

Driving New Hampshire Forward

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COVER: The 2016 Annual Convention (see page 15) will include a Hawaiian theme with Luau performers, see pictures at the top left and middle. Past conventions included the 2011 convention at the Mt. Washington Hotel, upper right, where Robert Groux of Honda Barn, NHADA chairman at the time enjoyed some hilarity with Peggy Proko of Peters of Nashua, first vice chair at the time, and friends; Emmett Horgan, bedecked in '20s garb in keeping with the evening's theme, of Rockingham Honda and Rockingham Toyota Scion and his wife, Carolyn, enjoyed the portico of the Mt. Washington Hotel at that same convention; and, lower right, participants in a hypnotist's session during the 2015 NHADA convention at the Mountain Club on Loon. Photos provided by Aloha Luau and taken by Michael Rosenblum and Nat Stout. Cover design by Nat Stout.

NH Top Court Deals with “Unsafe” Vehicle Sales

Peter McNamara, NHADA President

During January, the New Hampshire Supreme Court issued two opinions dealing with the Unsafe Motor Vehicle Law (RSA 358-F). In each case, the dealers properly followed the “unsafe” notice requirements and, as a result, the court rejected claims under the Uniform Commercial Code’s (UCC) implied warranty of merchantability and contract revocation laws.

Roy v. Quality Pro Auto, LLC

In the Roy case, the court ruled that when a consumer buys a vehicle that is properly documented as “unsafe”, the consumer cannot later claim a breach of the implied warranty of merchantability. The NHADA legal defense fund urged this outcome through its Amicus Brief filed by Attorney Greg Holmes.

The facts of the case are as follows:

Quality Pro Auto, LLC (“Dealer”) sold a used vehicle to Jeffrey Roy (“Consumer”). The dealer stated “As is As seen” on the bill of sale and also completed the NH DMV’s “Notice of Unsafe Motor Vehicle” form. The court pointed out that:

The DMV form contains the following notice:



Peter McNamara

“The motor vehicle described herein will not pass a New Hampshire inspection and is unsafe for operation.” By signing the form, the [consumer] “acknowledge[d] that [the] vehicle will not pass a New Hampshire inspection, is unsafe for operation, and cannot be driven on the ways of this state.”

The [consumer] indicated on the form that he did not “desire a safety inspection to be conducted.”

After driving the vehicle home to Maine, the Consumer found the vehicle would not pass Maine’s inspection law due to massive frame rust. The Dealer refused to refund to unwind the deal since the car was sold “as-is shown”.

In his small claims court suit, the consumer alleged the dealer violated the NH UCC’s “implied warranty of merchantability (RSA 382-A:2-314). It is important to note that in declaring the vehicle “as-is”, the dealer did not use the NHADA Dealer Warranty Disclaimer (NHAD Services form LW-2, <http://bit.ly/1QMm0FO>), which mirrors the statutory implied

Unsafe – continued on page 5

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Unsafe— continued from page 3

warranty waiver language. Had the dealer used the form, the consumer would likely not have filed the claim in the first place.

The lower court rejected the accusation and the Consumer appealed to the NH Supreme Court. Surprisingly, the Dealer filed no brief on appeal, which left the NHADA as the sole party seeking to have the lower court ruling upheld. The Supreme Court ruled that the implied warranty was not breached.

First the court cited NH RSA 382-A:2-314, the implied warranty law, which provides:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind....
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity with each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

The court then focused on the official comments to the RSA which explain that “[t]he question when the warranty is

Legal Defense Fund

The NHADA’s Legal Defense Fund filed a brief arguing to uphold the lower court which held the dealer didn’t violate the UCC. Had the court overturned the lower court, a flood gate of lawsuits may have occurred.

The LDF is funded by the membership through voluntary donations and has supported cases related to the Dealer Bill of Rights, insurance law, dealer license laws and body shops.

Find LDF information here, sign-in IS required: <http://bit.ly/1VrZyp9>.

imposed turns basically on the meaning of the terms of the agreement as recognized in the trade (RSA 382-A:2-314 cmt. 2). Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. (Id.) With regard to used goods, the official comments state that a contract for such goods “involves only such obligation as is appropriate to such goods for that is their contract description. (RSA 382-A:2-314 cmt.3).

The court then noted the motor vehicle was expressly described as one that “will not pass a New Hampshire inspection, is unsafe for operation,

Unsafe – continued on page 6

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Unsafe – continued from page 5

and cannot be driven on the ways of this state.”

The court then concluded that because the vehicle was unsafe and failed a motor vehicle inspection, the sale

“...did not constitute a breach of the implied warranty of merchantability. In other words, the subject vehicle was merchantable within the meaning of the parties’ contract. Accordingly, we conclude that the trial court did not err when it entered judgment for the defendant on the plaintiff’s breach of implied warranty of merchantability claim.”

Smith v. Milko Pesa dba Auto Milko

In the Smith case, the Court held that the consumer cannot revoke acceptance under the UCC by claiming that the vehicle did not “conform to the contract” since the vehicle was sold (and properly documented) as unsafe.

The facts of the case are as follows: Auto Milko (“Dealer”) sold a used vehicle to Jeffery Smith (“Consumer”) who signed four documents:

1. a dealership receipt with the phrases “as is as seen” and a statement which dealer “disclaimed ‘ALL WARRANTIES,

EITHER EXPRESS OR IMPLIED”;

2. a notice stating in part the vehicle “MAY NOT PASS A NH VEHICLE INSPECTION” that the vehicle as being sold “AS-IS” and other similar language about the condition of the car;

3. the NH DMV’s “NOTICE OF UNSAFE MOTOR VEHICLE” FORM;

4. the FTC “BUYER’S GUIDE”, which also included the “AS IS – NO WARRANTY” language and that the dealer would assume no responsibility for any repairs.

