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STATE

Littler on

New Mexico Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in New Mexico employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

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ACKNOWLEDGEMENTS

Erin M. Reid-Eriksen, Susie Papreck Wine, and Deanne Meyer would like to gratefully acknowledge the contributions of the attorneys who make this publication possible:

- Geetika Antani;
- Vincent Bates;
- Sebastian Chilco;
- Brittney Gibson;
- Maureen H. Lavery;
- Christine McDaniel Novak;
- Lilanthi Ravishankar;
- Rachel Simek;
- Mike Skidgel;
- Hannah Stilley; and
- Christine Sellers Sullivan.

Additional research and editing assistance was also rendered by Barb Olson.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

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3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In New Mexico, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The New Mexico Department of Workforce Solutions has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Fair Employment Practices Laws	New Mexico Department of Workforce Solutions, Human Rights Bureau	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Income Taxes	New Mexico Taxation and Revenue Department	Multi-factor balancing test set forth by the Taxation and Revenue Department.[6] An individual may be an *employee* if: • income tax is withheld from their paycheck;

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding with the New Mexico Department of Workforce Solutions is available at https://www.dol.gov/whd/workers/MOU/nm.pdf.

[6] New Mexico Taxation & Revenue Dep't, *Independent Contractors vs Employees: Which one are you? available at* http://www.tax.newmexico.gov/Individuals/independent-contractors-vs-employees.aspx.

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Table 1. State Tests for Classifying Workers		
		• the individual is covered by workers' compensation; • the business or organization paying wages also pays Social Security taxes and unemployment insurance on their behalf ; • the business or organization considers the individual an employee; or • the business or organization controls how the individual performs the job.[7] Conversely, the Taxation and Revenue Department contends that an individual may be an *independent contractor* if: • the individual creates their own schedule and hours; • the individual is responsible for costs associated with the service provided, including costs of vehicle, supplies, or equipment; • the business or organization provides a federal Form 1099 instead of a Form W-2; or • the individual has full control over how to provide service to the business or organization paying for the services.[8] The department will also accept a determination made by the Internal Revenue Service (IRS) regarding an individual's status as either independent contractor or employee.[9]
Unemployment Insurance	New Mexico Department of Workforce Solutions, Unemployment Insurance	Statutory ABC test. *Employment* is defined as "services performed by an individual for an employer for wages or other remuneration unless and until it is established by a preponderance of evidence that: (a) the individual has been and will continue to be free from control or direction over the

[7] New Mexico Taxation & Revenue Dep't, *Independent Contractors vs Employees: Which one are you?*

[8] New Mexico Taxation & Revenue Dep't, *Independent Contractors vs Employees: Which one are you?*

[9] New Mexico Taxation & Revenue Dep't, *Independent Contractors vs Employees: Which one are you?*

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Table 1. State Tests for Classifying Workers		
		performance of the services both under the individual's contract of service and in fact; (b) the service is either outside the usual course of business for which the 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 (c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service"[10]
Wage & Hour Laws	New Mexico Department of Workforce Solutions, Wage and Hour Bureau	IRS 20-factor test.[11]
Workers' Compensation	New Mexico Workers' Compensation Administration	Common-law "right to control" test, and "it is the character of such authority or control that is the usual and generally accepted distinction between independent contractors and employees."[12] New Mexico has adopted the test developed in the Restatement (Second) of

[10] N.M. STAT. ANN. § 51-1-42. New Mexico courts apply the statutory ABC test; all three factors of the test must be met to overcome the presumption of employment. *See Solar Age Mfg., Inc. v. Employment Sec. Dep't*, 714 P.2d 584 (N.M. 1986).

[11] Under the New Mexico Minimum Wage Act, *employee* is defined as "an individual employed by an employer." N.M. STAT. ANN. § 50-4-21. There is no definition of employee in the wage payment law. *See* N.M. STAT. ANN. § 50-4-1.

[12] *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1330 (N.M. 1996) ("[T]he employer controls the result the independent contractor achieves, but when the control descends to the details or to the means and methods of performance, the independent contractor becomes a servant or employee.") (citation omitted). In the Restatement (Second) of Agency, an *independent contractor* is "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." *Harger*, 916 P.2d at 1331 (quoting RESTATEMENT (SECOND) OF AGENCY § 2). Conversely, a *servant* is "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control." *Harger*, 916 P.2d at 1330 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1)). The individual claiming workers' compensation benefits bears the burden of establishing they are an employee and not an independent contractor. *Benavidez v. Serra Blanca Motors*, 959 P.2d 569, 571 (N.M. Ct. App. 1998).

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Table 1. State Tests for Classifying Workers		
		Agency Section 220.[13] The following factors are used to examine whether an alleged employer has the right to control: "whether the party employed engages in a distinct occupation or business; whether or not the work is a part of the employer's regular business; the skill required in the particular occupation; whether the employer supplies the instrumentalities, tools, or the place of work; the duration of a person's employment, and whether that person works full-time or regular hours; or whether the parties believe they have created the relationship of employer and employee, insofar as this belief indicates an assumption of control by one and submission to control by the other."[14] However, "[i]n specific situations, other factors may be significant to determine whether the employer has the right of control."[15]
Workplace Safety	New Mexico Environment Department, Occupational Health & Safety Bureau	While New Mexico has an approved state plan under the federal Occupational Safety and Health Act, there are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and

[13] *Harger*, 916 P.2d at 1331; *see also Owens v. Tramway Ridge Apts., L.L.C.*, 2013 WL 4516038, at **2-3 (N.M. Ct. App. June 13, 2013).

[14] *Harger*, 916 P.2d at 1334 (citing RESTATEMENT (SECOND) OF AGENCY § 220).

[15] *Harger*, 916 P.2d at 1334.

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Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[16]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[17] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[18]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

New Mexico does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in New Mexico should follow federal law requirements regarding employment eligibility and verification.

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement

[16] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[17] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[18] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

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guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[19] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

New Mexico has enacted a ban the box law. If a private employer uses a written or electronic employment application, the employer cannot make an inquiry regarding an applicant's history of arrests or convictions on the employment application. After reviewing an applicant's application and upon discussion of employment with the applicant, the employer may consider an applicant's conviction history.[20] Notably, the statute does not appear to permit the employer to consider an applicant's arrest history.

An employer is not prohibited from notifying the public or an applicant that the law or the employer's policy could disqualify an applicant who has a certain criminal history from employment in particular positions with that employer.[21]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

As discussed above, an employer is permitted to consider an applicant's conviction history upon discussion with of employment with the applicant, after reviewing the applicant's initial application.[22]

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[19] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[20] N.M. STAT. ANN. § 28-2-3.1.

[21] N.M. STAT. ANN. § 28-2-3.1.

[22] N.M. STAT. ANN. § 28-2-3.1.

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1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

In New Mexico, certain juvenile drug offenses may be expunged from a criminal history. Thereafter, the person may not be found under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of them for any purpose.[23]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[24] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[25] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[26]

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[23] N.M. STAT. ANN. § 30-31-28.

[24] 15 U.S.C. §§ 1681 *et seq*.

[25] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[26] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

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1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

New Mexico does not have a mini-FCRA law and there are no other provisions restricting the use of credit information and history by employers. In fact, a New Mexico employer may obtain credit information about an employee or prospective employee from a credit bureau if it certifies that the information will be used for a "*bona fide* business transaction" such as, for the purpose of evaluating the applicant's or employee's qualifications for employment.[27] *Credit bureau* is defined as any business engaging in furnishing credit information about consumers.[28]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Unlike most state laws restricting an employer's access to social media accounts, New Mexico's law only applies to job applicants and not to current employees. Under New Mexico law, an employer cannot:

- request or require a prospective employee to provide a password to gain access to their social networking account or profile; or
- demand access in any manner to a prospective employee's social networking account or profile.[29]

A *social networking website* is defined as an internet-based service allowing an individual to: "(1) construct a public or semi-public profile within a bounded system created by the service; (2) create a list of other

[27] *See* N.M. STAT. ANN. § 56-3-4.

[28] N.M. STAT. ANN. § 56-3-1.

[29] N.M. STAT. ANN. § 50-4-34(A).

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users with whom they share a connection within the system; and (3) view and navigate their list of connections and those made by others within the system."[30]

Notwithstanding the social media restrictions, an employer can obtain information about a prospective employee that is in the public domain.[31] In addition, an employer can promulgate and maintain lawful workplace policies regarding workplace internet use, social networking site use, and email use.[32]

An employer can also monitor usage of its electronic equipment and email *without* requesting or requiring a prospective employee to provide a password or other related account information to gain access to the prospective employee's account or profile on a social networking site.[33]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[34] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

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[30] N.M. STAT. ANN. § 50-4-34(E).

[31] N.M. STAT. ANN. § 50-4-34(C).

[32] N.M. STAT. ANN. § 50-4-34(B).

[33] N.M. STAT. ANN. § 50-4-34(B).

[34] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

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1.3(d)(ii) *State Guidelines on Polygraph Examinations*

New Mexico law contains no express provisions regulating polygraph examinations for applicants or employees.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[35] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[36] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

New Mexico law contains no express provisions regulating preemployment drug or alcohol screening by private employers.

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance;

[35] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[36] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	• that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[37] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[38] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[39] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[40]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[41] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[42]
Benefits & Leave Documents: Family and	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each

[37] 26 U.S.C. § 36B.

[38] 42 U.S.C. § 18071.

[39] 29 U.S.C. § 218b.

[40] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[41] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[42] 29 C.F.R. § 2590.606-1.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Medical Leave Act (FMLA)	employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[43] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[44] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[45]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[46] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[47]

[43] 29 C.F.R. § 825.300(a).

[44] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[45] 29 C.F.R. § 825.300(a).

