

EMPLOYMENT: NORTH AMERICA

USA - New Hampshire



Employment: North America

Quick reference guide enabling side-by-side comparison of key considerations, emerging issues and reform proposal for each state; the employment relationship; hiring; wage and hour laws; discrimination, harassment and family leave; privacy in the workplace; trade secrets and restrictive covenants; labour relations; and discipline and termination procedures.

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USA - New Hampshire



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STATE SNAPSHOT

Key considerations

Which issues would you most highlight to someone new to your state?

New Hampshire is a state in northern New England with a total population of approximately 1.4 million. Compared to its neighbour to the south (Massachusetts), New Hampshire has relatively straightforward employment laws and tends to be fairly balanced in protecting employers and employees.

Although New Hampshire does not have particularly complex or numerous employment laws compared to other states, there are a few quirks worth noting. Specifically, New Hampshire: (1) has adopted a pay equity law (N.H. R.S.A. § 275:37), which (a) requires equal pay for work that requires equal skill, effort, and responsibility and is performed under similar working conditions, and (b) prohibits employers from requiring employees to refrain from disclosing their wages; (2) provides generous unpaid pregnancy disability leave; (3) requires exempt employees who are discharged to be paid for the remainder of the pay period; (4) has strict requirements for wage deductions; (5) limits employees subject to non-compete agreements and imposes notice requirements for new hires; and (6) has a strict definition of independent contractor.

Law stated - 22 September 2022

What do you consider unique to those doing business in your state?

While the New Hampshire corporate income tax is relatively high (i.e., 7.6 per cent in 2022), there are no personal income or sales taxes, which means pass-through entities (e.g., limited liability companies, partnerships, S corporations) can retain much more of their income.

Employers should note that New Hampshire requires employers with 15 or more employees to have a written safety program and file this program with the Commissioner. RSA § 281-A:64 . The program must be reviewed and updated by the employer at least every two years. Such employers must also establish and administer a joint loss management committee composed of equal numbers of employer and employee representatives.

Law stated - 22 September 2022

Is there any general advice you would give in the labor/employment area?

As New Hampshire is a relatively small state, the administrative agencies that enforce its employment-related statutes are also relatively small. This means that they tend to be accessible and willing to offer information to any employers that show a willingness to learn and comply with New Hampshire law. Also, the employment bar in New Hampshire is collegial and it is common to successfully resolve disputes through negotiation.

Law stated - 22 September 2022

Emerging issues

What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

There is a bill under consideration, which would make a non-compete agreement unenforceable if an employer makes "any material change to the terms of employment" after the agreement is signed. Under the bill, "[n]ew requirements for

medical testing, vaccination, or other medical intervention, established by the employer as a condition of employment” will be considered a material change in the terms of employment. Any other agreement (e.g., confidentiality, non-disclosure, trade secret, intellectual property assignment, or other agreement between the employer and the employee will remain in full force and effect. House Bill 1089 . The bill passed the House of Representatives in March and was referred to Interim Study in May. This bill is facing significant push-back from business owners and organizations in New Hampshire.

New Hampshire law permits the therapeutic use of marijuana. RSA § 126-X:1 et seq . Employers are permitted to prohibit the possession, ingestion, or smoking of marijuana in the workplace or being under the influence of marijuana in a place of employment. RSA 126-X:3(II)(2) . Employers are not required to make any accommodation for the medical use of marijuana on the property or premises of the employer. RSA 126-X:3(III)(C) . Looking at off-duty, medical use of marijuana under the NH disability and accommodation statute, the NH Supreme Court held that the disability and accommodation statute excludes disability due to “current illegal use of or addiction to” a federally controlled substance, but does not contain a categorical exclusion of therapeutic cannabis as an accommodation. As such, whether an accommodation for an employee’s off-duty, medical use of marijuana is considered reasonable accommodation is based on an “intrinsically factual determination” and each accommodation request “should be decided on a case-by-case basis . . .” In the instant case, plaintiff’s disability was due to PTSD, not illegal drug use. *Paine v. Ride-Away, Inc.*, No. 2020-0470 (Jan. 14, 2022) .

Law stated - 22 September 2022

Proposals for reform

Are there any noteworthy proposals for reform in your state?

A proposed “right-to-work” bill (SB61), which was passed by the New Hampshire Senate in early 2021, is currently “indefinitely postponed.” If passed, it would allow private sector employees the right to choose whether to join unions and not to pay dues to a union. Similar proposed bills have come before the New Hampshire legislature in the last four decades, but have been unsuccessful.

Law stated - 22 September 2022

EMPLOYMENT RELATIONSHIP

State-specific laws

What state-specific laws govern the employment relationship?

RSA § 354-A:1, et seq. , RSA § 275:1 et seq. , RSA § 279:1 et seq. and RSA § 282-A:1 et seq. are the major employment-related statutes.

