractor for purposes of New Hampshire Wage/Hour, RSA 275, Whistleblower, RSA 275-E, Minimum Wage, RSA 279, and Workers’ Compensation, RSA 281-A with a new seven (7) part test. This revised test retains six (6) of the criteria exactly as they were in the prior test, and modifies another of the current criteria; the rest have been discarded. The new criteria ask whether:

- 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 employer 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 employers.
- 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 shall not prohibit the employer from reaching an agreement with the person as to the 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.

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d. The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

e. 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.** (bold type is the added language)

f. The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

g. The person is not required to work exclusively for the employer.

Stricken from this revised test are the requirements that the person: have continuing or recurring business liabilities or obligations; success or failure depend on the relationship of the receipts to expenditures of their own business; receive compensation for work or services performed and their remuneration is not determined unilaterally by the hiring party; supply the principal tools and instrumentalities used in the work, except for unique tools or instruments of the employer.

Clearly, these legislative changes were made in an effort to make it easier for an individual to qualify as an independent contractor under State employment laws. It remains to be seen if these changes will accomplish that goal. It should also be noted that this legislation does not change the 3-part test the New Hampshire Department of Employment Security uses to determine independent contractor status for purposes of unemployment insurance and benefits. It also has no effect upon the several federal laws, including the federal tax code, which use different definitions to determine whether a person is an employee vs. independent contractor status. As the twelve-step test was more stringent than federal laws, it was rare that an individual could be considered an independent contractor for state law purposes but an employee under federal law. The new seven-step test creates the possibility of different treatment under different laws, potentially increasing the risk of misclassification.

Worker's Compensation Safety Programs

The requirement that New Hampshire employers with 10 or more employees must prepare and file a safety program with the Commissioner of Labor has been changed to include only employers **with 15 or more** employees. While employers required to have a written safety program will still have to review and update their program at least every 2 years, updates will not have to be filed with the Commissioner of Labor. In addition, the requirement that employers with 5 or more employees have a joint loss management committee comprised of equal numbers of employer and employee representatives has been revised to include only employers with **15 or more**

employees. These changes are **effective January 1, 2013.** NH RSA 281-A:64, II-V

The administrative penalty that can be assessed against an employer for failure to comply with written safety program requirements , joint loss management committee requirements, or directives of the Department of Labor for employers participating in the safely incentive program were reduced from \$1,000 per day to a maximum of \$250 per day. Any such, penalties collected will now be place in the general fund, rather than the special workers' compensation safety inspection fund. These changes are also effective January 1, 2013. NH RSA 281-A:64, VIII.

Please contact anyone in our group for assistance in drafting any non-compete or non-piracy agreements, in determining the employee/independent contractor status of anyone under New Hampshire and federal laws, and with your worker's compensation safety programs.

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