[46] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[47] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

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Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[48]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[49]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Healthy Workplaces Act - Earned Paid Sick Leave Notice	When employment begins, employers must give written or electronic notice to an employee of the following information: • the right to paid leave; • the manner in which leave accrues and is calculated; • the terms of leave use under the Act; • the Act's anti-retaliation provisions; • the right to file a complaint with the state labor department if the employer denies leave or retaliates against an employee; and • all means of enforcing violations of the law. Generally, the individual notice must be in English, Spanish or any language that is the first language spoken by at least 10% of the employer's workforce. Employers can comply with the requirement via a model notice created by the state labor department.[50]
Fair Employment Practices Documents	No notice requirement located.

[48] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[49] 29 C.F.R. § 531.59.

[50] N.M. CODE R. § 11.1.6.10. The model notice is available at https://www.dws.state.nm.us/NMPaidSickLeave.

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Table 3. State Documents to Provide at Hire	
Category	**Notes**
Tax Documents	New Mexico does not have a form equivalent to the federal Form W-4. However, employees can continue to use the Form W-4 for state withholding, but should use the state withholding tables found in FYI-104.[51]
Wage & Hour Documents	No notice requirement located.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[52] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[53]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

[51] *New Mexico Taxation and Revenue Dep't., FYI-104*, *available at*: https://www.tax.newmexico.gov/businesses/wp-content/uploads/sites/4/2022/12/FYI-104.pdf.

[52] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[53] 42 U.S.C. § 653a.

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Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[54] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of New Mexico's new hire reporting law.

Who Must Be Reported. An employer must report employees hired, rehired, or returned to work after being laid off, furloughed, separated, granted an unpaid leave, or terminated.[55]

[54] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[55] N.M. STAT. ANN. § 50-13-3(A).

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Report Timeframe. Reporting should be done not later than 20 days after the hiring date. If the report is submitted magnetically or electronically, it should be done twice per month if necessary, and not less than 12 nor more than 16 days apart.[56]

Information Required. Employers must report the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number.[57]

Form & Submission of Report. The following are acceptable forms for submission: Form W-4, New Mexico new hire reporting form, and printed lists. The report may be submitted online, by new hire data entry software, first-class mail, magnetically, or electronically.[58]

Location to Send Information.

New Mexico New Hire Directory
PO Box 2999
Mercerville, NJ 08690
(888) 878-1607
(505) 995-8230
(505) 995-8232 (fax)
(888) 878-1614 (fax)
https://nm-newhire.com/

Multistate Employers. An employer in New Mexico that also employs persons in another state and transmits reports magnetically or electronically must designate one state in which the employer has employees to which the employer will transmit the report. Any employer that transmits such reports must notify the state directory of new hires in writing as to which state the employer designates for the purpose of sending reports.[59]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a

[56] N.M. STAT. ANN. § 50-13-3(F).

[57] N.M. STAT. ANN. § 50-13-3(C).

[58] N.M. STAT. ANN. § 50-13-3(G).

[59] N.M. STAT. ANN. § 50-13-3(D).

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business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[60] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

New Mexico does not have a noncompete agreement statute that applies generally to private employers. Employers can look to case law to determine if a noncompete is enforceable. Covenants not to compete that restrict employment present competing principles: the freedom to contract and the freedom to work. Furthermore, the public has an interest not only "in protecting the freedom of persons to contract and in enforcing contractual rights and obligations[,]" but also in "seeing that competition is not unreasonably limited or restricted [.]"[61]

The New Mexico Supreme Court has held that noncompete restrictions will be enforceable if they are reasonable. Whether a restraint is reasonable depends on the facts of the case.[62] Covenants not to compete with reasonable restraints will be enforced when "they are not against public policy, and any detriment to the public interest in the possible loss of the services of the covenantor is more than offset by the public benefit arising out of the preservation of the freedom of contract."[63]

Enforceability Following Employee Discharge. New Mexico courts have not frequently addressed noncompetes when the employer terminates the employment relationship, but one court invalidated a noncompete in the context of a discharge without cause.[64]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the

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[60] 18 U.S.C. §§ 1832 *et seq.*

[61] *Lovelace Clinic v. Murphy*, 417 P.2d 450, 453-54 (N.M. 1996).

[62] *KidKare, P.C. v. Mann*, 350 P.3d 1228, 1231 (N.M. Ct. App. 2015).

[63] *Lovelace Clinic*, 417 P.2d at 454.

[64] *Danzer v. Professional Ins., Inc.*, 679 P.2d 1276, 1280-81 (N.M. 1984).

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employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

New Mexico courts have held that signing a noncompete at inception of employment is sufficient consideration.[65] Courts have also enforced noncompete agreements executed during employment, implying that continued employment is sufficient consideration;[66] however, at least one court has stated that continued at-will employment does not constitute adequate consideration for an employment contract binding an employee to post-employment covenants.[67]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

In New Mexico, if the parties agree to reformation of the terms in the original contract, courts will follow the contractual wishes of the parties.[68]

2.3(b)(iv) *State Trade Secret Law*

When an employee leaves a business, the employee will sometimes take valuable information of the business to use for competitive purposes. Even without a written contract, an employer may protect a trade secret and prohibit the former employee from disclosing or using it, based on the employee's common-law duty not to do so. New Mexico has also adopted the Uniform Trade Secrets Act.[69]

Definition of a Trade Secret. Under the New Mexico Uniform Trade Secrets Act, a *trade secret* is defined as a complication of information, including a formula, pattern, compilation, program, decide, method, technique, or process that:

1. derives independent economic value, present or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[70]

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[65] *Taylor v. Lovelace Clinic*, 432 P.2d 816, 818 (N.M. 1967).

[66] *Taylor*, 432 P.2d at 818.

[67] *Piano v. Premier Distributing Co*., 107 P.3d 11 (N.M. 2004) (continued at-will employment not sufficient to enforce arbitration agreement).

[68] *KidKare, P.C.*, 350 P.3d at 1232 (employment agreement specifically provided for amendment of any provision found to be overly broad).

[69] N.M. STAT. ANN. §§ 57-3A-1 *et seq*.

[70] N.M. STAT. ANN. § 57-3A-2(D).

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Misappropriation of a Trade Secret. Under the New Mexico Act, liability attaches if the trade secret is misappropriated. *Misappropriation* is defined as:

1. acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. disclosure or use of a trade secret of another without express or implied consent by a person who:
    a. used improper means to acquire knowledge of the trade secret; or
    b. at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
        i. derived from or through a person who had utilized improper means to acquire it;
        ii. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
        iii. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    c. before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[71]

Actual or threatened misappropriation may be enjoined.[72] Additionally, damages including the actual loss caused by the misappropriation as well as unjust enrichment may be available.[73]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

New Mexico offers no statutory guidance addressing ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

[71] N.M. STAT. ANN. § 57-3A-2(B).

[72] N.M. STAT. ANN. § 57-3A-3.

[73] N.M. STAT. ANN. § 57-3A-4.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[74]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[75]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[76]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[77]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[78]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[79]

[74] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[75] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[76] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[77] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[78] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[79] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[80]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[81]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[82] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[83]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[84]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by

[80] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[81] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[82] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[83] 41 C.F.R. §§ 60-300.44, 60-741.44.

[84] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	attaching a notice to the contract, or may post the notice at the worksite.[85]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[86]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[87]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[88]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[89]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their

[85] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[86] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[87] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[88] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[89] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

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Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[90] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[91]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[92]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[93]

[90] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[91] 29 C.F.R. § 13.5.

[92] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[93] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

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3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Child Labor	Employers that employ minors must post a list of all children working at a worksite, based on their labor permits.[94]
Fair Employment Practices	Employers with four or more employees must post conspicuous notice summarizing the protections of the state Human Rights Act.[95]
Healthy Workplaces Act: Earned Paid Sick Leave Notice	In a conspicuous and accessible place in each establishment where employees are employed, employers must display a poster that contains the following information: • the right to paid leave; • the manner in which leave accrues and is calculated; • the terms of leave use under the Act; • the Act's anti-retaliation provisions; • the right to file a complaint with the state labor department if the employer denies leave or retaliates against an employee; and • all means of enforcing violations of the law. Generally, the poster should, be in English, Spanish or any language that is the first language spoken by at least 10% of the employer's workforce. Employers can comply with the requirement via a poster the state labor department will create.[96]
Human Trafficking	Certain employers are obligated to post conspicuous notice concerning human trafficking and the hotline to call for assistance. This requirement applies to: • employers covered by the state's Minimum Wage Act; • individuals licensed: ▪ to sell retail alcoholic beverages; ▪ to dispense for sale alcoholic beverages; ▪ to operate a restaurant; or ▪ to operate a club; and • health facilities licensed by the Public Health Act.

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94 N.M. STAT. ANN. § 50-6-9. Employers must create their own notices to satisfy this posting requirement.

95 N.M. STAT. ANN. § 28-1-14. This poster is https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/human_rights_poster_2015.pdf. It includes the necessary information in English and Spanish.

96 N.M. CODE R. § 11.1.6.10.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	Notice must be posted in English, Spanish, and any other written language where a high percentage of the workers speak that language. It must be clearly visible to the public as well as to all employees.[97]
Unemployment Compensation	All employers must post and maintain conspicuous notice informing employees of unemployment coverage, summarizing their rights, and instructing them how to file for benefits.[98]
Wages, Hours & Payroll: Day Labor Wage Payment Notice	Any employer (including a check cashing service) operating as a day labor service agency must post clearly visible, easily readable notices in the area where cashing of checks or payment instruments occurs. Notice must indicate the fee for cashing a check or payment instrument. Notice must be posted in English, Spanish, and any other written language where a high percentage of the workers speak that language. In areas where the day labor service agency employs Navajo workers and the check cashing service cashes checks of such workers, notice must be posted in Navajo.[99]
Wages, Hours & Payroll: Minimum Wage Act	All employers must post conspicuous notice informing employees of the minimum wage and related provisions, including overtime.[100]
Workers' Compensation Act and Notice of Accident Forms	All employers with three or more employees must post conspicuous notice, where such notices are customarily displayed, informing employees of the protections of the workers' compensation law and identifying the employer's insurer. This notice also advises workers of the statutory requirement to give the employer written notice of an accident within 15 days of its occurrence. An employer's failure to post the required notice extends the time a worker has to give the employer written notice to the statutory maximum of 60 days. Both the poster and a Notice of Accident Form are provided by the state agency.[101]

[97] N.M. STAT. ANN. § 30-52-2.1. This poster is available in English at https://www.dws.state.nm.us/Portals/0/DM/Business/Human_Trafficking_Poster.pdf. It is also available in Spanish and Navajo at https://www.dws.state.nm.us/Business/Publications/State-and-Federal-Posters.