The New Hampshire Commission for Human Rights enforces RSA § 354-A:1, et seq. , the New Hampshire Department of Labor enforces RSA § 275:1 et seq. and RSA § 279:1 et seq. , and the New Hampshire Department of Employment Security enforces RSA § 282-A:1 et seq.

Law stated - 22 September 2022

Who do these cover, including categories of workers?

The New Hampshire Employment Discrimination Law (RSA § 354-A:1, et seq.) generally applies to employers with six or more employees, unless otherwise exempt (e.g., certain non-profit religious organizations).

The New Hampshire Wage/Hour Laws (RSA § 275:1 et seq. , RSA § 279:1 et seq.) generally applies to all employers.

The New Hampshire Unemployment Insurance Law (RSA § 282-A:1 et seq.) generally applies to any employer that:

- for some portion of a day in each of 20 different calendar weeks in either the current or preceding calendar year, whether or not such weeks are or were consecutive, has or had in employment within a calendar year one or more individuals, irrespective of whether the same individual was in employment in each such day; or
- in any calendar quarter in either the current or preceding calendar year caused gross wages for services in employment to be paid or payable in the amount of \$1,500 or more.

Law stated - 22 September 2022

Misclassification

Are there state-specific rules regarding employee/contractor misclassification?

Yes. Under the Unemployment Compensation statute, services performed by an individual for wages are considered to be employment unless all of the following criteria have been met:

- such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact;
- such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- such individual is customarily engaged in an independently established trade, occupation, profession, or business. RSA § 282-A:9(III).

Law stated - 22 September 2022

Contracts

Must an employment contract be in writing?

Like most states, New Hampshire recognizes the employment-at-will doctrine—i.e., employment for an indefinite period is terminable at the will of either party, subject to any applicable common law or statutory protections, unless the parties have clearly stated their intention to restrict the common law at-will rule. Thus, although not specifically required by statute, it is important to reflect the terms and conditions of employment in writing, whether the relationship is at-will or otherwise. Many New Hampshire employers enter into employment contracts for C-suite employees and rely on offer letters establishing the at-will employment relationship for all other employees.

Terms and conditions of employment are generally found in offer letters, written policies, rules, benefit plans, and employee handbooks. New Hampshire courts have held that promises contained in an employee handbook could modify an employee's at-will status, absent a contract disclaimer. *Panto v. Moore Bus. Forms*, 130 N.H. 730 (1988); *Butler v. Walker Power, Inc.*, 137 N.H. 432 (1993) (employer's disclaimer in handbook preserved the at-will employment status).

New Hampshire law requires employers to:

- notify, at the time of hire and prior to any changes, employees in writing as to the rate of pay or salary, frequency of payment (e.g., weekly, biweekly, etc.), the day and place of payment, and the specific methods used to determine wages;

- provide employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacation, holidays, sick leave, bonuses, severance pay, personal day, payment of the employee's expenses, pensions, and all other fringe benefits;
- inform employees in writing of any change to such employees' rate of pay, salary, or employment practices or policies; and
- make available to employees in a written statement information regarding permissible deductions. NH Admin. Rules, Lab 803.03.

Law stated - 22 September 2022

Are any terms implied into employment contracts?

Employment contracts in New Hampshire are analysed under straightforward contract principles. In addition, New Hampshire has recognized a tort of wrongful termination in violation of public policy. Employees may have a claim against their employers for wrongful discharge if they can establish that their termination was motivated by bad faith, malice, or retaliation and that it contravenes public policy. See e.g., *Cloutier v. A. & P. Tea Co.*, 121 N.H. 915 (1981).

Law stated - 22 September 2022

Are mandatory arbitration agreements enforceable?

The New Hampshire arbitration statute presumptively deems any written arbitration agreement (including but not limited to agreements between employers and employees) valid, enforceable, and irrevocable, except where there are grounds for the revocation of any contract, provided, however, that an arbitration agreement in the employment context must specifically reference the New Hampshire statute. RSA § 542:1, et seq .

Law stated - 22 September 2022

How can employers make changes to existing employment agreements?

If employment is at will, an employer may change the terms and conditions of employment within its discretion. Notably though, employers are required to provide employees with a written notice of any changes to the wage payment (e.g., rate of pay or salary, payroll date) or employment practices or policies "prior to any [such] changes." NH Admin. Rules, Lab 803.03 .

If employment is subject to a written employment agreement, the provisions of such agreement will govern how changes can be made to any terms of employment set forth in the agreement.

Law stated - 22 September 2022

HIRING

Advertising

What are the requirements relating to advertising open positions?

New Hampshire employers are prohibited from publicizing any notice or advertisement that indicates any limitation, specification, or discrimination of applicants based on age, sex, sexual orientation, gender identity, race, color, marital status, physical or mental disability, religious creed, national origin or sexual orientation, unless there is a bona fide occupational qualification for such preference. RSA § 354-A:7(III) .