There was a factual dispute as to whether the dealer refused to do an inspection but, in any case, the consumer initialed the DMV Unsafe form that he declined the inspection. The vehicle then failed a later inspection at a Subaru dealership.

The consumer then sued in small claims court alleging that he revoked his acceptance of the motor vehicle under the UCC (RSA 382-A:2-608) and that the dealer violated the unsafe motor vehicle law (RSA 358-F:2,;3). The UCC provides that a “... buyer may revoke his acceptance of a commercial

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Legislative Update: Crossover is Looming

Daniel Bennett, Vice President of Government Relations

This time of year brings Crossover, which is the deadline when all bills must have their vote by the full chamber from whence they originated. This is when we see which bills will move on to the opposite chamber, thereby keeping a fighting chance at becoming law.

As you can imagine, Crossover day, Thursday, March 24, can be incredibly long and hectic for both Senators and Representatives. And that is why, for many years, NHADA has hosted our annual Legislative Crossover Reception. Many Senators and Representatives attend the reception for a much needed free bite to eat and drink in order to celebrate... or mourn. This great event is always filled with bipartisan camaraderie and opportunities for legislators to casually discuss NHADA issues and the current legislative session.

As you know, NHADA is monitoring over 100 important bills. By Crossover, we will know the fate of many of these. We are expecting votes on two very important NHADA bills within the next few weeks leading up to Crossover.

Inspection and OBD II

House Bill 1649 (HB 1649), filed by Rep. James Spillane (R-Deerfield), attempts to change the annual safety and OBD II inspection program by exempting vehicles of the latest two model years from an inspection.

As filed, however, the bill could create gaps extending to four years the exemption for some motor vehicles, thus putting NH out of compliance with Federal Clean Air Act requirements. This could possibly lead to sanctions and financial penalties impacting our highway funds, in addition

to putting potentially unsafe vehicles on the road.

The bill could also actually cost consumers money when needed repairs go unnoticed. Recalls and defects that would be under warranty in the first few years of a vehicle's life could be missed, when they otherwise would be repaired at no cost to the consumer. NHADA strongly opposed the bill and the committee wisely respected ours and others' arguments when it voted to kill the bill by a vote of 17-1 (found it "Inexpedient to Legislate" or ITL). The bill now goes to the full House sometime before Crossover; we hope that the voting body will support the Transportation Committee, which did the policy work on this issue.

Body Shops

Senate Bill (SB 436), filed by Senator Nancy Stiles (R-Hampton), affects close to 100 body shops, which NHADA represents. Senator Stiles' bill, while not initiated by NHADA, is one that has taken much time, effort, and hard work. As originally filed, the legislation would have significantly impacted the use of



Dan Bennett

aftermarket structural parts in a vehicle's repair, as dictated by the insurance company. It appears now that the bill will codify, or put in statute, a long-standing NH Insurance Department (NHID) bulletin, originally issued in 1999, clarifying and creating a uniform

statewide policy for when an insurer can require or specify the use of aftermarket structural parts. The bill will also require the insurance department to begin to catalog body shop complaints against an insurer in the course of doing their routine market conduct research. If the body shop complaint is coupled with a consumer complaint, the NHID may then act upon the complaint to remedy the issue.

NHADA supports both of these approaches to the bill as amended, which recently passed the Senate Transportation Committee by a vote of 4-1. It was supported by Senator Stiles, Senator Regina Birdsell (R-Derry), Senator Dan Feltes (D-Concord), and Senator David Watters (D-Dover). It was opposed by Senator Gary Daniels (R-Milford).

NHADA will keep you posted as we

Crossover – continued on page 11

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Universal Waste Training Can Ease Your Burden

Pat Austin, NHADA Loss Prevention Consultant

“Universal wastes” are a special group of hazardous wastes that are generated by all segments of the population and, unfortunately, often improperly disposed of by the people who generate them. In an effort to make it easier and more cost effective to properly manage these wastes, the “Universal Waste Rule” exempts the wastes from the more burdensome Hazardous Waste Rules requirements, as long as they are managed to prevent release to the environment and properly recycled or disposed.”

For example, the Universal Waste Rules do not require generators to provide separate waste storage areas, nor do they require a hazardous waste hauler for transportation.

Wastes the NH Department of

Environmental Services (DES) has declared to be universal wastes are:

- Antifreeze
- Batteries
- Cathode Ray Tubes (CRT)
- Flourescent Lamps (Including HIDs)
- Mercury Containing Devices (such as thermometers)
- Pesticides

The New Hampshire-specific rule states: Env-Wm1103.03 Employee Training:

A small quantity handler of universal wastes shall inform all employees who handle or have responsibility for managing universal waste of proper waste handling and emergency procedures appropriate to the type(s) of universal waste handled at the facility.



Pat Austin

Working in the regulation requires any employee who comes into contact with a universal waste to be provided with and to attend a one-time training session while working at a facility. The training must cover the proper handling and management procedures, as well as, emergency procedures.

Find important information and services for your business at nhada.com. Under Insurance Offerings, select Workers' Compensation, then Loss Prevention: <http://bit.ly/1WDyUu6>. Note that most links will require your signing in.

We are available at NHADA Loss Prevention to answer your questions. Contact us at 800-852-3372 or email me directly at paustin@nhada.com. 🇺🇸



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NHADA Leaders Obtain Highest Credentials In Association Industry

Peter McNamara, Dan Bennett Earn “Certified Association Executive” (CAE) Designation

The American Society of Association Executives (ASAE) has announced that Peter McNamara, NHADA president, and Dan Bennett, NHADA vice president government relations and environmental affairs, have earned the Certified Association Executive (CAE) designation. The CAE is an honored professional credential in the association industry, which requires rigorous and extensive training and culminates in a final examination which must be successfully passed.