[98] N.M. STAT. ANN. § 51-1-8; N.M. CODE R. § 11.3.400.403. This notice is obtained from the insurance carrier or from the Department of Labor upon initial unemployment insurance tax registration.

[99] N.M. STAT. ANN. § 50-15-5; N.M. CODE R. §§ 11.6.2.9, 11.6.2.10. Employers must create their own notices to satisfy this posting requirement.

[100] N.M. STAT. ANN. § 50-4-25. This poster is available in English at https://www.dws.state.nm.us/Portals/0/DM/Business/New_Mexico_Minimum_Wage_Act_Summary_.pdf and in Spanish at https://www.dws.state.nm.us/Portals/0/DM/Business/Salario_Minimo_.pdf.

[101] N.M. STAT. ANN. §§ 52-1-29, 52-3-15, 52-3-19, and 52-1-49; N.M. CODE R. §§ 11.4.2.10, 11.4.4.11. The notice is available at https://workerscomp.nm.gov/sites/default/files/documents/publications/poster11x17.pdf. It includes the necessary information in English and Spanish. The Notice of Accident Form and additional information is available at https://workerscomp.nm.gov/NMWCA-Publications.

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Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workplace Safety: New Mexico Job Health and Safety Protection	All employers must post and maintain conspicuous notice, where such notices are customarily displayed, informing employees of the protections and obligations set forth in the state occupational safety and health law. Notice should be posted where employees either report to work or from which they operate to carry out their activities.[102]
Workplace Safety: Smoking Policy and No Smoking Signs	Generally speaking, smoking is prohibited in indoor workplaces in New Mexico.[103] Employers must adopt and post a written smoking policy. Employers must also post appropriate signage, including "No Smoking" signs at the entrances to workplaces subject to the smoking ban. Where smoking is permitted, "Smoking Permitted" signs must also be posted.[104]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[105]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual;	At least 1 year from the date of the personnel action to which any records relate.

[102] N.M. STAT. ANN. § 50-9-5; N.M. CODE R. §§ 11.5.1.17, 11.4.2.10. This poster is available at https://www.dws.state.nm.us/en-us/State-and-Federal-Posters. It includes the necessary information in English and Spanish.

[103] N.M. STAT. ANN. §§ 24-16-1 *et seq*.

[104] N.M. STAT. ANN. §§ 24-16-14, 24-16-15.

[105] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[106]	
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[107]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[108]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has

[106] 29 C.F.R. § 1627.3(b).

[107] 29 C.F.R. § 1627.3(b).

[108] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[109]	expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[110]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[111]	At least 3 years following the date on which the polygraph examination was conducted.
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This	At least 6 years after documents are filed or would have been filed but

[109] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[110] 29 C.F.R. § 1602.7.

[111] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	includes vouchers, worksheets, receipts, and applicable resolutions.[112]	for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[113]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[114]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours;	3 years from the last day of entry.

[112] 29 U.S.C. § 1027.

[113] 29 C.F.R. § 1620.32(a).

[114] 29 C.F.R. § 1620.32(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[115] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[116]	

[115] 29 C.F.R. §§ 516.2, 516.5.

[116] 29 C.F.R. § 516.28.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[117]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[118]	At least 3 years from the last effective date.
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[119]	At least 2 years from the date of last entry.

[117] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[118] 29 C.F.R. § 516.5.

[119] 29 C.F.R. § 516.6.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records*	At least 3 years.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	required by the second series with respect to any secondary employees. *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[120]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration:	At least 4 years after the date the tax is due or paid, whichever is later.

[120] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[121]	
Immigration	Employers must retain all completed Form I-9s.[122]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required	Required to be maintained for "so long as the contents [of the records] may become material in the

[121] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[122] 8 C.F.R. § 274a.2.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to be shown by such person in any return of such tax or information.[123]	administration of any internal revenue law;” this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee’s name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee’s individual tax status.[124]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[125]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[123] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[124] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[125] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[126]	
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[126] 26 C.F.R. § 31.6001-4.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[127]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[128]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[129]	At least 30 years.

[127] 29 C.F.R. § 1910.1020(d).

[128] 29 C.F.R. § 1910.1020(d).

[129] 29 C.F.R. § 1910.1020(d).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[130]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[131]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from

[130] 29 C.F.R. §§ 1904.33, 1904.44.

[131] 41 C.F.R. § 60-1.12(b).

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[132]	the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[133]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s);	3 years.

[132] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[133] 41 C.F.R. §§ 60-1.12, 60-741.80.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[134]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;	During the course of the covered contract as well as after the end of the contract.

[134] 29 C.F.R. § 23.260.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[135]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[136]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation;	At least 3 years from the completion of the work records containing the information.

[135] 29 C.F.R. § 13.25.

[136] 29 C.F.R. § 5.5.

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Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[137]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[138]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Day Laborer Act	Employers subject to the Day Laborer Act must maintain true and accurate records of the day laborers employed, the hours worked by them, and the wages paid to them.[139]	At least 1 year after entry of the record.

[137] 29 C.F.R. § 4.6.

[138] 41 C.F.R. § 50-201.501.

[139] N.M. STAT. ANN. § 50-15-6(B).

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Healthy Workplaces Act	Employers subject to the Healthy Workplaces Act must keep records of hours worked and leave taken by employees for the preceding 48-month period.	48 months.[140]
Income Tax	All employers must keep records necessary to a determination of the correct tax liability, including, but not limited to, copies of all returns or reports filed, including attachments.[141]	None specified.
Public Works Contracts	*Contractors and subcontracts must maintain and submit certified payroll records containing the following information:* • employee's full name and Social Security number (need only be shown on the first payroll); • address (need only be shown on the first payroll unless the address changes); • the employee's classification(s); • the employee's hourly wage rate(s); • the employee's hourly fringe benefits; • the employee's overtime hourly wage rate(s), if applicable; • daily and weekly hours worked in each classification, including actual overtime hours; • itemized deductions made; • net wages paid; and • the number of the wage rate decision issued on the project.[142]	Not less than 4 years after completion of the project.
Unemployment Compensation	*Each employing unit must keep true and accurate work records. Employment and payroll records must include:* • name and address of the employer; • name and correct address of each branch or division owned, operated or maintained by the employer in New Mexico; and • all disbursements for services rendered to the employer. *Records must also be kept with respect to each employee and must include*:	4 years in addition to the current year.

[140] N.M. STAT. ANN. § 50-17-6.

[141] N.M. STAT. ANN. § 7-1-10; N.M. CODE R. §§ 3.1.5.8, 3.1.5.12, and 3.1.5.15.

[142] N.M. CODE R. § 11.1.2.10.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• name, address and Social Security number; • dates on which services were performed and state(s) where services were performed; • amount of wages paid to the employee each pay period; • date of payment; • total amounts paid each payroll period other than wages; • total cash payments to the employee and cash value of any other remuneration; • whether, during any pay period, the individual worked less than full-time and, if yes, hours and dates worked; and • reasons for the employment separation. *Records must be kept establishing ownership and must include:* • any change in ownership of the employing unit; • address where records are available for inspection; and • addresses of the owners of the employing unit or, if a corporation, records showing addresses of directors, officers, registered agents, and any person on whom legal process may be served in New Mexico.[143]	
Wages, Hours & Payroll	All employers must keep true and accurate records of hours worked each day and wages paid to each employee.[144]	1 year after entry of the record. Given the statute of limitations for wage claims, however, it is recommended to retain these records for at least 3 years.
Workplace Safety: Hazardous	*All employers must maintain accurate records, including:* • an inventory of all chemicals in the workplace that have been labeled as hazardous; • material safety data sheets for such chemicals; and	None specified.

143 N.M STAT. ANN. § 51-1-27; N.M. CODE R. § 11.3.400.401.

144 N.M. STAT. ANN. §§ 50-4-9, 50-4-16.

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Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Chemicals & Exposures	• records of exposure to potentially toxic materials or harmful physical agents.[145]	
Workplace Safety: Injuries & Illnesses	The state has adopted the federal standard found at 29 C.F.R. part 1904, Recordkeeping and Reporting Occupational Injuries and Illnesses, with some revision to reporting requirements relating to fatalities and multiple accidents.[146]	See federal requirements.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

New Mexico law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

As noted in **1.3**, New Mexico places no statutory restrictions on a private employer's use of criminal records for current employees. Moreover, there are no statutory restrictions on an employer's access to credit history or social media (New Mexico's restrictions on social media access apply only to job applicants), or on an employer's use of polygraph examinations. For more information on background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

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[145] N.M. STAT. ANN. §§ 50-9-5.1, 50-9-11. The statutes indicate that these records must be kept and retained pursuant to New Mexico regulations, but no pertinent regulations have been located.

[146] N.M. STAT. ANN. §§ 50-9-11, 50-9-19; N.M. CODE R. § 11.5.1.16.