Background checks

(a) Criminal records and arrests

Generally, employers may condition offers of employment on the satisfactory completion of a criminal history record check. Also, there is no statute in New Hampshire, preventing employers from questioning applicants or employees about their prior criminal convictions, as long as the crime has not been annulled by a court. RSA § 651:5(X)(f) . Specific background inquiries may be required for specific employment positions. For instance, certain schools are required to perform a background investigation, including a criminal history check, on all employees. RSA § 189:13-a . In addition, childcare centers are required to submit to the Department of Health and Human Services the names along with other information of new hires, new household members, or other individuals who are responsible for the care of or have regular contact with children. RSA § 170-E:7 . Employers are also required to check the criminal history of employees in certain healthcare professions. See RSA § 151:2-d (residential care and healthcare providers); RSA § 161-I:6-a (personal care service providers).

New Hampshire has adopted the Fair Credit Reporting Act, RSA §§ 359-B:1 – 359-B:21 , which parallels the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006).

Law stated - 22 September 2022

(b) Medical history

New Hampshire prohibits employers from: (1) soliciting, requiring, or administering genetic testing relating to any individual as a condition of employment; or (2) affecting the terms, conditions, or privileges of employment of any individual based on genetic testing. RSA § 141-H3 .

Law stated - 22 September 2022

(c) Drug screening

New Hampshire has no statutory prohibition against employers administering drug tests to applicants or employees. Drug testing, however, in certain circumstances may violate an employee's right to privacy (e.g., when the scope of testing unreasonably exceeds the employer's legitimate interest in imposing the test).

Employers are prohibited from requiring an employee or applicant for employment to pay for the cost of a medical examination, non-required drug or alcohol testing, records required by the employer, or any item required by and for the benefit of the employer, as a condition of employment. This shall not include examinations, permits or licenses required by state or federal law." N.H. Code Admin. R., Lab § 803.02(b) .

Law stated - 22 September 2022

(d) Credit checks

New Hampshire does not have any restriction on an employer's ability to inquire into certain credit history questions during the hiring process, as long as all requirements under the federal and state Fair Credit Reporting Acts have been met (e.g., obtaining written authorization from the applicant; making certain required disclosures and notifications, etc.).

Law stated - 22 September 2022

(e) Immigration status

The New Hampshire Department of Labor does not issue work visas or conduct certification for employers seeking to bring foreign workers to the United States. All employers must comply with federal laws regarding immigration.

Law stated - 22 September 2022

(f) Social media

Employers are prohibited from requesting or requiring an employee or prospective employee to (1) disclose social media passwords for accessing their social media accounts, (2) to add anyone to a list of contacts associated with a personal social media account, or (3) reduce the privacy settings associated with any personal social media account RSA § 275:73 An employee cannot discriminate or retaliate against an employee for refusing to do any of these things. RSA § 275:74 .

Law stated - 22 September 2022

(g) Other

New Hampshire has not clarified whether an employer checking references has to comply with the requirements of the New Hampshire Fair Credit Reporting Act.

Law stated - 22 September 2022

WAGE AND HOUR

Pay

What are the main sources of wage and hour laws in your state?

The majority of wage and hour laws in New Hampshire are contained in RSA § 275:1 et seq. and RSA § 279:1 et seq. The most significant subchapters are:

- Day's work; days of rest: RSA §§ 275:30 through 275:35.
- Payment of wages, RSA §§ 275:42 through 275:55.
- Minimum wages, RSA § 279:21.

Law stated - 22 September 2022

What is the minimum hourly wage?

The minimum wage in New Hampshire is the same as the federal minimum wage. RSA § 279:21 . As of 2022, the minimum wage is \$7.25 per hour. There have been proposals in the state legislature to increase the minimum wage but those proposals have thus far failed. The minimum wage provisions apply to all employees, except those engaged in household, domestic, or farm labor; those employed as outside salesmen; employees of summer camps for minors, or those employed as newsboys, non-professional ski patrolmen, or golf caddies. RSA § 279:21. Furthermore, employees

with fewer than six months of experience in an occupation may be paid 75 per cent of the minimum wage, provided the employer files an application with the labor commissioner within 10 days of hiring the employee. Individuals 16 years of age or younger may also be paid 75 per cent of the minimum wage. Employers cannot pay salaried employees an amount that falls below the minimum wage, when compared to the hours worked in any workweek. N.H. Code Admin. R. Ann. Lab. § 803.02(a) .

Law stated - 22 September 2022

What are the rules applicable to final pay and deductions from wages?

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, are all considered “wages” when due. RSA § 275:43(V) .

