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DEPARTMENT OF LABOR
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LAURA A. FORTMAN
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WAGE & HOUR DIVISION

DR. JASON MOYER-LEE
DIRECTOR

September 4, 2024

American Legion
Maine Post #75 (Tedd Lait Post)
20 North Water Street
Old Town, ME 04468

RE: Violations of Title 26 MRS. Inspection #486770

Dear Wayne Feero,

When our inspector visited your place of business on April 8, 2024 and points thereafter, the following violations of Maine Labor Law were found:

Employee Misclassification

26 MRS §591-A Employee Misclassification - An employer that intentionally or knowingly misclassifies an employee as an independent contractor commits a civil violation for which a fine of not less than \$2,000 and not more than \$10,000 per violation may be adjudged. A determination of misclassification of a worker as an independent contractor may result in the assessment of penalties under section 1051, 1082, 1225 or Title 39-A, section 105-A or 324.

In this case, the employer hired [REDACTED] to work as a bartender on 23 separate weeks between 07/03/2023 and 12/23/2023.

With respect to criterion 1(b), the individual performing the work was not customarily engaged in an independently established trade. Statements provided by [REDACTED] failed to show that she had an independently established business.

With respect to criterion 1(c), the investigation revealed facts showing [REDACTED] needed permission from the organization to hire others.

With respect to criterion 1(e), the investigation revealed facts showing [REDACTED] did not advertise or make her services available to the community.

Having failed to pass all 5 criterion of section 1 of the employment standard, it is determined that the work performed by [REDACTED] was, in fact, employment.

Total violations: 23

Records

Section 622 of Title 26¹ (materially) states:

Every employer shall keep a true record showing the date and amount paid to each employee pursuant to section 621-A. Every employer shall keep a daily record of the time worked by each such employee... Records required to be kept by this section must be accessible to any representative of the department at any reasonable hour. ...

Records statutes, such as Section 622, are a critical element of labor standards because records help employers ensure they have met their legal obligations to pay workers what they are owed, and they provide the Division with a source of evidence when evaluating an employer's compliance with other statutes.

The Division counts each day on which an employer fails to “keep a daily record of the time worked by each such employee”, or each instance in which the employer fails to provide such a record to the Division, as a separate violation. Similarly, the Division counts each payroll period in which an employer fails to keep a pay record, or each instance in which the employer fails to provide the Division with such a record, as a separate violation.

In this case, the employer failed to provide the department representative access to the daily time records and payroll records, when requested by a document request letter issued in-hand on 04/17/2024, for the following employee and for the following pay dates:

[REDACTED], 23 separate pay cycles between 07/14/2023 and 12/29/2023.

Total violations: 23

Pay Statements

¹ <https://legislature.maine.gov/statutes/26/title26sec622.html>

Subchapter 3 of Chapter 7 of Title 26 of the Maine Revised Statutes, concerning minimum wage and paid overtime, requires employers to keep pay records and provide pay statements to employees. This requirement is set out at Section 665² and (materially) states:

Every employer...shall keep a true and accurate record of the hours worked by each employee and of the wages paid, such records to be preserved by the employer for a period of at least 3 years, and shall furnish to each employee with each payment of wages a statement that clearly shows the date of the pay period, the hours, total earnings and itemized deductions.

In this case, the employer failed to provide a detailed pay statement with each payment of wages to the following employees on the following dates in accordance with this statute:

██████████, 23 separate pay cycles between 07/14/2023 and 12/29/2023.

Total violations: 23

Penalties

When assessing fines, the Division generally relies on Section 53 of Title 26, which (materially) states:

...[T]he director may assess a forfeiture against any employer, officer, agent or other person who violates any provision of chapter 7, subchapters I to IV for each violation of those subchapters. The forfeiture may not exceed \$1,000 or the amount provided in law or rule as a penalty for the specific violation, whichever is less. ... The director shall adopt rules to govern the administration of the civil money forfeiture provisions. The rules must include a right of appeal by the employer and a range of monetary assessments with consideration given to the size of the employer's business, the good faith of the employer, the gravity of the violation and the history of previous violations. ...