“This is a proud moment, but I know this additional training has already raised the bar at the NHADA, where I’ve applied the lessons I have learned to improve our operations and become a better association for the businesses we serve,” Pete said.

“This is an honor I intend to pay forward to the clients we serve every day in NH,” explained Dan. “Adopting best practices and improving our own performance will only improve the results for automobile dealers around the state, and I’m ready to get started.”

To be designated as a CAE, an applicant must have a minimum of three years of experience with nonprofit organization management, complete a minimum of 100 hours of specialized professional development, pass a stringent examination in association management, and pledge to uphold a code of ethics. To maintain the certification, individuals must undertake ongoing professional development and activities in association and nonprofit management. The CAE program



L to R: NHADA Vice Chairman Larry Foss of Foss Motors, Inc.; NHADA Chairman Bill Gurney of Gurney’s Automotive Repair, Inc.; NHADA President Pete McNamara; NHADA Vice President of Government Relations Daniekl Bennett at a recent board of directors meeting. Photo by Nat Stout

is accredited by the National Commission for Certifying Agencies (NCCA).

“As the Chief Staff Executive, Pete sets the tone for the organization and carries out the board directives. I am proud of Pete and Dan earning the CAE designation as it gives NHADA a stronger foundation,” says Bill Gurney, chairman of the NHADA Board of Directors. “As importantly, the lessons they have learned will mean we can explore new business solutions to help our association prosper, save money, and boost efficiencies throughout our industry.”

Michael Rosenblum, NHADA executive vice president, also holds the CAE certification.

ASAE is a membership organization of more than 21,000 association executives and industry partners representing 10,000 organizations. Its members manage leading trade associations, individual membership societies and voluntary organizations across the United States and in nearly 50 countries around the world. With support of the ASAE Foundation, a separate nonprofit entity, ASAE is the premier source of learning, knowledge and future-oriented research for the association and nonprofit profession, and provides resources, education, ideas and advocacy to enhance the power and performance of the association and nonprofit community. ▲

This article is adapted from a press release written by Scott Spradling of Spradling Group.

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Try NHADA's New Online Safety Orientation Training At No Cost

Brian Duplessis, Loss Prevention Coordinator

A number of Occupational Safety and Health Administration (OSHA) standards affect the automotive service and collision repair industries and require employee safety training prior to their being exposed to various hazards. The Hazard Communication standard, for instance, mandates that employees be trained on the hazards of chemicals in the workplace and trained as well on how to protect against exposure.

Auto lift safety training is required for all technicians prior to their being allowed to use a lift. All employees need to be trained in fire extinguisher usage, emergency procedures and bloodborne pathogens awareness. Depending on job responsibilities, workers might also require training in respiratory safety, forklift safety and possibly Lockout/Tagout awareness.

Time-of-hire is a great opportunity to conduct other trainings as well. For instance, NHADA's service technician ergonomic awareness training, though not required, provides valuable information towards the prevention of ergonomic injuries while conducting service and collision repair tasks.

Comprehensive safety training for new employees is important for OSHA standards compliance, but there are other important benefits as well. Although not historically true for the NHADA Workers' Compensation Trust (WCT), new employees tend to be injured at a higher rate than tenured employees. Safety orientation training can help reduce these injuries by creating a culture of safety right from the get-go.

NHADA Loss Prevention has developed industry specific safety training for the above-mentioned topics. We continue to expand and enhance the training offerings. And now NHADA has an exciting new partnership with TrainCaster, an online training portal that provides a cost-effective, easy-to-use online



Brian Duplessis

platform allowing for a comprehensive, time-of-hire safety orientation for every employee.

The following outlines what is found on TrainCaster for your new hires:

New Service Technician Safety Orientation

Hazard Communication and Personal Protective Equipment

Fire Extinguisher and Emergency Evacuation

Automotive Lift Safety

Bloodborne Pathogen Awareness

New Body Shop Technician Safety Orientation with Automotive Lift

Hazard Communication and Personal Protective Equipment
Respirator Training

Fire Extinguisher and Emergency Evacuation

Automotive Lift Safety

Bloodborne Pathogen Awareness

New Truck Service Technician Safety Orientation

Hazard Communication and Personal Protective Equipment

Fire Extinguisher and Emergency Evacuation

Bloodborne Pathogen Awareness

New Employee Safety Orientation (Non-Technician)

Fire Extinguisher and Emergency Evacuation

Bloodborne Pathogen Awareness

New Recon Employee Safety Orientation

Hazard Communication and Personal Protective Equipment

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Bloodborne Pathogen Awareness

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Unsafe – continued from page 6

unit whose non-conformity substantially impairs its value to him....” However, the court noted that UCC also provides that “Goods... are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract.”

Much like its logic in the Roy case above, the Court rejected the UCC claims because the consumer’s:

“... reliance upon [the UCC] was misplaced because here the motor vehicle conformed to the parties’ contract. The parties specifically contracted for a used motor vehicle that ‘will not pass a New Hampshire inspection, is unsafe for operation and cannot be driven on the ways of this state.’ 📌

See Also “How to Document the Sale of an As-Is Vehicle” on page 18

Managing the Risks Created When Hiring New Employees

Peter Sheffer, Workers' Compensation Director

We all manage the risk we face every hour of every day. We manage health risks by eating right, exercising, and keeping up with annual physicals. We manage our commuting risks by driving defensively, obeying traffic laws and avoiding distractions. But here at the NHADA's Workers' Compensation Trust (WCT) staff focuses on other risks — those that our WCT members face.