Salaried employees are required to be paid their full salary for any period in which such employees perform any work without regard to the number of hours or days worked by the employees, unless certain exceptions apply. RSA § 275:43-b(I) . However, an employer may “prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.” RSA § 275:43-b(II) . Please note that this means that exempt employees who are terminated for a reason other than cause must be paid for the remainder of the pay period (e.g., if an employer has a two-week pay period and terminates an exempt employee without cause on the first day of the pay period, the exempt employee must be paid the regular salary through the remainder of the full two-week pay period). RSA § 275:43-b(II) .

New Hampshire has strict requirements regarding deductions from wages. RSA § 275:48(I) . Employers are permitted to deduct amounts from employee wages only in the following circumstances:

- When the employer is required or empowered to do so by law, such as payroll taxes.
- When the employee authorizes (in writing) the employer to make a deduction for union dues, health, welfare pension, and apprenticeship fund contributions, voluntary contributions to charities, housing and utilities, payments into savings funds held by someone other than the employer, voluntary rental fees for non-required clothing, voluntary cleaning of uniforms and non-required clothing, the employee’s use of a vehicle (under RSA § 261:111), medical, surgical, hospital and other group insurance benefits without financial advantage to the employer, required clothing not covered by the definition of uniform, legal plans and identity theft plans without financial advantage to the employer.
- 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.
- Upon an employee’s written request, for the following (provided the employer provides an itemized accounting to the employee at least once a month):
 - voluntary contributions into cafeteria plans or flexible benefit plans;
 - voluntary payments by the employee for childcare fees, parking fees;
 - voluntary payments for pharmaceutical items, gift shop or cafeteria items purchased on site of a hospital by hospital employees;
 - voluntary installment payments for legitimate loans made by the employer to the employee, as evidenced by a document that includes the time the payments will begin and end, the amounts to be deducted, and a specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment;
 - voluntary payments for accidental overpayments of wages, when the recovery is agreed to in writing (and when certain conditions are met);
 - voluntary payments for the recovery of tuition for non-required educational costs paid by the employer for the employee to an educational institution when the specific deduction is authorized in writing prior to the

deduction (and when certain conditions are met); or

- voluntary payments for employee's use of a health or fitness facility (and when certain conditions are met).
- Contributions to political action committees when requested in writing by the employee.
- Deduction from the employee's final paycheck for vacation pay or other paid time off when paid to the employee in advance of eligibility, if the employer has a written authorization from the employee that was made at the time of the original request for the advanced pay, without coercion or pressure.
- For any purpose on which the employer and employee mutually agree does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business.

Law stated - 22 September 2022

Hours and overtime

What are the requirements for meal and rest breaks?

It is unlawful for an employer to require an employee to work more than five consecutive hours without providing the employee with a half-hour lunch or eating period, unless it is feasible for the employee to eat while performing his or her work and the employer permits the employee to do so. RSA § 275:30-a .

Law stated - 22 September 2022

What are the maximum hour rules?

In general, eight hours of work constitutes a workday under New Hampshire law, unless otherwise agreed to by the employer and employee. RSA § 275:30 . Also, with some exceptions, nurses and nurses' assistants may not be required to work more than 12 consecutive hours. RSA § 275:67 .

Employers in New Hampshire cannot operate on Sundays unless they have posted a list of employees who are required or allowed to work on Sunday and designated another day of rest for those employees. RSA § 275:33 . Employers, however, may operate on Sundays if they reach an agreement with employees and the agreement is approved by the labor commissioner. RSA § 275:33-b . Furthermore, this provision does not apply to hospitals, nursing homes, orphanages and homes for the aged. RSA § 275:33-a . Specific occupations are also exempt from this requirement, such as janitors and employees engaged in farm or personal service. RSA § 275:35 . If an employee is required to work on Sunday, he or she must be allowed 24 consecutive hours off during the next six days. RSA § 275:32 .

Law stated - 22 September 2022

How should overtime be calculated?

The overtime requirement in New Hampshire tracks the federal Fair Labor Standards Act. Under the New Hampshire overtime law, an employer must pay an employee 1.5 times his or her regular hourly rate for all hours worked over 40 in one working week. RSA § 279:21(VIII) .

Law stated - 22 September 2022

What exemptions are there from overtime?

New Hampshire law exempts from overtime requirements employees of amusement, seasonal or recreational establishments (if certain conditions are met). Employees of employers covered by the Fair Labor Standards Act are also not subject to New Hampshire overtime provisions (but, of course, are subject to the overtime provisions of the FLSA); provided, however, that employers may not calculate overtime for delivery drivers and sales merchandisers through use of the fluctuating workweek method authorized under the FLSA regulations. RSA § 279:21 .

Law stated - 22 September 2022

Record keeping

What payroll and payment records must be maintained?

New Hampshire law requires every employer to keep an accurate record of the hours worked by, wages paid to, and classification of each employee, which records shall be made readily available to the New Hampshire Department of Labor (NHDOL) for inspection. RSA § 279:27 .