The Rules referred to above are entitled: *Chapter 9: Rules Governing Administrative Civil Money Penalties for Labor Law Violations*.³ Pursuant to these rules, fines start at the minimum penalty or the lowest amount in the penalty range for a particular violation, and then must be increased for the severity of the violation, when the employer has a history of violations, and if the violations are “willful”. The fines decrease, on the other hand, when the employer demonstrates “good faith” or has 100 or fewer employees.

² <https://legislature.maine.gov/statutes/26/title26sec665.html>

³ The rules which are currently in force, and upon which this citation relies, can be found here: <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.maine.gov%2Fsos%2Fcec%2Frules%2F12%2F170%2F170c009.docx&wdOrigin=BROWSELINK>.

Employer size is the only relevant criterion to the imposition of fines in this case. The employer in this case has an unknown number of employees. This means that, pursuant to Section III(B)(2), the penalty amount in all violations will be reduced by 33.3%. Therefore, to calculate the penalty amount the Division imposes for the violations in this case, the Division starts with the minimum penalty provided by the statute in question and then reduces the amount by 33.3%.

Employee Misclassification

Section 591-A, concerning employee misclassification, provides for a penalty range of \$2,000 to \$10,000 per violation. As \$2,000 is the lowest amount in the range, the Chapter 9 Rules require us to use this number as our starting point. The \$2,000 figure is then multiplied by the 23 violations in this category, resulting in an initial fine of \$46,000. We then reduce the \$46,000 by 33.3%, resulting in a **total penalty amount of \$30,682.00**.

Records

The violations for daily time records (Section 622) and for pay records (Section 622) are both subject to the same penalty range. This is set out at Section 626-A, which (materially) states: “Whoever violates any of the provisions of...sections 621-A to 623...is subject to a forfeiture of not less than \$100 nor more than \$500 for each violation.”⁴

As \$100 is the lowest amount in the range, the Chapter 9 Rules require us to use this number as our starting point. The \$100 figure is then multiplied by the 23 violations under this category, resulting in an initial fine of \$2,300.00. The 33.3% reduction is then applied, resulting in a **total penalty amount of \$1,534.10 for the violations in this category**.

Pay Statements

The penalty range for pay statement violations is set out at Section 671⁵ and (materially) states: “Any employer who violates this subchapter shall, upon conviction thereof, be punished by a fine of not less than \$50 nor more than \$200.” We therefore start with the minimum figure of \$50 per violation. We then multiply this by the 23 violations in this category, resulting in a penalty amount of \$1,150.00. After reducing by 33.3% to account for employer size, **the result is a total penalty amount of \$767.05 for the violations in this category**.

⁴ <https://legislature.maine.gov/statutes/26/title26sec626-A.html>

⁵ <https://legislature.maine.gov/statutes/26/title26sec671.html>

Appeals and Settlements

The total penalty for the above violation(s) is \$32,983.15. Please make checks payable to “Treasurer, State of Maine” and mail to the address at the top of this letter.

Pursuant to Section 53 of Title 26, you have the right to appeal this citation. The Bureau’s appeals process is set out in Section IV of the Chapter 9 Rules.

If you choose to file an appeal of any violation or penalty, you must do so within fifteen (15) business days of receipt of this notice. The appeal must be submitted in writing to the Deputy Director of the Bureau, at the address listed above. If you file an appeal, be specific as to which violation(s) or penalties you wish to appeal. If a request for a formal appeal is received timely, a hearing will be scheduled. The Deputy Director will assign the appeal to a qualified hearing officer. The hearing will be at the headquarters of the Bureau or at a place mutually agreeable to the parties. The hearing may be held telephonically or by remote video, at the discretion of the hearing officer. All proposed penalties will be stayed until after the formal appeal is heard.

If no response is received within the designated timeframe, you accept all citations and any penalties assessed. The notice will become a final order and payment will be due at that time.

We strongly recommend that any correspondence be sent by certified mail. Failure to correct violations may result in additional penalties for each violation that is not corrected.

You may approach the Bureau to negotiate a settlement to waive the violations or penalties at any time during this process. However, settlement negotiations will not affect the deadline to appeal.

If you have questions regarding this notice, you may contact the Bureau of Labor Standards, Wage & Hour Division at (207) 623-7900.

Respectfully,



Scott Cotnoir, Director
Wage and Hour Division
Inspection #486770