Risk management starts with our members' each and every new hire. That's because national studies have found that 30 to 40 percent of injured workers have been on the job for less than a year. Obviously, then, it is critical that employers take the time to hire the right person for the job and take the time to train and educate new employees.

The *NHADA Strategic Hiring Guidelines* were created with the assistance of employment law professionals to help members with this process. The *Guidelines* are available on the NHADA website for all NHADA members after signing in. The *Guidelines* outline key points in the hiring process that include reviewing applications, the interview, checking references, making a conditional offer, performing background checks, and ultimately performing the pre-placement drug test and completing the Second Injury Fund form. The studies have identified several reasons — beyond hiring the wrong person for the job — that new employees sustain injuries.

- Employers assume that new employees know more than they do.
- New employees are afraid to ask questions.
- The environment is new and the employee is not familiar with the hazards.

- Task-specific training focuses on what to do rather than what to avoid.
- New employees lack knowledge about hazardous substances.
- New employees fail to understand the purpose and importance of personal protective equipment and how to properly use it.
- Employers fail to convey the safety message.



Peter Sheffer

The NHADA loss prevention system has launched an internet-based training program in a partnership with TrainCaster that addresses many of these issues. One of the modules is directed specifically at new hires, who can complete all OSHA-required, best-practices safety orientation training quickly and conveniently prior to their commencement of actual work.

Providing new hires with industry specific training helps to set the tone of a safety culture in the workplace. Taking steps to help employees understand the risks they face and providing them with the tools and training they need to avoid injuries is a huge step toward managing the risk created by new employees. In the

current economy with unemployment in NH at 3.1 percent, finding the best candidate for any open position is challenging. Please remind those on your staff who are involved in the hiring process to review the *NHADA Strategic Hiring Guidelines*. By taking your time in the hiring process and following the steps outlined in the *Guidelines*, you should be able to identify applicants that you do not want in your place of employment and find the ones that are best suited to work for you.

Contact the Loss Prevention Department to get set up with TrainCaster through the NHADA web portal, at 800-852-3372 or email us at NHADAWorkersCompLPprev@nhada.com.

Crossover – continued from page 7

approach Crossover as to when these bills will receive their vote. Please be ready and heed our call to action to let your Senators and Representatives know that these bills are important to you as both a citizen, consumer, and constituent. Make your voice heard!

Reach me with questions at dbennett@nhada.com or call me at 800-852-3372.

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NHADA Leadership & Management Summit Scheduled for May 16, 2016

Jean Conlon, Programs Administrator

Last fall, NHADA sent out a survey asking our members about their needs and wants for management and leadership training.



Jean Conlon

The results exceeded our expectations, with 21.3 percent extremely likely to participate in management training, 46.8 percent very likely, and 30.9 percent moderately likely.

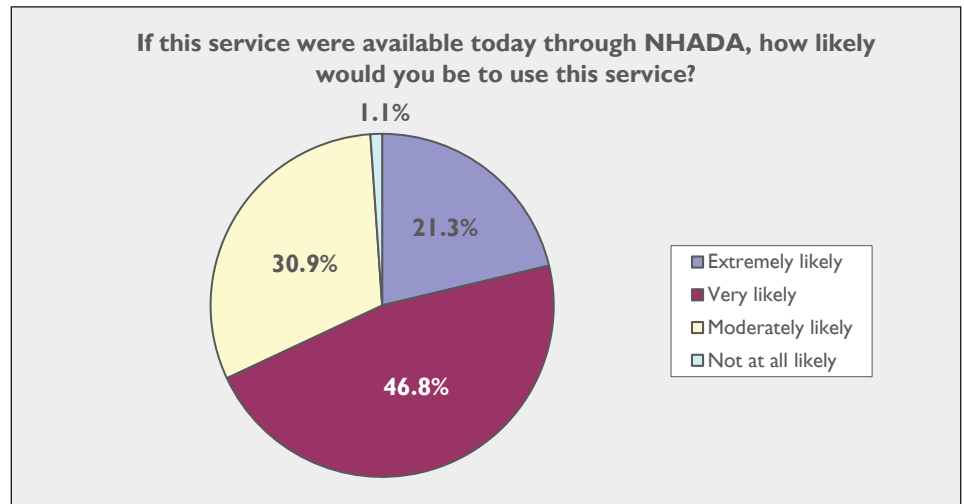
We have done our due diligence and found three leadership and management training specialists in New England and invited them to present at the NHADA Leadership & Management Summit.

With these 75-minute sessions, you are guaranteed to take back information that will assist you in managing your company.

In addition, your feedback will assist us in providing future in-depth training sessions at NHADA.

Jim Kimberly is president and founder of Sapphire Consulting. He also presented at an earlier event and was instrumental in helping to write our survey.

After spending more than two decades in senior leadership positions in the human services, employee assistance and behavioral healthcare fields, he began consulting with businesses and industries in 1990, and has worked with a wide variety of organizations including healthcare, higher education, police departments, utilities, publishers, manufacturers, financial services and high technology firms. Jim has extensive management experience in leadership, sales, business development and operations.



With a MSW (University of Buffalo), BA in Sociology and Anthropology (Ripon College) and advanced certification in emotional intelligence and coaching, Jim is a skilled speaker, trainer and facilitator offering a high-energy focus to sensitive human resource-related topics. He holds memberships in the Association for Corporate Growth, Organizational Development Network, Society of Human Resource Management and the Human Resource Leadership Forum.

Jim is also an active member of The Heart of Coaching Consortium, a national consultant's forum committed to the building of coaching cultures within organizations.