Law stated - 22 September 2022

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

Protected categories

(a) Age?

Yes. RSA § 354-A:7 .

Law stated - 22 September 2022

(b) Race?

Yes. RSA § 354-A:7.

Law stated - 22 September 2022

(c) Disability?

Yes. RSA § 354-A:7.

Law stated - 22 September 2022

(d) Gender?

Yes. Gender identity is protected. RSA § 354-A:7.

Law stated - 22 September 2022

(e) Sexual orientation?

Yes. RSA § 354-A:7.

Law stated - 22 September 2022

(f) Religion?

Yes. RSA § 354-A:7.

Law stated - 22 September 2022

(g) Medical?

Genetic testing is regulated under New Hampshire law. RSA §§ 141-H:1-6 . Use of genetic testing results is prohibited in employment settings except with regard to potential exposure to workplace toxins or the investigation of a workers' compensation claim as long as the employer obtains informed written consent. RSA § 141-H:3 . In addition, the unauthorized disclosure of the identity of persons infected with HIV is prohibited. All HIV testing records must be maintained as confidential and be protected by measures to prevent inadvertent or unwarranted disclosure. RSA § 141-F:8 .

Law stated - 22 September 2022

(h) Other?

Sex, color, marital status, and national origin. RSA § 354-A:7.

Law stated - 22 September 2022

Harassment

What is the state law in relation to harassment?

New Hampshire law protects against harassment on the basis of sex. RSA § 354-A:7(V). The federal district court in New Hampshire has recognized a cause of action for harassment based on race or national origin under the NH law. *Scott v. Univ. of New Hampshire* , 2004 WL 235258, at *9 (D. N.H.).

Law stated - 22 September 2022

Family and medical leave

What is the state law in relation to family and medical leave?

Private employers with 50 or more employees are able (but are not required) to participate in the "Granite State Paid Family Leave Plan." Employers who choose to opt into the Plan are required to participate in payroll deductions, maintain health insurance coverage while on leave, provide job protection, and protect employees from discrimination and retaliation in connection with accessing benefits. As an incentive to voluntary participation, employers that choose to participate in the Plan will receive a tax credit, allowed against family medical leave insurance premiums due, of 50

per cent of the premium that the employer paid for the insurance coverage for the taxable period at issue. For employees whose employers do not participate in the Plan (or offer equivalent benefits), the Plan will allow such employees to participate individually, and employers will be responsible for remitting the employee contribution to the state via a payroll deduction. The benefits under this new Plan will begin on January 1, 2023. The benefit will cover up to 60 per cent of an employee's wages for up to six weeks of paid family and medical leave (e.g., new child bonding leave, care of a family member, family military exigency, or a personal serious health condition independent of employment if the employer does not offer short-term disability insurance). The details of the Plan are yet to be finalized by the New Hampshire Department of Administrative Services is expected to establish rules for base periods, minimum participation requirements, any open-enrollment period parameters, and procedures for contributory plans, including payroll deduction and payment of contributions to a newly established Family and Medical Leave Insurance premium fund.

Employers with six or more employees must provide female employees with a leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth, or related medical conditions. (Note, this pregnancy disability leave is not capped—i.e., an employee may be out of work on job-protected leave for the entire duration of a temporary physical disability related to pregnancy regardless of how long that is.) When the employee is physically able to return to work, her original job or a comparable position shall be made available to her by the employer unless business necessity makes this impossible or unreasonable. RSA § 354-A:7(VI) .

Law stated - 22 September 2022

PRIVACY IN THE WORKPLACE

Privacy and monitoring

What are employees' rights with regard to privacy and monitoring?

It is a violation of privacy under New Hampshire law to intrude upon a person's physical or mental solitude, to publicize private facts about the individual, or to appropriate an individual's name or likeness. However, it "is only when the intrusion has gone beyond the limits of decency that liability accrues." *Karch v. Baybank FSB* , 147 N.H. 525, 534-35 (2002). For the intrusion or disclosure to invade an individual's privacy, it must relate to "something secret, secluded or private, pertaining" to the individual. *Fischer v. Hooper* , 143 N.H. 585, 590 (1999). Given the common law right to privacy, employers should not search employee property brought onto company premises without disseminating written policies stating that the employer can search all property on its premises at its discretion.

Under New Hampshire law, monitoring or intercepting electronic communications is permissible only if all parties to the conversation consent. RSA § 570-A:2 . Surveillance by an employer of its employees could also be a crime under New Hampshire law if undertaken without the consent of the employees. RSA § 644:9 . Importantly, the New Hampshire Legislature has amended its criminal violation of privacy statute to allow surveillance of employees, without consent, when the employer has an "articulable suspicion" that the employee has engaged in illegal or fraudulent conduct.