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3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

New Mexico law contains no express provisions regarding drug and alcohol testing of current employees by private employers.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[147]

3.2(c)(ii) *State Guidelines on Marijuana*

New Mexico allows marijuana use for medicinal and recreational purposes.[148]

Under the medical marijuana law, unless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, it will be unlawful to take adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.[149] However, the prohibition does not restrict an employer's ability to prohibit or take adverse employment action against an employee for using, or being impaired by, medical marijuana on employment premises or during hours of employment, nor does it apply to an employee that works in a safety-sensitive position,[150] *i.e.*, a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another.[151]

At least one state appellate court has held an employer can be required to reimburse an injured worker for medical marijuana expenses under workers' compensation laws, and that reimbursement does not violate federal law:

> [T]he legislative intent of the Compassionate Use Act [is] 'to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.' The Legislature has provided in the [Workers' Compensation] Act that a worker receive through an employer reasonable and necessary health care services, which the regulations define to include 'drugs, products or items provided to a worker' in various ways provided that they are 'reasonable and necessary for the evaluation and treatment of a worker.' When read together, we view the legislative intent to be that a worker's treatment under a program authorized by the Compassionate Use Act that has been determined by a [Workers' Compensation Judge]

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[147] 21 U.S.C. §§ 811-12, 841 *et seq*.

[148] N.M. STAT. ANN. §§ 26-2B-5; 26-2c-1 *et seq*.

[149] N.M. STAT. ANN. § 26-2B-9.

[150] N.M. STAT. ANN. §§ 26-2B-9, 26-2B-3(Y).

[151] Before the 2019 amendments, a federal court in New Mexico, ruling on a motion to dismiss, held that New Mexico's medical marijuana law "combined with the New Mexico Human Rights Act does not provide a cause of action [because] medical marijuana is not an accommodation that must be provided for by the employer" and that "[t]o affirmatively require [an employer] to accommodate [an employee's] illegal drug use would mandate [that employers] permit the very conduct the [federal Controlled Substances Act] proscribes." *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016).

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> to be reasonable and necessary treatment is embraced within the [Workers' Compensation] Act.[152]

Later, the same court reversed a workers' compensation judge's conclusion that medical marijuana was not reasonable and necessary medical care for the worker.[153] Another New Mexico court upheld a workers' compensation judge's conclusion that medical marijuana was reasonable and necessary medical care for the worker, requiring the employer and its insurer to reimburse the worker for its costs.[154]

More recently, a state appellate court affirmed a workers' compensation judge's denial of request for full reimbursement of out-of-pocket costs for medical cannabis used in connection with work-related injury. In that case the claimant sought $453.05 but was reimbursed $108.18: the amount allowed under the health care provider fee schedule established by the Workers' Compensation Administration.[155]

Finally, it is worth noting that a qualified patient's participation in a medical cannabis use program does not relieve the individual from criminal prosecution or civil penalty for cannabis possession or use in their workplace or at public places.[156]

Under the recreational marijuana law, unless there is an agreement between the employer and employee, employers can adopt and implement a written zero-tolerance policy regarding cannabis product use, which may permit discipline or termination of an employee on the basis of a positive drug test that indicates any amount of delta-9-THC or delta-9-THC metabolite.[157] Additionally, unless there is an agreement between the employer and employee, employers can prohibit or take an adverse employment action against an employee for impairment by or possession or use of intoxicating substances at work or during work hours. *Adverse employment action* means:

- refusing to hire or employ a person;
- barring or discharging a person from employment;
- requiring a person to retire from employment; or
- discriminating against an employee in compensation or in terms, conditions, or privileges of employment.[158]

Moreover, the Cannabis Regulation Act does not restrict a person's ability to prohibit conduct the law otherwise allows on its privately owned property.[159]

Unless there is an agreement between the employer and employee, the recreational marijuana law does not require employers to commit any act that would cause them to be noncompliant with or violate

[152] *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014), *cert. denied*, 331 P.3d 924 (N.M. 2014).

[153] *Maez v. Riley Indus.*, 347 P.3d 732 (N.M. Ct. App. 2015).

[154] *Lewis v. American Gen. Media*, 355 P.3d 850 (N.M. Ct. App. 2015).

[155] *Barrozo v. Albertson's, Inc.*, 2022 WL 6688497 (N.M. Ct. App. Oct. 11, 2022).

[156] N.M. STAT. ANN. § 26-2B-5

[157] N.M. STAT. ANN. § 26-2C-34.

[158] N.M. STAT. ANN. § 26-2C-34.

[159] N.M. STAT. ANN. § 26-2C-26.

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federal law or regulations or that would result in the loss of a federal contract or funding. Additionally, the law does not:

- apply to an employee of an employer subject to Title 2 of the Federal Railway Labor Act;[160]
- invalidate, diminish, or otherwise interfere with any collective bargaining agreement or any party's power to collectively bargain such an agreement, or to an employer or employee;[161]
- limit a privilege or right of a qualified patient participating in the medical cannabis program or limit the use, dispensing, possession, prescribing, storage, or transport of a prescription drug containing cannabis that is approved per the Federal Food, Drug, and Cosmetic Act;[162] or
- allow a person to smoke cannabis products in a public place.[163]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[164]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[165]

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[160] N.M. STAT. ANN. § 26-2C-34(B).

[161] N.M. STAT. ANN. § 26-2C-34(C).

[162] N.M. STAT. ANN. § 26-2C-23.

[163] N.M. STAT. ANN. § 26-2C-26(A)(1).

[164] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[165] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

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3.2(d)(ii) *State Data Security Breach Guidelines*

New Mexico's new data security breach notification law requires companies that own or license data containing personal identifying information of New Mexico residents to notify those residents if the company reasonably believes the information was the subject of a breach.[166] A *security breach* is the unauthorized acquisition of unencrypted computerized data, or of encrypted computerized data and the confidential process or key used to decrypt the encrypted computerized data, that compromises the security, confidentiality, or integrity of personal identifying information maintained by the person or entity.[167]

Covered Entities & Information. Any person or entity that receives, stores, maintains, licenses, processes, or otherwise is permitted access to personal identifying information is covered under the law. Under the new law, *personal information* means an individual's first name or first initial and last name in combination with any one of more of the following unencrypted elements:

- Social Security number;
- driver's license number or state identification card number;
- government-issued identification card;
- account number, credit card number, or debit card number in combination with any required security code; or
- biometric data.

Personal information does not include data that is encrypted and the encryption key has not been access or acquired, data that is redacted, or information publicly available.[168]

Content & Form of Notice. The notice must consist of the following:

- the name and contact information of the notifying person or entity;
- a list of the types of personal identifying information believed to be subject to the breach;
- the date of the security breach or an estimated date range;
- a general description of the incident;
- the toll-free number and address to major consumer reporting agencies;
- advice that directs the recipient to review personal accounts and credit reports to detect errors resulting from the breach; and
- advice that informs the recipient of the notification of the recipient's rights pursuant to the Fair Credit Reporting Act.[169]

Notice may be in one of the following formats:

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[166] N.M. STAT. ANN. §§ 57-12C-1 *et seq.*

[167] N.M. STAT. ANN. § 57-12C-2(D).

[168] N.M. STAT. ANN. § 57-12C-2(C).

[169] N.M. STAT. ANN. § 57-12C-7.

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- written notice to the most recent address of the state resident;
- electronic notice if the person's primary method of communication with the individual is by electronic means or is consistent with the federal e-sign act; or
- substitute notice if the person demonstrates that:
  - the cost of providing notice would exceed $100,000;
  - the affected class of subject individuals to be notified exceeds 50,000 persons; or
  - the person does not have sufficient contact information.

Substitute notice must consist of all of the following:

- email notice if the person has electronic mail addresses for the individuals subject to the notice;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains one; and
- written notification to the Office of the Attorney General and major local media outlets.[170]

There are three exceptions to the notice requirement: (1) an entity that maintains its own notification procedure consistent with these requirements is deemed in compliance; (2) any entity that is subject to and complies with title V of the Gramm-Leach-Bliley Act; and (3) entities covered under and in compliance with laws and regulations under the Health Insurance Portability and Accountability Act (HIPAA).

Timing of Notice. Notice must be given in the most expedient manner possible, but no longer than 45 days following discovery of the breach.[171] Notification may be delayed if:

- A law enforcement agency indicates that notification will impede a criminal investigation. However, once the covered entity is notified in writing that disclosure of the breach will no longer interfere with the investigation, notice must be made.
- A covered entity needs time to determine the nature and scope of the breach.[172]

Additional Requirements. If more than 1,000 New Mexico residents will be notified of the breach, then the entity must also notify the Office of the Attorney General and major consumer reporting agencies.[173]

The law also requires that any records containing personally identifying information be properly disposed of when they are no longer needed for business purposes. Proper disposal means shredding, erasing, or otherwise modifying the personal identifying information to make that information unreadable or undecipherable.[174]

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[170] N.M. STAT. ANN. § 57-12C-6.

[171] N.M. STAT. ANN. § 57-12C-6(A).

[172] N.M. STAT. ANN. § 57-12C-9.

[173] N.M. STAT. ANN. § 57-12C-10.

[174] N.M. STAT. ANN. § 57-12C-3.

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3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[175] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[176]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[177]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[178]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[179] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The minimum wage in New Mexico is $12.00 per hour for most nonexempt employees.[180]

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[175] 29 U.S.C. § 218(a).

[176] 29 U.S.C. § 206.

[177] 29 U.S.C. §§ 203, 206.

[178] 29 U.S.C. § 3(m)(2)(B).

[179] 29 U.S.C. § 207.

[180] N.M. STAT. ANN. § 50-4-22.