Gerri King, Ph.D., president and founding partner of Human Dynamics Associates, based in Concord, NH, is a social psychologist and organizational consultant to corporations, nonprofits, governmental agencies, and educational and healthcare institutions. She works throughout the U.S., Asia, and Canada with a focus on mergers and acquisitions, strategic planning,

leadership and supervisory training, conflict resolution, managing change, and enhancing teams.

Gerri also has a new book out, available on Amazon.com, *The 'DUH' Book of Management and Supervision — Dispelling Common Leadership Myths.*

David Lee, founder of HumanNature@Work, is an internationally recognized authority on organizational and managerial practices that optimize employee performance. David is the author of *Managing Employee Stress and Safety and Storytelling for Trainers*, as well as nearly one hundred articles and book chapters on employee and organizational performance that have been published in North America, Europe, India, Australia, and China. The second edition of the business classic *The Talent Management Handbook* includes a chapter of his about on-boarding.

He has worked in the healthcare field as a clinician, supervisor, and trainer, and in the corporate world as a manager and trainer.

Leadership – continued on page 14

In addition to his own work with both high performance and struggling organizations, David Lee draws from a broad range of disciplines including neuroscience; stress research; accelerated learning; organizational development; paleopsychology, the investigation of mental phenomena traceable to or persisting from an earlier stage in evolution; anthropology; and peak performance technologies. Taking this research, which typically doesn't find its way into the business world, David translates these principles of human nature into leadership and managerial practices that optimize employee performance.

Using the popular TV show “The Dog Whisperer” as an analogy for the difference understanding human nature makes, David’s work helps leaders and managers become “Employee Whisperers.”

Because the legal aspect of managing is every bit as important, we have asked two of NHADA’s association partners with hotlines to also speak on Employment Law: Managing by the Rules.

Margaret “Peg” O’Brien, Esq. serves as chair of Devine Millimet’s Labor & Employment practice group. She exclusively represents management in the resolution of employment-related disputes before state and federal courts and administrative agencies.

While Peg has experience performing all aspects of employment work, her daily practice primarily focuses on either providing clients with risk management advice or aiding them with a defense in the event of an employment claim.

At present, Peg is chair of the NH Bar Association Labor and Employment Section. She frequently presents at seminars on employment law issues and enjoys speaking with different human resources

and trade groups. She has practiced law for more than 20 years in NH, and has handled litigation in all ten counties in NH and federal court. Peg has extensive jury trial experience as well as extensive experience appearing before government agencies.

Peg serves as the point person for the “employment law” hotline services offered by Silver-level partner Devine Millimet through the NHADA to its members. The hotline number is 603-695-8582.

Jennifer Shea Moeckel, Esq. is a member of Cook, Little, Rosenblatt & Manson, p.l.l.c. She devotes her practice exclusively to assisting employers in complying with legal requirements during all phases of the employment relationship and defending employers in discrimination and other claims pending before state and federal agencies.

Jen has almost 20 years of experience assisting employers with issues including: hiring and background checks; non-compete and non-disclosure agreements; wage-and-hour laws and payroll compliance; employee handbooks and policies; drug and alcohol testing; safety and workplace

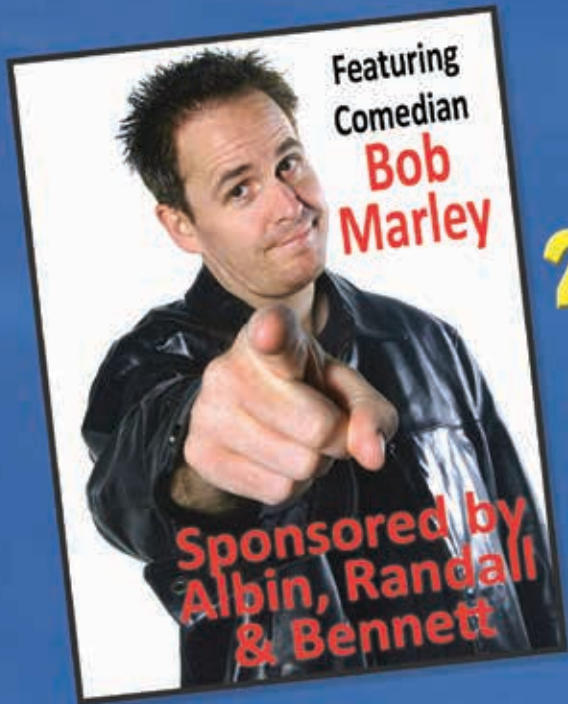
violence; managing leaves of absence and requests for reasonable accommodation; performance management and best practices; preventing and correcting harassment, discrimination, and retaliation; corrective/disciplinary action, employee misconduct, and termination; layoffs/reductions in force; severance agreements; and personnel files and record-keeping.

Jen provides in-house training for employers on issues including harassment prevention and managing within the law. Jen also conducts workplace investigations and defends employers before the New Hampshire Commission for Human Rights, Equal Employment Opportunity Commission, and state and federal Departments of Labor.

Jen serves as the point person for the “employment law” hotline services offered by Cook, Little, Rosenblatt & Manson, p.l.l.c. through the NHADA to its members. The hotline number is 603-206-4901.

Plan to send your management team to learn from these experts. Registration materials have been sent or register online at nhada.com. Reach me at jconlon@nhada.com or 800-852-3372. 📍





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Be Prepared for a Department Of Labor Audit Process

NHADA Loss Prevention staff recently have heard reports from association members of visits by the U.S. Department of Labor, prompting us to provide you with this timely information.

Peg O'Brien, Esq., Devine, Millimet & Branch, PA

A wage and hour audit can occur at any time, with or without prior notice. For that reason, employers should have a plan. It is crucial that you understand the potential scope of the investigation, the type of information that the investigator will review, and the location and condition of that information. Decisions should be made in advance as to how the investigator will be treated, the level of access to records and personnel that will be provided, and the persons who will be responsible for interacting with the investigator.