Law stated - 22 September 2022

Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Employers are prohibited from requesting or requiring an employee or prospective employee to (1) disclose social media passwords for accessing their social media accounts, (2) to add anyone to a list of contacts associated with a personal social media account, or (3) reduce the privacy settings associated with any personal social media account. RSA § 275:73 An employer cannot discriminate or retaliate against an employee for refusing to do any of these things.

However, employers have the right to:

- adopt and enforce workplace policies governing the use of the employer's electronic equipment (including policies regarding internet use, social networking site use and electronic mail use);
- monitor the usage of the employer's electronic equipment and electronic mail;
- request or require an employee to disclose login information to access an account or service provided by the employer or paid for by the employer;
- conduct an investigation into work-related employee misconduct based on information about activity on an employee's personal account or service received from an employee or other source; and
- conduct an investigation into an employee's actions based on the receipt of specific information about the unauthorized transfer of an employer's proprietary information, confidential information, or financial data to a personal or online account or service by an employee or other source.

During any investigation, the employer may require the employee's cooperation to share only the content that was received by the employer (in order to make a factual determination). RSA § 275:74 .

Law stated - 22 September 2022

Bring your own device

What is the latest position in relation to bring your own device?

Currently, New Hampshire does not have a law that specifically addresses this matter. Therefore, employers may generally establish a Bring Your Own Device policy.

Law stated - 22 September 2022

Off-duty

To what extent can employers regulate off-duty conduct?

Any investigation by an employer into the off-duty conduct of an employee must not violate the employee's privacy. This means that the investigative technique must not be "highly offensive." *O'Brien v. Papa Gino's* , 780 F.2d 1067 (1st Cir. 1986). For example, "eavesdropping upon private conversations" may constitute a violation of privacy. Information learned from an investigation into off-duty conduct must be kept confidential in order to ensure that the employee's privacy is not breached by the "public disclosure of private facts." *Karch v. Baybank FSB* , 147 N.H. 525, 535 (2002).

New Hampshire employers may not require as a condition of employment that an employee or applicant for employment not use tobacco products outside the course of employment. RSA § 275:37-a . This provision is enforced by the New Hampshire Department of Labor. RSA § 275:38 .

Law stated - 22 September 2022

Gun rights

Are there state rules protecting gun rights in the employment context?

New Hampshire does not restrict employers' ability to ban guns and other weapons from their property.

Law stated - 22 September 2022

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual property

Who owns IP rights created by employees during the course of their employment?

Like the majority of other states, New Hampshire generally recognizes an employer's IP rights to works created by employees in the course of employment or related to the employer's business. Such "works for hire" are generally considered the employer's property.

New Hampshire has also adopted the Uniform Trade Secrets Act. RSA § 350-B:1-9 .

Law stated - 22 September 2022

Restrictive covenants

What types of restrictive covenants are recognized and enforceable?

Non-competition agreements

Covenants not to compete are not favored in New Hampshire, but are enforceable if the restraint is reasonable, given the particular circumstances of the case. *ACAS Acquisitions (Precitech) Inc. v. Hobert* , 155 N.H. 381 (2007). A restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest. Furthermore, when a restrictive covenant is contained in an employment agreement, the covenant is rendered unenforceable if the employer materially breaches the employment agreement. See *Genex Coop., Inc. v. Bujencic* , 2000 WL 150, at *4 (D. N.H.).

New Hampshire courts have the authority to partially enforce a restrictive covenant containing unreasonable provisions to the extent reasonable. See *Ferrofluidics Corp. v. Advanced Vacuum Components* , 968 F.2d 1463, 1469 (1st Cir. 1992). The courts will not reform an overbroad covenant if the employer acted in bad faith. Bad faith has been found when an employee had no notice that he would be required to sign a non-competition covenant until after he commenced working for the employer.

Covenants that restrict an employee from competing with the employer during the employment relationship are enforceable under New Hampshire law. *Technical Aid Corp. v. Allen* , 134 N.H. 1, 17 (1991). However, restrictive covenants that go beyond protecting the employer's confidential information, goodwill, or trade secrets are generally not enforceable. The attempt to recoup costs associated with recruiting and hiring is not a legitimate interest protectable by a restrictive covenant. *Nat'l Employment Serv. Corp. v. Olsten Staffing Serv.* , 145 N.H. 158, 161 (2000).

Non-disclosure agreements

Reasonable non-disclosure agreements are routinely enforced. Although the New Hampshire Supreme Court has not specifically resolved the issue of the appropriate test for determining enforceability of non-disclosure agreements, the Court acknowledged that non-disclosure agreements that meet the test for non-competition agreements are enforceable. See *ACAS Acquisitions* , 155 N.H. at 395-396.

Misappropriation of trade secrets

The New Hampshire Supreme Court has held that common law causes of action for misappropriation of trade secrets

or confidential information are pre-empted by the New Hampshire Uniform Trade Secrets Act (NHUTSA) and cannot be pursued under a common law duty of loyalty theory. See *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764 (2006).