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3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. Employees that customarily and regularly receive more than $30 in tips a month can be paid a lower minimum cash wage of $3.00 per hour if the minimum cash wage they receive from their employer plus tips they receive equal at least the minimum wage. Note that if an employee does not make in tips an amount equal to the maximum tip credit per hour, an employer must make up the difference between the wage actually made and the minimum wage. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee. All tips received by the employee must be retained by the employee, but tip pooling among wait staff is not prohibited.[181]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

New Mexico law carves out numerous exceptions to the minimum wage requirements. For purposes of the minimum wage provisions, the definition of *employee* does not include:

- an individual employed in domestic service in or about a private home;
- an individual employed in a *bona fide* executive, administrative, or professional capacity and forepersons, superintendents, and supervisors;
- an individual engaged in the activities of an educational, charitable, religious, or nonprofit organization where the employer-employee relationship does not, in fact, exist or where the services rendered to such organizations are on a voluntary basis;
- salespersons or employees compensated at piece rate, flat rate schedules, or commission basis;
- registered apprentices and learners;
- G.I. bill trainees while under training;
- seasonal employees of an employer with a valid certificate to employ exempt seasonal employees;
- certain agricultural employees;
- employees engaged in the handling, drying, packing, packaging, processing, freezing, or canning of any agricultural or horticultural commodity in its unmanufactured state; or
- employees of charitable, religious, or nonprofit organizations who reside on the premises of group homes operated by such charitable, religious, or nonprofit organizations for persons who have a mental, emotional, or developmental disability.[182]

3.3(b)(iv) *Local Minimum Wage Ordinances*

A handful of municipalities within New Mexico have enacted minimum wage ordinances that establish a local minimum wage rate that may differ from the state's minimum wage rate. Local minimum wage ordinances often include their own notice, record-keeping, and wage statement requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations.

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[181] N.M. STAT. ANN. § 50-4-22.

[182] N.M. STAT. ANN. § 50-4-21.

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Table 9 includes some of the larger cities and counties in New Mexico that have enacted minimum wage ordinances. To the extent smaller cities or counties may have enacted similar ordinances, these are not covered here.

Employers, however, should be aware of the following developments in Albuquerque, Bernalillo County, and Las Cruces.

In 2020, the Albuquerque minimum wage was $9.35. For 2021, the city announced the applicable consumer price index (CPI) increase was 1.393% but increased the local minimum wage to $10.50, *i.e.*, the state minimum wage (12.3% increase). For 2022, the city announced the applicable CPI increase was 5.832% but again increased the local minimum wage to the state rate, $11.50 (9.5% increase from 2021 state rate). For 2023, the city announced the applicable CPI increase was 8.638% and initially increased the local minimum wage to $12.50, applying the CPI increase under the ordinance to the 2022 state rate, producing a rate that exceeds the 2023 state minimum wage of $12.00, but later revised the announced rate to $12.00. For 2024, the city announced that the minimum wage would remain the same but did not announce the applicable CPI. Additionally, in each year, the city announced the minimum cash wage would be a percentage of the minimum wage, as the ordinance requires, but based on a percentage of the state and/or announced rate. In the announcements for 2023 and 2024, the city acknowledges that the local minimum wage, adjusted for inflation, is less than the state minimum wage. Under the ordinance, employers may be able to pay employees $1 per hour less than the general minimum wage if they provide a certain level of health and/or childcare benefits. The city's 2023 and 2024 announcements, however, say all employers must pay $12.00 per hour. Practically speaking, because the state minimum wage will be $12, an employer could not pay employees $1 per hour less because that would cause an employee's wage to fall below the state minimum wage.[183]

In 2020, the Las Cruces minimum wage was $10.25. In 2021, 2022, and now 2023, the city announced the local minimum wage would increase to the rate set under state law; $10.50, $11.50, and $12.00, respectively. In these announcements, the city did not indicate the CPI increase percentage. Additionally, in each year, the city announced the minimum cash wage would be a percentage of the minimum wage, as required under the ordinance, but based on a percentage of the state rate. Note, however, that for 2023 the announced minimum cash wage of $4.78 appears to be lower than 40% of the announced minimum wage, as $4.80 would be 40% of $12.[184]

The approaches taken by Albuquerque and Las Cruces differ from those by Bernalillo County, whose ordinance contains a similar CPI-adjustment requirement. In 2021 and 2022, the county continued to adjust its rate based on inflation, but indicated that the CPI-adjusted rate was less than the rate required under the state minimum wage, so state law would supersede county law.[185]

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[183] *See* https://www.cabq.gov/legal/documents/2021-adjustment-in-annual-minimum-wage-english-spanish.pdf, https://www.cabq.gov/legal/documents/2022-adjustment-in-annual-minimum-wage-english-spanish.pdf, and https://www.cabq.gov/legal/documents/2023-adjustment-in-annual-minimum-wage-english-spanish-october22.pdf.

[184] *See* https://web.archive.org/web/20211230065350/https:/www.las-cruces.org/CivicAlerts.aspx?AID=7414 and https://lascruces.gov/government/departments/human-resources/.

[185] *See* http://web.archive.org/web/20210616165515/https:/www.bernco.gov/planning/for-business-owners/required-workplace-postings/ and https://www.bernco.gov/planning/for-business-owners/required-workplace-postings/.

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Table 9. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
Albuquerque	• $12.00 per hour for employers that do not provide such benefits. Although the ordinance allows employers to pay $1.00 per hour less if they provide health care and/or childcare benefits, employers must consider whether and how doing so would drop an employee's wage below the state minimum wage. The minimum cash wage for tipped employees will be $7.20 if their direct wage plus tips equals at least the minimum wage. Note that because the first minimum wage rate is less than state law, employers should follow state law.[186] • See above discussion about Albuquerque rate adjustments for 2021, 2022, 2023, and 2024.	• written notice to tipped employees; • workplace poster; and • records retention.
Bernalillo County (Unincorporated areas)	• $9.30 per hour for employers that provide health care and/or childcare such benefits; $10.30 for employers that do not provide benefits. The rates are lower than the state law requires, and employers subject to state and local law must comply with whichever standard is more beneficial to employees. • The ordinance permits a tip credit, and tipped employees can be paid a minimum cash wage of $2.80 per hour if their direct wage plus tips equals at least the minimum wage [Note: Amendments to state law impact employers covered by both state and local law. The minimum cash wage identified is the state law rate]. • The minimum wage rates are annually adjusted.[187] • See above discussion about Bernalillo County rate adjustments for 2021 and 2022.	• workplace poster; and • records retention.
Las Cruces	• Effective January 1, 2024, the minimum wage is $12.36 per hour, the minimum cash	• workplace poster; and • records retention.

[186] ALBUQUERQUE, N.M., CODE §§ 13-12-1 *et seq.*

[187] BERNALILLO CTY., N.M., CODE §§ 2-218 *et seq.*

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Table 9. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
	wage is $4.95, and the maximum tip credit is $7.41. • The minimum wage rates are annually adjusted, *e.g.*, on January 1, 2025, they will increase to $12.65, $5.06, and $7.59, respectively.[188] • See above discussion about Las Cruces rate adjustments for 2021, 2022, and 2023.	
Santa Fe	• $14.60 per hour since March 1, 2024.[189] • For tipped employees, follow state law. Since January 1, 2023, the state minimum cash wage has been $3.00 per hour. Direct wages plus tips must equal at least the local minimum wage. • The minimum wage rates are annually adjusted.	• workplace poster.
Santa Fe County (Unincorporated areas)	• $14.60 per hour since March 1, 2024. • The ordinance permits a tip credit, and tipped employees can be paid a minimum cash wage of $4.38 if their direct wage plus tips equals at least the minimum wage. • The minimum wage rates are annually adjusted.[190]	• workplace poster.

3.3(c) *State Guidelines on Overtime Obligations*

Employees must be paid one-and-one-half times their regular rate for all hours worked over 40 in a week.[191]

3.3(d) *State Guidelines on Overtime Exemptions*

New Mexico exempts certain employers from coverage under the state's overtime requirements. An employer of workers engaged in cotton ginning, in a place of employment located within a county where cotton is grown in commercial quantities, is exempt from the overtime requirements if each employee is employed for a period of not more than 14 weeks in the aggregate in a calendar year.[192] Employers in

[188] LAS CRUCES, N.M., MUN. CODE §§ 14-60 *et seq*.

[189] SANTA FE, N.M., CITY CODE §§ 5-37.01 *et seq*.

[190] SANTA FE CTY., N.M., CODE §§ 118.01 *et seq.*

[191] N.M. STAT. ANN. § 50-4-22.

[192] N.M. STAT. ANN. § 50-4-24.

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agriculture, as defined under the federal FLSA, are exempt,[193] as are certain employers when the overtime work is performed by air carrier employees subject to the federal Railway Labor Act.[194]

In addition, various types of employees are exempt from the state overtime pay requirements, including the categories of employees exempted from the minimum wage requirements as discussed in **3.3(b)(iii)**, plus individuals employed by the United States, the state, or any political subdivision of the state.[195] This publication looks more closely at the white collar overtime exemptions and the exemptions for certain salespeople.

3.3(d)(i) *Executive, Administrative, & Professional Exemptions*

Forepersons, Superintendents & Supervisors. To qualify as a foreperson, superintendent, or supervisor, an individual must meet all the following requirements:

- primary duty is to perform nonmanual work related to the management of the business;
- exercises discretion;
- regularly assists an executive or performs specialized work or special assignments; and
- performs less than 20% manual work.[196]

Executive, Administrative & Professional Employees. Although New Mexico exempts *bona fide* executive, administrative, and professional employees from its overtime requirements, the statute does not define these terms. Employers are recommended to follow the federal FLSA.[197]

3.3(d)(ii) *Commissioned Sales Exemption*

The overtime provisions do not apply to "salespersons or employees compensated upon piecework, flat rate schedules or commission basis."[198]

3.3(d)(iii) *Outside Sales Exemption*

Although the statute does not expressly reference outside salespeople, such employees may be exempt because overtime provisions do not apply to "salespersons or employees compensated upon piecework, flat rate schedules or commission basis."[199]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last

[193] N.M. STAT. ANN. § 50-4-24; 29 U.S.C. § 203.

[194] N.M. STAT. ANN. § 50-4-24; 45 U.S.C. §§ 181-188.

[195] N.M. STAT. ANN. § 50-4-21.

[196] N.M. STAT. ANN. § 50-4-21; N.M. CODE R. § 11.1.4.7.

[197] N.M. STAT. ANN. § 50-4-21; *see, e.g.*, *Williams v. Mann*, 388 P.3d 295 (N.M. Ct. App. 2016).