Both the federal and state departments of labor are empowered to conduct audits.

See 29 U.S.C. §211; NH R.S.A. 273:9. Typically, the audit will cover the prior two to three years and will focus on compliance with laws and rules related to payment of wages, minimum wage, child labor and record-keeping. The state and federal wage and hour laws authorize representatives of each department of labor (US DOL and NH DOL) to investigate and gather data from employers concerning wages, hours, and other employment practices.

If the DOL decides to investigate an employer, investigators are permitted to enter and inspect the company's premises and records, to interview employees, to make initial determinations as to whether the law has been violated, and to determine if money is owed to employees. Both the state and federal DOLs have the authority to levy penalties above the amounts owed to employees and to adjust disputes with employers; or, if a resolution cannot be reached, commence enforcement proceedings.

In many cases, an audit is precipitated by a complaint filed by an employee. Other audits are the result of targeted enforcement of particular industries. Less often, audits are conducted randomly or as a result of an industry wide probe. No matter what the moving force is behind the DOL's decision to conduct an audit, it will usually proceed according to one or two paths.

The first type of audit is all in writing. The notification of the audit is in writing and is accompanied by a request for copies of certain employer records and the employer is expected to provide a



Margaret O'Brien, Esq.

written response. The second and more common type of audit is when an inspector visits the workplace, either with or without advance notice, and asks to review documents and interview witnesses on site. The department may also combine the two different audit methods.

Twelve Steps to a Successful Response to an Audit

- 1. Be Prepared.** Of course, it goes without saying that staying up to date and in compliance with all of the state and federal wage and hour laws before an audit takes place is key to surviving an audit. Also, it is important to have an organized record-keeping system.
- 2. Don't Panic!** There is no reason to panic, even if you know that there are problems with your records and payroll practices. Make sure that you know your rights going into the investigation and get advice on how to manage the investigation process.
- 3. Do Not Call Your Legislator/Congressperson!** Elected officials should not interfere with administrative agencies activities and your efforts to invoke their assistance will likely backfire.
- 4. Make Compliance a Goal.** Investigators are more likely to work in a collaborative fashion with employers who make clear that it is their goal to achieve and maintain compliance and to act as a responsible corporate citizen.
- 5. Assign a Company Representative to be the Liaison for the Investigation.** This person should be the key contact between the company and the investigator. This

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NHADA Association Partner

person should be knowledgeable of the audit process, the employer's record-keeping and payroll procedures, and should have access to employer records. Above all, the liaison should be courteous and diplomatic. The investigator should be instructed to communicate through the liaison. Your liaison should keep track of all records reviewed or provided to the investigator, what questions he/she asked, and the response given. The liaison should escort the investigator around the workplace and keep detailed notes of the process.

6. Be Courteous to the Investigator. You should make the investigator feel comfortable in your workplace. Preferably, set them up in an office near the front office. Be aware of where they are physically placed in your workplace, with whom they will come into contact and what they will see.

7. Request a Pre-Investigation Meeting. Everyone benefits from conducting the audit in an organized manner. Find out what the department would like to inspect and how you can help. A short delay in commencing the investigation is often granted if you are courteous.

8. Do the Investigator's Work for Him/Her. It is important to limit the investigator's broad access to company records and employee files. Don't allow a fishing expedition. For example, if the investigator asks for I-9s — don't hand them the whole personnel file — just hand them the I-9s. Also, do not volunteer information about the company, and if the representative isn't sure whether you have an obligation to disclose the information, he/she should check with your legal counsel first.

9. Don't Offer the Investigator Original Documents! This is an important, but

oftentimes overlooked step in the process. The investigator will be fine with copies. A best practice is to keep a log of the documents (hard copy or electronic) that you have produced to the government.

10. Protect Proprietary Information. This is an issue that you should discuss with counsel prior to the start of the audit. You must always safeguard confidential company information.

11. Provide Information Requested. The company must be thoroughly compliant with the department's request — even when you know it is going to lead to a violation.

12. Fix problems. Most employers receive a written finding of a violation of at least one or two rules. In general, and especially where they are on the minor side, the department's goal is to see that the company is in compliance. So, it is

Audit Process – continued on page 21



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How to Document the Sale of an As-Is Vehicle

Lisa Lavoie, AUTOCap Coordinator

Two forms must be completed by the dealer and signed by the consumer during an As-Is sale:

- 1. Buyer's Guide:** a federal form that requires the dealer to disclose that it is AS-IS. The AS-IS-NO WARRANTY box must be checked. Consumer's signature is suggested but not mandatory. Your NHADA store carries this form; find it at <http://nhadastore.com/buyers-guide-BG-1985/> (Item No. BG-1985).
- 2. Dealer Warranty Disclaimer:** This is a State of NH form that must be signed by the dealer and the



Lisa Lavoie

consumer. This form is available at your NHADA store; find it at <http://nhadastore.com/warranty-disclaimer-lw-2/> (Item No. LW-2).

Even with the Roy v. QPA ruling, the NHADA recommends the use of this

Dealer Warranty Disclaimer form whenever selling an "As-Is" vehicle, even if the vehicle is properly disclosed as "unsafe".

How to document the sale of an unsafe motor vehicle

Because the dealer can sell a car that does not pass safety or emissions two separate forms are required:

- 1. The Notice of Sale of Vehicle that Does Not Pass OBD II Emissions Testing:** RDMV 950A must be issued anytime a vehicle is sold that does not pass emissions regardless if it passes

the safety inspection. This must be signed by the consumer and the dealer and a copy must be sent to the NH Division of Motor Vehicles (DMV).