Non-solicitation agreements

Under New Hampshire law, an agreement not to solicit a former employer's customers is enforceable to the extent it applies to customers with whom the former employee had contact. *Allen*, 134 N.H. at 13-14. Employers have a legitimate interest in retaining the service of its current employees and, thus, an agreement not to recruit away current employees is enforceable to the extent the applicable time period is reasonable.

Breach of duty of loyalty/breach of fiduciary responsibilities

The employee duty of loyalty bars an employee from misappropriating a business opportunity of the employer or soliciting clients of the company for the employee's competing business. *White v. Ransmeier & Spellman*, 950 F. Supp. 39 (D.N.H. 1996). The duty only applies to a supervisor, manager, director, officer, or other person holding a position of trust and confidence with the employer.

A corporate officer owes fiduciary duties to the corporation he or she serves. *Hansen v. Sentry Ins. Co.*, No. 13-1940, 2014 U.S. App. LEXIS 12092, at *25 (1st Cir. June 25, 2014). Corporate officers must act in good faith, with care that "a person in a like position would reasonably exercise . . . in a manner that the officer reasonably believes to be in the best interests of the corporation." RSA § 293-A:8.42(a).

Law stated - 22 September 2022

Non-compete

Are there any special rules on non-competes for particular classes of employee?

New Hampshire law prohibits non-compete agreements with low-wage employees (i.e., employees who earn an hourly rate less than or equal to 200 per cent of the federal minimum wage). RSA § 275:70-a.

Any employer who requires an employee who has not previously been employed by the employer to execute a non-compete agreement as a condition of employment must first provide the employee with a copy of the agreement prior to the employee's acceptance of an offer of employment. RSA § 275:70. Failure to provide the advance copy renders the noncompetition provisions unenforceable, but does not affect the enforceability of any confidentiality, nondisclosure, trade secret, intellectual property assignment or any other type of employment agreement or provision. This statutory disclosure requirement does not apply to existing employees. See *NRC East Environmental Services, Inc. v. Murphy*, No. 218-2018-CV-00267 (Rockingham Super. Ct. Apr. 2, 2018) (Justice N. W. Delker). As addressed in Section 1.2.1, there is a bill under consideration, which would amend RSA § 275:70 to make a non-compete agreement unenforceable if an employer makes "any material change to the terms of employment" after the agreement is signed. Under the bill, "[n]ew requirements for medical testing, vaccination, or other medical intervention, established by the employer as a condition of employment" will be considered a material change in the terms of employment. House Bill 1089.

It is unclear whether continued employment alone constitutes consideration for a covenant not to compete in New Hampshire. Although the New Hampshire Supreme Court has held that continued employment constitutes sufficient consideration for a covenant not to compete (*Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 683 (1979)), that decision and numerous decisions that followed it pre-dated the New Hampshire statute addressed above. Significantly, there is a NH Supreme Court case that touched upon the issue of asking an employee to sign a non-compete after the employee had been employed. *Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192 (2005). In that case, the

court found the non-compete agreement to be too broad, and refused to reform it based on the “bad faith” of the employer. The Court found bad faith because, during the hiring process, the employer never informed the employee that he would be required to sign a non-compete covenant. After working for six months, the employee was presented with the non-compete agreement and informed that his continued employment was contingent upon his signing the agreement. Although the court did not address the issue of consideration, this case suggests that courts may take a close look at the factual circumstances of any non-compete executed after employment has begun.

Finally, any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a physician licensed by the board to practice in New Hampshire, which includes any restriction on the right of such physician to also practice medicine in any geographic area for any period of time after the termination of such partnership, employment, or professional relationship shall be void and unenforceable with respect to said restriction. RSA § 329:31-a .

Law stated - 22 September 2022

LABOR RELATIONS

Right to work

Is the state a “right to work” state?

New Hampshire does not currently have a right-to-work law. A proposed “right-to-work” bill (SB61) was passed by the New Hampshire Senate in early 2021, but the bill failed to pass in the House in June 2021. Similar proposed bills have come before the New Hampshire legislature in the last four decades, but all have been unsuccessful.

Law stated - 22 September 2022

Unions and layoffs

Is the state (or a particular area) known to be heavily unionized?

Labor unions only represent 11.2 per cent of the public and private workforce in New Hampshire.

Law stated - 22 September 2022

What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

Mandatory notice

Employers that employ 100 or more employees (excluding part-time employees) or 100 or more employees who in the aggregate work at least 3,000 hours per week (exclusive of hours of overtime) are required to provide advance notice of a mass layoff or plant closing. RSA § 275-F:3 .