[198] N.M. STAT. ANN. § 50-4-21.

[199] N.M. STAT. ANN. § 50-4-21.

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30 minutes or more) are not considered "hours worked" and can be unpaid.[200] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[201]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[202] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[203] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[204] Exemptions apply for smaller employers and air carriers.[205]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[206] Lactation is considered a related medical condition.[207] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[208] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[200] 29 C.F.R. § 785.19.

[201] 29 C.F.R. § 785.18.

[202] 29 U.S.C. § 218d.

[203] 29 U.S.C. § 218d(b)(2).

[204] 29 U.S.C. § 218d(a).

[205] 29 U.S.C. § 218d(c), (d).

[206] 42 U.S.C. § 2000gg–1.

[207] 29 C.F.R. § 1636.3.

[208] 29 C.F.R. § 1636.3.

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3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in New Mexico, other than the lactation breaks noted below. However, in an FAQ, the state labor department notes "deductions cannot be made from wages if less than 30 minutes is allowed for the breaks."[209]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no generally applicable meal and rest period requirements for minors in New Mexico.

3.4(b)(iii) *Lactation Accommodation Under State Law*

An individual may breast feed their child in public or any place the individual is authorized to be.[210] Specific to the employment context, an employer must provide nursing employees a space to pump breast milk that is clean and private, near the employee's workspace, and not a bathroom. However, an employer is not liable for storage or refrigeration of breast milk.[211]

An employer must also provide flexible break times so an employee may pump breast milk. However, if the lactation break is in addition to the employee's regular meal and/or rest period, the employee need not be paid for that time. Moreover, lactation break time is excluded when determining whether an employee worked overtime hours.[212]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[213] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[214]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable"

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[209] New Mexico Department of Workforce Solutions, *Frequently Asked Labor Law Questions* (rev. Nov. 2017), *available at* https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/Labor_Law_FAQs.pdf.

[210] N.M. STAT. ANN. § 28-20-1.

[211] N.M. STAT. ANN. § 28-20-2.

[212] N.M. STAT. ANN. § 28-20-2.

[213] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[214] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

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part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

New Mexico law does not provide a precise definition of "hours worked." There are a number of issues considered when determining whether activities constitute work and should be compensable. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. New Mexico statutes and regulations do not address these topics.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[215] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[216] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Like federal law, New Mexico's Child Labor Act prohibits the employment of minors in any hazardous occupations.[217] The Act restricts the employment of persons under the age of 18 by age and by the type of job as described below in Table 10.

Table 10. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	Minors under age 18 cannot be employed in underground mining or quarrying where explosives are used. However, minors 14 to 18 years old can be employed to separate mica if blasting is done during periods when there is nobody working, and the mica is subsequently removed from the blasting area to another site for operation.[218]

[215] 29 C.F.R. §§ 570.36, 570.50.

[216] 29 C.F.R. § 570.6.

[217] N.M. CODE R. § 11.1.4.9.

[218] N.M. STAT. ANN. § 50-6.5.

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Table 10. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
14-15	*Minors ages 14-15 also cannot work in the following occupations or positions:* • on or around belted machines while in motion; • on or around power-driven machinery; • in or about plants or jobs manufacturing, storing, or using explosives or articles containing explosive components; • electronic jobs with exposure to electrical hazards; • in or about any establishment where malt or alcoholic beverages are manufactured, packed, wrapped, or bottled; • municipal firefighting; • manufacturing goods for immoral purposes; • any employment dangerous to lives and limbs, or injurious to the health or morals of minors under age 16; • on or around power-driven hoisting apparatus (except traditional elevators); • door-to-door sales, unless for nonprofit activities or a parent or guardian approves; or • any additional occupations as determined by the state child labor inspector.[219]
Under Age 14	Minors under age 14 cannot be employed or permitted to work unless otherwise provided for in the Child Labor Act.[220]

Restrictions on Selling or Serving Alcohol. A person under age 21 cannot be employed as a bartender. Additionally, an employer cannot knowingly employ or use the service of any minor in the sale and service of alcoholic beverages.[221]

A person holding a dispenser's, restaurant, or club license may employ individuals age 19 or older to sell or serve alcoholic beverages in an establishment that is held out to the public as a place where meals are prepared and served and the primary source of revenue is food, and where the sale or consumption of alcoholic beverages is not the primary activity. Additionally, minors may be allowed to enter restricted areas to remove and dispose of alcoholic beverage containers in the course of their employment as bussers, provided that such employees remain in restricted area no longer than necessary to carry out those duties.[222]

A holder of a wholesaler's, retailer's, or manufacturer's license, or a holder of a dispenser's license who sells by the package, may employ minors to stock and handle alcoholic beverages in unopened containers on or around the licensed premises, provided an adult age 21 or older is on duty directly supervising such activities. Additionally, certain minors may be permitted to enter and remain in a restricted area of a

[219] N.M. STAT. ANN. §§ 50-6-4, 50-6-18; N.M. CODE R. §§ 11.1.4.10, 11.1.4.14.

[220] N.M. STAT. ANN. § 50-6-1.

[221] N.M. STAT. ANN. § 60-7B.11; N.M. CODE R. § 15.10.33.9.

[222] N.M. STAT. ANN. § 60-7B.11; N.M. CODE R. § 15.10.33.9.

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licensed premise during the course of their employment or official duties if the minors are at least age 18.[223]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

In New Mexico, minors age 14 to 16 cannot work:

- during school hours (except for work experience and career exploration programs);
- more than three hours a day on a school day;
- more than 18 hours a week during a school week;
- more than eight hours in one day in a nonschool week;
- more than 40 hours in a nonschool week; or
- between 7:00 P.M. and 7:00 A.M., except that minors may work until 9:00 P.M. from June 1 through Labor Day.[224]

Special rules apply to performing minors.[225]

3.6(b)(iii) *State Child Labor Exceptions*

A minor under age 16 may be employed without a work permit and without the restrictions on the type or time of employment if the minor is employed:

- by a parent in an occupation other than manufacturing or mining, or other than an occupation found to be particularly hazardous or detrimental to the health of children under age 16;
- as an actor or performer in motion picture, theatrical, radio, or television productions; or
- to sell or deliver newspapers, with a parent's consent, during the school term or during vacation, if the minor is attending school as required by law and does not engage in such employment except at times when the minor's presence is not required at school.[226]

The provisions restricting certain work activities for minors under age 16 do not apply to:

- minors working with equipment in connection with school or cooperative education under the supervision of an instructor;
- apprentices under supervision of a journeyman in a certified program; or
- film and television productions.[227]

Further, special rules apply to minors in the performing arts.[228]

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[223] N.M. STAT. ANN. § 60-7B.11; N.M. CODE R. § 15.10.33.9.

[224] N.M. STAT. ANN. § 50-6-3; N.M. CODE R. § 11.1.4.9. While the specific hour requirements are present in the statute, as of June 2023, they are not present in the enacting regulation.

[225] N.M. CODE R. §§ 11.1.4.10 *et seq.*

[226] N.M. STAT. ANN. § 50-6-17.

[227] N.M. STAT. ANN. §§ 50-6-4, 50-6-18; N.M. CODE R. §§ 11.1.4.10, 11.1.4.14.

[228] N.M. CODE R. §§ 11.1.4.10 - 11.1.4.14.

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3.6(b)(iv) *State Work Permit or Waiver Requirements*

Work permits are issued by the school superintendents, school principals, designated issuing school officers, or the state labor department.[229] A work permit is required at all times when employing a minor between the ages of 14 and 16 unless otherwise provided for in the Child Labor Act.[230] Work permits are not available to minors under age 14.

An employer must keep the work permit on file in a place on the premises where the minor is employed, and also post in a conspicuous place on the premises where the minor works a list of all minors employed at the establishment under a work permit.[231]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Child Labor Section of the New Mexico Department of Workforce Solutions enforces the Child Labor Act and investigates violations.[232] An employer that permits a minor to be employed in violation of any of the provisions of the Act is guilty of a petty misdemeanor. Each violation of the Act constitutes a separate offense. A second or subsequent conviction for violation of the Act is a misdemeanor.[233]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[234]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[235]

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[229] N.M. STAT. ANN. § 50-6-7.

[230] N.M. CODE R. § 11.1.4.9.

[231] N.M. STAT. ANN. § 50-6-9.

[232] N.M. STAT. ANN. § 50-6-10.

[233] N.M. STAT. ANN. § 50-6-12.

[234] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[235] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

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According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[236]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[237] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[238]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[239] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[240]

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[236] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[237] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[238] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[239] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[240] 12 C.F.R. § 1005.18.

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The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[241]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[242]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in 3.7(a)(ii), wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[243] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[244] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work

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[241] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr.. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[242] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[243] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[244] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

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uniforms,[245] tools and equipment,[246] and business transportation and travel.[247] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[248]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[249]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[250]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[251]
- with an employee's authorization for:
    - the purchase of U.S. savings stamps or U.S. savings bonds;
    - union dues paid pursuant to a valid and lawful collective bargaining agreement;
    - payments to the employee's store accounts with merchants wholly independent of the employer;
    - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
    - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[252]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[253] or

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[245] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[246] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[247] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[248] 29 C.F.R. § 778.217.

[249] 29 C.F.R. § 531.38.

[250] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[251] 29 C.F.R. § 531.40.

[252] 29 C.F.R. § 531.40.

[253] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

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- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[254]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[255]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[256] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[257]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[258]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or

[254] 29 C.F.R. § 825.213.

[255] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[256] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[257] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[258] 29 C.F.R. § 531.36.