- 2. The Notice of Sale of Unsafe Motor Vehicle:** RMDV 950 must be issued for any vehicle that is sold with safety deficiencies. The consumer must sign the form and check whether they want to have a safety inspection or not. Although it is not required, NHADA believes that it is in the best interest of all parties to have a safety inspection completed and for the deficiencies to be listed on the form. This must be signed by the consumer and the dealer and a copy must be sent to the DMV.

It is important to note that both forms are necessary if the vehicle does not pass both emissions *and* safety. RDMV 950A and RDMV 950 forms can be obtained from the DMV's Dealer Desk by sending a fax request to 603-271-1061. 📌

Dealerships That Participate in Workforce Study by April 29 Will Receive Two Complimentary Reports

NADA and ATD member dealerships that participate in the NADA/ATD Dealership Workforce Study by completing a questionnaire and submitting payroll records will receive two complimentary reports.

Automotive Retail: National & Regional Trends in Compensation, Benefits & Retention is the industry's top resource for helping dealers meet their No. 1 challenge of attracting and retaining productive employees. It contains clear analysis of the light-vehicle and commercial-truck industry. The report includes national and regional data for 60 car and truck

dealership positions. In addition to data on pay, benefits and turnover, the report details the impact of work schedules, gender gap and generational challenges facing dealerships today. Participants will also receive a complimentary individualized comparative report for each participating dealership.

To enroll in the 2016 Dealership Workforce Study, which is open through April 29, visit www.nadaworkforcestudy.com and enter your Member (Company) ID. For questions, email WorkforceStudy@nada.org or call 800.557.6232. 📌

Source: NADA Dealership Operations

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NHADA Association Partner

Updated Dealer and Inspection Rules On The Way

Daniel Bennett, Vice President of Government Relations

Although they don't garner a great deal of notoriety, the Saf-C 3200 & Saf-C 2000 rules issued by the Department of Safety (DOS) guide your everyday actions as an inspection station or retail vehicle dealer.

Almost two years ago, NHADA started conversations with our partners at the DOS and the Division of Motor Vehicles (DMV) on the recent deadline being set for the update and issuance of the new versions of these rules.

Rule-making in NH is a very burdensome and time-consuming process. After all the different versions, public comments and hearings, and all other stakeholder input, final approval must be given by the Joint Legislative Committee on Administrative Rules (JLCAR). For JLCAR, made up of state Senators and Representatives and state attorneys, literally every *t* must be crossed and *i* dotted.

So it is with a sigh of relief that I tell you new dealer and inspection rules recently have been approved by JLCAR and, except for minor tweaks along the way, they will be in place and in effect for ten years, until 2026, when we do it all over again!

About the time this edition of *Dateline: NH* lands at your business, you will receive educational guidance from NHADA instructing you on what the various changes to the sets of rules are. We will highlight the changes that you most certainly will want your staff and customers to be immediately aware of.

DMV has informed us they plan on reaching out at about the same time as well. We also will provide you links to where you can obtain new sets of the rules for the business and your staff.

These new rules are critical to the

operation of your businesses. They received great scrutiny on your behalf from NHADA internally as well as from a team of expert volunteer members such as Holly Carlson of Carlson's Motor Sales, Inc.; Larry Foss of Foss Motors, Inc.; Rick Gauthier of Banks Chevrolet-Cadillac-Buick-GMC Autos, and Dan Weed of Weed Family Automotive Inc. We owe

them much thanks for putting in a great deal of effort and hard work on reviewing the various DOS proposals and assessing industry and consumer impact.

Keep on the lookout for upcoming announcements on your new retail vehicle dealer and inspections stations rules.

Do not hesitate to reach out to me with any questions at dbennett@nhada.com or call 800-852-3372. 🇺🇸

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FTC Announces Enforcement Actions Related to the Advertisement of Vehicles Subject to an Open Safety Recall

The Federal Trade Commission (FTC) has been investigating whether an advertisement is deceptive and thus prohibited under the FTC Act if it states or implies that a used vehicle, subject to an unrepaired open safety recall, is safe to drive (such as by stating that it is certified or subject to a qualified assurance or multi-point inspection).

Details on this point were described recently by Andy Koblenz, NADA executive vice president of legal and regulatory affairs and general counsel, who addressed to the NADA Board of Directors at its meeting in Dallas, and

... NADA suggests that, prior to sale, dealers check the recall status of all used vehicles using the NHTSA recall website ...

by Paul Metrey, NADA vice president of regulatory affairs and chief regulatory counsel, who explained it to ATAEs at the recent legal conference in Chicago.

Recently the FTC announced proposed consent orders with General Motors and two dealers to resolve several of those investigations. Because these investigations are nonpublic and the FTC has not previously issued specific guidance on this issue, the FTC press release and documents that accompany it finally provide insight into the FTC's specific compliance expectations with respect to these types of advertisements.

While GM and the two dealer respondents must fulfill other obligations under the consent orders, the following provisions related to their prospective duties provide the most useful guidance to dealers:

- The dealer may not represent that used vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to a safety-related inspection unless:
 - a) those vehicles are not subject to an open safety recall or
 - b) the dealer clearly and conspicuously discloses — in close proximity to such representation — any material qualifying information related to open safety recalls including but not limited to:
 - (i) the fact that its used vehicles may be subject to unrepaired recalls for safety issues and
 - (ii) how consumers can determine whether a motor vehicle is subject to an open safety recall that has not been repaired (which, although not stated in

this portion of the order, presumably can be accomplished by directing the consumer to NHTSA's recall website at <https://vinrcl.safercar.gov/vin/>);

- If the dealer receives written notice from a manufacturer that a used motor vehicle is subject to an open safety recall, it must provide that notice to the consumer prior to the consummation of the sale of that vehicle; or provide a document with the same information and in a substantially similar format; and
- The dealer may not misrepresent a vehicle's safety recall status, whether the dealer repairs vehicles subject to an open recall, and any other material fact about the safety of vehicles it advertises for sale.