Like the federal Act, covered employers are required to provide 60 days’ advance written notice of a plant closing or mass layoff. However, the notice provisions are more extensive under New Hampshire law. The notice must be provided to (1) all affected employees and representatives of affected employees, (2) the Commissioner of Labor, (3) the New Hampshire Attorney General, and (4) the chief elected official of each municipality in New Hampshire within which the plant closing or mass layoff occurs. R.S.A. § 275-F:3 .

Failure to provide the notice can result in penalties, including an award of back pay and lost benefits (including medical expenses incurred by the employee that would have been covered under an employee benefit plan) to affected employees for each day the notice is not provided, as well as attorneys’ fees and costs. The NH DOL has the authority

to enforce the NH WARN Act, including holding hearings to determine liability under the Act, to award civil penalties, to examine the books and records of an employer, and to place a lien on business revenues and real and personal property of the employer.

In addition, all employers (even those that do not meet the 100-employee threshold applicable to NH WARN) must file a mass layoff notice with the State Unemployment Compensation Bureau if the employer lays off or expects to lay off 25 or more employees: (a) in the same calendar week; (b) for an expected duration of seven days or more; and for either (1) vacation or holiday shutdown, or (2) company closure. Such notice must be made within three days of the end of week in which 25 employees are being laid off. RSA § 282-A:45-a ; N.H. Code Admin. R. EMP 302.13 .

Transfer of undertakings/TUPE

If an employer sells all or part of its business, the seller is responsible for providing notice for any plant closing or mass layoff, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser is responsible for providing notice for any plant closing or mass layoff. R.S.A. § 275-F:3 (IV).

Benefits

New Hampshire's health care continuation law requires that continuation coverage be offered to any individual (except one dismissed for gross misconduct) covered under a group plan offered by the employer. RSA § 415:18(XVI) .

Severance pay

New Hampshire does not require employers to provide severance pay for employees who are laid off, but severance pay that is provided as part of a policy or practice of the employer constitutes "wages" under New Hampshire law when due. RSA § 275:43(V).

Law stated - 22 September 2022

DISCIPLINE AND TERMINATION

State procedures

Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

New Hampshire has no specific law on this issue that is applicable to private employers.

Law stated - 22 September 2022

At-will or notice

At-will status and/or notice period?

Like most other states, New Hampshire recognizes the at-will employment doctrine. In the absence of an employment contract for a definite term, the at-will relationship may be terminated by either the employer or the employee at any time for any reason not prohibited by law, with or without notice. Requiring employees to provide any specified amount of notice for a resignation would be considered inconsistent with the at-will doctrine.

What restrictions apply to the above?

New Hampshire has recognized an exception to the at-will rule for terminations that are in violation of public policy. Employees may have a claim against their employers for wrongful discharge if they can establish that their termination was motivated by bad faith, malice, or retaliation and that it contravenes public policy. See e.g., *Cloutier v. A. & P. Tea Co.*, 121 N.H. 915 (1981).

Aside from common law claims, statutes protect employees in New Hampshire from termination for engaging in the following conduct or for the following reasons:

- Because of the employee's status based on age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed, national origin, sexual orientation, or any other characteristic protected by applicable law. RSA §§ 354-A:6, 354-A:7.
- Retaliation for making a claim of discrimination based on their age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed, national origin, or sexual orientation. RSA § 354-A:19.
- Taking time off from work for the period of temporary physical disability resulting from pregnancy, childbirth, or related medical conditions. RSA § 354-A:7(VI).
- Reporting an employer's violation of state or federal law, refusing to carry out an employer's directive where the employee has an objective basis in fact for believing that such action would violate state or federal law, or participating in a related investigation, hearing or inquiry. RSA §§ 275-E:2, E:3.
- Taking time off from work in order to perform active duty in the National or State Guard or Reserve or to participate in Guard or Reserve training. RSA § 110-C:1.
- Taking time off from work for jury duty. RSA § 500-A:14.
- Taking time off from work to attend proceedings related to prosecution of a crime. RSA §§ 275:61 et seq.
- Disclosing the amount of the employee's wages, salary or paid benefits. RSA § 275:41-b.
- Because the employee is a victim of domestic violence, harassment, sexual assault or stalking. RSA § 275:71.
- Because the employee used tobacco products outside the course of employment. RSA § 275:37-a.

Law stated - 22 September 2022

Final paychecks

Are there state-specific rules on when final paychecks are due after termination?

If the employer "discharges" an employee, his or her wages must be paid within 72 hours. RSA § 275:44 . If the employee voluntarily resigns, is suspended due to a labor dispute, or is otherwise "laid off," the employee's wages must be paid on the next regular payday. However, if the employee gives the employer at least one pay period's notice, the employee must be paid within 72 hours of the last day of employment. If there is a dispute over the amount of wages due at the time of termination, New Hampshire law requires the employer to pay the amount that is conceded to be due. RSA § 275:45 However, acceptance by the employee of a partial payment does not act as a release of the balance of the wages claimed to be due.

Law stated - 22 September 2022

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