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increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[259]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[260]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages must be paid in U.S. currency or by bank checks and may be in the form of cash, check, payroll voucher, or draft, or by direct deposit to an employee's account with voluntary authorization from the employee, employer, and financial institution. Paychecks must be convertible into cash on demand at full face value.[261]

Direct Deposit. Mandatory direct deposit is not permitted in New Mexico. However, with the voluntary authorization of the employee, employer, and financial institution, wages may be directly deposited into an employee's account at a bank, savings and loan association, credit union, or other financial institution authorized by federal or state governments to receive deposits. Payment by direct deposit must be without reduction or deduction except as specifically stated in a written contract entered into at the time of hiring.[262]

Payroll Debit Card. New Mexico law does not address the use of payroll debit cards as a wage payment method.

3.7(b)(ii) *Frequency of Payment Under State Law*

An employer must designate regular paydays and pay employees at least semimonthly on regular paydays not more than 16 days apart. Wages earned during the first 15 days of the month must be paid by the 25th day of the month (by the last day of the month if payroll originates outside of the state), and wages earned from the 16th of the month to the end of the month must be paid by the tenth day of the next month (by the 15th day if payroll originates outside of the state).[263] An employer may pay professional, administrative, or executive employees, and employees employed in the capacity of outside salespeople (as those terms are defined under the FLSA) once a month unless the employees' salaries are subject to provisions of a collective bargaining agreement.[264]

Where an employee is compensated on a task, piece, or commission basis, an employer and employee may agree in writing at the time of hiring that wages will be paid on a monthly basis, on or before the tenth day of the succeeding calendar month.[265]

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[259] 29 C.F.R. § 531.37.

[260] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[261] N.M. STAT. ANN. § 50-4-2.

[262] N.M. STAT. ANN. § 50-4-2.

[263] N.M. STAT. ANN. § 50-4-2.

[264] N.M. STAT. ANN. § 50-4-2.

[265] N.M. STAT. ANN. § 50-4-2.

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3.7(b)(iii) *Final Payment Under State Law*

Upon involuntary discharge, an employer must pay an employee whose wages are a fixed and definite amount within five days of discharge. Task, piece, and commission wages must be paid within 10 days of discharge.[266] If work is suspended due to an industrial dispute, unearned wages and compensation must be paid by the next regular payday without abatement or reduction.[267]

When an employee who does not have a written contract for a definite period quits or resigns, wages must be paid on the next regularly scheduled payday.[268]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Employers must provide employees with a written receipt that identifies:

- the employer's name;
- the employee's gross pay;
- the number of hours worked by the employee;
- the total wages and benefits earned by the employee; and
- an itemized listing of all deductions withheld from the employee's gross pay.[269]

The statute does not specify whether an employer may provide wage statements electronically.

When wages are paid, a day labor service agency must provide each day laborer with an itemized statement showing in detail each deduction made from wages.[270]

3.7(b)(v) *Wage Transparency*

New Mexico law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under New Mexico law regarding making a change to regular paydays or an employee's rate of pay. However, in an FAQ addressing whether wages or salary can be reduced, the state labor department states "[t]he employer must advise the employee of the new lower rate before the hours are worked."[271] Additionally, concerning payday changes, employers should consider providing employees with advance written notice before a change occurs.

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[266] N.M. STAT. ANN. § 50-4-4.

[267] N.M. STAT. ANN. §§ 50-4-4, 50-4-6.

[268] N.M. STAT. ANN. § 50-4-5.

[269] N.M. STAT. ANN. § 50-4-2.

[270] N.M. STAT. ANN. § 50-4-2.

[271] New Mexico Department of Workforce Solutions, *Frequently Asked Labor Law Questions* (rev. Nov. 2017), *available at* https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/Labor_Law_FAQs.pdf.

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3.7(b)(vii) *Paying for Expenses Under State Law*

In New Mexico, there is no general obligation to indemnify an employee for business expenses, and state law includes no express provisions addressing how uniform, tool, and/or equipment expenses incurred during employment are treated in the wage payment, minimum wage, and/or overtime contexts.

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. An employer can only deduct from wages if the deduction is:

- a lawful deduction; or
- authorized by the employer and employee.[272]

The term *written authorization* is defined as "a document an employee signs at the time of hiring, giving the employer permission to deduct certain items from [an employee's] pay."[273] The regulation further specifies that a "written authorization is needed for an employer to deduct an advance . . . of wages, however, the employer must pay at least the minimum wage times the hours worked to the employee."[274] However, the term *written authorization* does not appear anywhere in the wage and hour statutes or regulations other than in this regulation providing definitions for terminology used in the New Mexico wage payment provisions.[275]

According to the state labor department, "[n]o deduction can be made except appropriate state, federal and social security taxes without a written authorization from the employee or a court order. In all cases, the employee must receive the minimum wage."[276]

Prohibited Deductions. New Mexico law does not specify any deductions that are prohibited under any circumstances. However, if an employer does not comply with the requirement to obtain authorization from an employee or the deduction exceeds amounts permitted under the law, as required for certain deductions, such deductions would be noncompliant and prohibited.

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Orders of Support. A New Mexico employer that receives an order requiring an employee's income to be withheld for child or spousal support must begin the withholding no later than the next payday that occurs immediately following service of the notice.[277] No more than 50% of an employee's income may be withheld for support.[278] The employer must forward the amount withheld to the appropriate state child support agency or court as required by the notice within seven business days of payday. The employer may also deduct an administrative fee of $1 per withholding.[279] If the employee's employment terminates,

[272] N.M. STAT. ANN. § 50-4-2.

[273] N.M. CODE R. 11.1.4.7(R).

[274] N.M. CODE R. 11.1.4.7(R).

[275] N.M. CODE R. 11.1.4.7; *see* N.M. STAT. ANN. §§ 50-4-1 to 50-4-33; *see also* N.M. CODE R. 11.1.4.100 to 11.1.4.123.

[276] New Mexico Dep't of Workforce Solutions, *Frequently Asked Labor Law Questions, available at* https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/NMLaborLaws2013.pdf.

[277] N.M. STAT. ANN. § 40-4A-8.

[278] N.M. STAT. ANN. § 40-4A-6.

[279] N.M. STAT. ANN. § 40-4A-8.

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the employer must notify the state child support agency of the employee's last known address and new employer, if known.

An employer is prohibited from discharging, disciplining, or refusing to hire an individual on the basis that the individual is subject to an order of support.[280]

Debt Collection. An employer served with an order of garnishment against an employee's wages must file an answer within 20 days of service to confirm whether the individual whose wages are to be garnished is in fact working for the employer and how much the individual stands to receive as wages from the employer.[281] The portion of an employee's income that is garnishable is the greater of: (1) 75% of the employee's disposable earnings for any pay period; or (2) an amount each week equal to 40 times the federal minimum hourly wage rate.[282] The writ of garnishment remains in effect until the debt designated in the writ is paid in full or the employee's employment terminates.[283]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

In case of a dispute over wages, an employer must provide written notice to the employee of the amount of wages the employer concedes to be due. The employer must pay those amounts without condition within the time required by law for frequency of payment as set forth in 3.7(b)(ii).

The New Mexico Department of Workforce Solutions enforces the state's wage and hour laws and may investigate violations and institute actions to recover wages.[284] State law affords an employee a private right of action to file suit against an employer individually or on behalf of similarly situated employees.[285] The employee must file suit within three years of the alleged violation.[286] A prevailing employee may recover the amount of unpaid or underpaid wages plus interest, an additional amount equal to twice the unpaid or underpaid wages, and attorneys' fees and costs. The court may also order appropriate injunctive relief, including requiring the employer to post in the place of business a notice describing violations by the employer as found by the court or a copy of a cease and desist order applicable to the employer.[287]

An employer that violates the New Mexico minimum wage and overtime provisions commits a misdemeanor and can be punished by imprisonment for less than one year, a fine up to $1,000, or both.[288] An employer that violates or fails to comply with the wage payment provisions commits a misdemeanor.[289] A first offense can be punished by imprisonment for less than one year, a fine up to $1,000, or both, and a second or subsequent offense also risks imprisonment for less than one year and a fine of between $250 and $1,000 for each offense.[290]Each violation for which an employer is convicted is

[280] N.M. STAT. ANN. § 40-4A-8.

[281] N.M. STAT. ANN. § 35-12-2.

[282] N.M. STAT. ANN. § 35-12-7.

[283] N.M. STAT. ANN. § 35-12-9.

[284] N.M. STAT. ANN. §§ 50-4-8, 50-4-26.

[285] N.M. STAT. ANN. § 50-4-26.

[286] N.M. STAT. ANN. § 37-1-5.

[287] N.M. STAT. ANN. § 50-4-26.

[288] N.M. STAT. ANN. §§ 31-9-1, 50-4-26.

[289] N.M. STAT. ANN. § 50-4-8.

[290] N.M. STAT. ANN. §§ 31-9-1, 50-4-26.

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a separate offense, and multiple violations arising from transactions with the same person or multiple violations arising from transactions with different people are separate occurrences.[291]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[292] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[293] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[294]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

In New Mexico, vacation pay and other forms of pay for time that is not worked are included in the definition of *wages* if such pay is compensation for labor or service rendered pursuant to the employer's written policy.[295]

Currently, state law does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. See **3.9(b)(ii)**. However, once an employer establishes a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

In New Mexico, because the right to vacation pay is treated as a matter of contract and courts will generally follow the provisions an employer's written policy,[296] an employer is likely free to cap vacation accrual, and include a "use-it-or-lose-it" provision, and/or require forfeiture of accrued vacation upon

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291 N.M. STAT. ANN. § 50-4-10.

292 29 U.S.C. § 1002.

293 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

294 490 U.S. 107, 119 (1989).

295 N.M. CODE R. § 11.1.4.7(O).

296 *See, e.g.*, *Wolf v. Sam's Town Furniture*, 904 P.2d 52 (N.M. Ct. App. 1995); *New Mexico State Labor & Indus. Comm'n ex rel. Tolman v. Deming Nat'l Bank*, 634 P.2d 695 (N.M. 1981).