Note that the second bullet above appears to apply to any sale of a used vehicle to a consumer for which the dealer has received a safety recall notice from a vehicle manufacturer it represents. Consistent with past guidance, NADA suggests that, prior to sale, dealers check the recall status of all used vehicles using the NHTSA recall website identified above or a manufacturer's VIN specific lookup. If the results indicate that an un-remediated federal safety recall applies, a copy of those results should be provided to prospective purchasers, including both consumers and commercial customers. Upon consummation, NADA also suggests that the dealer obtain an acknowledgement from the purchaser that a written recall notice has been provided. Dealers should consult their legal counsel concerning their specific legal obligations.

Additional guidance on this topic will be provided to NADA members in the future. ▲

- Wes Lutz, Chairman, Regulatory Affairs Committee

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Five Types of Insurance Benefits for Our Members

Laurie Churchill, Field Representative

Medical: Health Insurance protects you, your employees and your families financially in the event of an unexpected illness or injury that could be very expensive. Besides offering access to affordable health insurance plans through Anthem Blue Cross Blue Shield, we offer group coverage that helps businesses with employee retention and tax benefits. We can help you find the right level of benefits to meet your needs.

Dental: Our goal is to advance the oral health and overall wellness of our members by providing innovative dental benefits with quality plan designs through Northeast Delta Dental. These unique features combine to give our dental programs superior value. Dental benefits are consistently cited as one of the most sought after employee benefits.

Life and AD&D: Life insurance coverage doesn't begin when it's time to write a claim check. We provide resources your employees and their families can use right now to help manage emotional, financial and legal issues through Anthem Life. Our array of benefits enables us to tailor a life insurance plan to meet your unique needs.

Short-Term Disability: Our disability plans through Anthem Life get your employees back to health, back to work, back to life. We deliver complete care at an affordable cost with less hassle.

Vision: Vision benefits are more critical to a benefits package than you might think. Employees who have a vision benefit are nearly twice as satisfied with their benefits. With our VSP Vision



Laurie Churchill

Care plans, you spend less and get more when it comes to your eye care and eye wear needs. We put members first to deliver the best care at the lowest out-of-pocket costs.

We are always delighted to explain more about these benefits. Contact me directly by email at lchurchill@nhada.com or call 800-852-3372 to obtain further details. ▲

Audit Process – continued from page 17
important for the company to quickly and effectively respond to any violations (unless, there is a good faith reason to dispute the finding). ▲

Margaret O'Brien is an attorney at Devine, Millimet, a Silver-level association partner located at 111 Amherst Street in Manchester. She can be reached at 603-695-8631.

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Safety/OBD II Inspections Statistics				
Safety Inspection Results	Jan '16	Percent of Total	YTD '16	Percent of Total
Total *	121,680	100.00%	121,680	100.00%
Passed	97,067	79.80%	97,067	79.80%
Corrected	13,163	10.80%	13,163	10.80%
Rejected	7,236	5.90%	7,236	5.90%
Untested	4,214	3.50%	4,214	3.50%
OBD II Inspection Results (1996 and newer)				
Total	109,959	100.00%	109,959	100.00%
Passed	95,697	87.00%	95,697	87.00%
Rejected	9,282	8.40%	9,282	8.40%
Untested	4,980	4.50%	4,980	4.50%
* Total numbers include OBD II Inspections				
<i>Statistics provided by Gordon-Darby</i>				

2015 Unemployment Rates by Area			
	Oct	Nov	Dec
United States	4.8%	4.8%	4.8%
New England	4.3%	4.4%	4.4%
Connecticut	4.8%	4.8%	5.0%
Maine	3.5%	3.9%	3.8%
Massachusetts	4.5%	4.5%	4.6%
New Hampshire	3.0%	3.2%	2.9%
Rhode Island	4.7%	4.9%	4.8%
Vermont	3.2%	3.5%	3.1%

NHADA Mission Statement: *To be the voice of the motor vehicle industry by providing services, education and investment in New Hampshire's economy.*

Title Statistics Report Ending January 2016				
<i>New Hampshire Department of Safety, Division of Motor Vehicles</i>				
	Jan '16	Jan '15	'16 YTD	'15 YTD
Titles Issued for New and Demo Vehicles:	12,179	7,752	12,179	7,752
Titles Issued for Used Vehicles:	24,736	14,427	24,736	14,427
TOTAL TITLES ISSUED:	36,915	22,179	36,915	22,179
Titles Issued with a Lien:	16,849	11,410	16,849	11,410
Titles Issued with no Lien:	20,066	10,769	20,066	10,769
Salvage Titles Issued:	1,577	900	1,577	900
Salvage Tags Issued:	127	105	127	105
Titles Issued for Heavy Trucks More than 15 Years Old:	33	26	33	26
Titles Issued for Heavy Trucks 15 Years Old or Less:	141	115	141	115
Titles Issued for Trailers:	857	395	857	395
Titles Issued for Motorcycles:	577	368	577	368
Titles Issued for Motor Homes:	60	28	60	28

Thank You 2016 NHADA Partners!

These Partners have answered the call and supported NHADA programs and events. Please consider your partners first when you need professional services for your business. To become a 2016 NHADA Partner please call Jean Conlon at 800-852-3372. Compiled February 22, 2016. Companies endorsed by the NHADA are listed first within each association partner level.

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