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termination. However, per the state labor department, accrued paid time off is considered to be the equivalent of earned wages, and must be paid on termination of the employment.[297]

if a policy does not contain a forfeiture provision, it is unclear whether payout is required when employment ends because courts have expressed different opinions about not paying accrued vacation at termination and no court has examined the issue since the definition of wages was amended to reference vacation.

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

New Mexico does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[298] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[299] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[300] Here again, states may choose to

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[297] New Mexico Department of Workforce Solutions, Investigations Manual, Labor Relations Division (Nov. 12, 2019), *available at* https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/LRD_Manual_Final_11-14-19.pdf.

[298] 29 U.S.C. § 1144.

[299] 29 U.S.C. § 1161.

[300] 29 U.S.C. § 1167(3).

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extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in the cities of Albuquerque and Santa Fe. However, state law does not address the issue of whether an employee's domestic partner would be considered an eligible dependent for purposes of employee benefits offered by a private-sector employer.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[301]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[302]
- to take medical leave when the employee is unable to work because of a serious health condition;[303]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[304] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[305] For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[301] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[302] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[303] 29 C.F.R. §§ 825.112, 825.113.

[304] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[305] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

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3.9(a)(ii) *State Guidelines on Family & Medical Leave*

New Mexico does not have a mini-FMLA law for private-sector employees.

3.9(a)(iii) *State Guidelines on Kin Care Leave*

The Caregiver Leave Act requires an employer that provides sick leave for its employees' own illnesses or injuries to permit employees to use accrued sick leave for the care of a family member in accordance with the same terms and procedures that the employer imposes for any other use of sick leave by eligible employees. Employees are eligible to use caregiver leave under the new law if they are eligible to accrue sick leave under an employer's own policies. The Act does not apply to an employee of an employer subject to Title II of the federal Railway Labor Act or to an employer or employee as defined in the federal Railroad Unemployment Insurance Act, the Federal Employers' Liability Act, or other comparable federal law. The Act defines *family member* as an employee's spouse, domestic partner, or parent, grandparent, great-grandparent, child, foster child, grandchild, great-grandchild, sibling, niece, nephew, aunt, or uncle by blood, marriage, or legal adoption.[306]

Sick leave means a leave of absence for which an employer pays an employee due to illness, injury, or receiving care from a health professional, and does not include leave to which an employee is entitled under the federal Family and Medical Leave Act. The Act does not require employers to provide sick leave to their employees, nor does it prohibit an employer from providing greater benefits to its employees than the Act requires, and it may not be construed to invalidate or interfere with any collective bargaining agreement.[307]

The Act does not set a cap on the amount of time an employee may use for caregiver leave. Thus, the amount of leave to which an employee is entitled depends on the amount of sick time the employee has accrued under the employer's policy. Likewise, the Act does not provide for requesting leave or providing medical certification. Employees should follow the same procedures for requesting leave, providing certification, etc. as the employer requires with respect to use of sick leave under the employer's policy.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[308] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[306] N.M. STAT. ANN. §§ 50-16-1 *et seq*.

[307] N.M. STAT. ANN. § 50-16-2.

[308] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

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3.9(b)(ii) *State Guidelines on Paid Sick Leave*

All private employers must provide paid leave to employees that they can use for sick time, safe time, or "other" reasons for themselves or to care for or assist a broad list of "family" members.[309]

Covered Employer, Employees & Family Members. The law will apply to all private employers and to all employees, including employees covered by a collective bargaining agreement. However, the law does not apply to employees subject to either Title II (air carriers) of the federal Railway Labor Act (RLA) or the federal Railroad Unemployment Insurance Act (RUIA), or[310] employees performing services outside New Mexico or on tribal land. While the law does not apply to independent contractors, it expressly prohibits independent contractor misclassification and provides a sick-leave-related cause of action and damages for misclassifying workers.

Under the law, covered family members include an employee's spouse or domestic partner, other "traditional" family members like children, grandchildren, grandparents, parents, and siblings of an employee or the employee's spouse or domestic partner, along with an individual whose close association with the employee or the employee's spouse or domestic partner is the equivalent of a family relationship. Note that, unlike some similar laws, a domestic partner need not be "registered"; instead, a domestic partner is an individual with whom the employee maintains a household and a mutual committed relationship without a legally recognized marriage.

Accrual, Carry-Over & Frontloading. When employment begins, employees must accrue at least one hour of sick leave for every 30 hours worked. For accrual purposes, the law assumes employees who are exempt under 29 U.S.C. section 213(a)(1) of the federal Fair Labor Standards Act work 40 hours each week; however, if their normal workweek involves fewer hours, employers use the normal workweek for accrual purposes.

Per the state labor department, there is no annual accrual cap; [311] however, employers can limit carry-over from year to year to 64 hours.[312] Additionally, based on state labor department statements, employers cannot annually frontload 64 hours and avoid carry-over requirements. Moreover, per the state labor department, frontloading can occur only on a calendar year basis, even though for other purposes of the law employers can designate any 12-month period as their "year" for compliance purposes.[313] Although, under the statute, an employer can elect to grant employees the *full* 64 hours of sick leave for the upcoming year on January 1 of each year, in its guidance the state labor department says that, if an employer frontloaded 64 hours, but the employee worked sufficient hours to accrue more than 64 hours, the employer would need to provide additional sick leave to the employee. Moreover, the state labor department says carry-over must occur when employers frontload leave.[314]

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[309] N.M. STAT. ANN. §§ 50-17-1 et seq.

[310] New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[311] New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[312] N.M. CODE R. § 11.1.6.8(L).

[313] New Mexico Department of Workforce Solutions, A Guide to New Mexico's Paid Sick Leave Law (rev. Dec. 2023), *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[314] *Compare* N.M. STAT. ANN. § 50-17-3(A) *with* New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

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An employer with a paid time off policy or collective bargaining agreement that makes available an amount of leave sufficient to meet the law's requirements that may be used for, at minimum, the same purposes and under the same terms and conditions as the law requires is deemed to comply with the law. Employers with policies that are *more* generous than what the law requires should note, however, that statements from the state labor department indicate that, under certain circumstances, it *could* apply those more generous provisions *under the paid leave law*.[315]

Covered Uses. Once they have leave available, employees will be able to use immediately – *i.e.*, there is no waiting period for new hires – up to 64 hours of leave each year for the following sick time, safe time, and other, reasons:

- mental or physical illness, injury or health condition of employee or family member;
- medical diagnosis, care or treatment of a mental or physical illness, injury or health condition of employee or family member;
- preventive medical care for employee or family member;
- absences due to domestic abuse, sexual assault or stalking suffered by the employee or family member to:
  - obtain medical or psychological treatment or other counseling;
  - relocate;
  - prepare for or participate in legal proceedings; or
  - obtain services; or
- meetings at a child's school or place of care related to the child's health or disability.

Using, Requesting & Documenting Leave. Under the law, employees may leave use in hourly increments or the smallest increment the employer's payroll system uses to account for absences or use of other time, whichever amount is smaller. Employers cannot require employees to use other types of paid leave before they use HWA sick leave.

Employers must provide leave upon the oral or written request of an employee or an individual acting on the employee's behalf. When possible, this request must include the absence's expected duration. For foreseeable absences – when the employee is aware of the need to use leave seven or more days before such use[316] – employees must make a reasonable effort to notify their employer in advance of use and schedule use in a manner that does not unduly disrupt the employer's operations. For unforeseeable absences, employees must provide notice as soon as practicable.

Only when employees use leave on two or more consecutive workdays can employers request "reasonable" documentation to substantiate the employee used leave for a covered purpose, which employees must provide in a timely manner; corresponding regulations require employers to allow employees 14 days from the date they return to work to provide such documentation.[317] Note that employers cannot delay the start date for leave based on the fact an employee has not provided

[315] New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[316] N.M. CODE R. § 11.1.6.7(D).

[317] N.M. CODE R. § 11.1.6.8(M).

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documentation substantiating the need for leave. For "sick" time purposes, documentation signed by a health care professional indicating the amount of leave taken was necessary is reasonable. For "safe" time purposes, employees can choose to provide a police report, a court-issued document or a signed statement from a victim services organization, clergy member, attorney, advocate, the employee, a family member or other person affirming leave was taken for a covered purpose. The signed statement may be written in the employee's native language.

Employers cannot require the documentation to explain the nature of any medical condition or the details of the domestic abuse, sexual assault or stalking, nor can they require a signed statement to be in a particular format or notarized. All information an employer obtains must be treated as confidential and cannot be disclosed except with the employee's permission or as necessary for validation purposes for insurance disability claims, accommodations consistent with the federal Americans with Disabilities Act (ADA), as required by the HWA or by court order.

Rate of Pay. When employees use HWA sick leave, employers must pay the same hourly rate, with the same benefits, including health care benefits, as employees normally earn during hours worked, but in no case less than the applicable minimum wage, which, in New Mexico, could be the state or, where applicable, local minimum wage. For exempt salaried employees, employers must convert the employee's regular salary to an hourly rate by dividing the salary amount by 40 – if the employee typically works 40 or more hours per week – or the number of hours in the employee's regular workweek if this involves fewer than 40 hours. For nonexempt salaried employees who hours do not fluctuate, the state labor department says to divide the salary amount by the number of hours in the employee's regular workweek. Employees paid on task, piece, or commission basis must be paid their hourly or salary rate or the state or local minimum wage, whichever is greater. Employees paid via commissions only, however, must be paid at least the minimum wage.[318] For tip-credit employees, employers must pay the employee the full applicable state or local minimum wage.[319] Leave must be paid on the same scheduled payday as regular wages.[320]

Notice, Posting, & Recordkeeping. When employment beings, employers must give written or electronic notice to an employee of the following information: (1) their right to leave; (2) the manner in which leave is accrued and calculated; (3) the terms of leave use under the law; (4) that the law prohibits retaliation against employees for leave use; (5) that employees have the right to file a complaint with the state labor department if the employer denies leave or retaliates against an employee; and (6) all means of enforcing violations of the law. Additionally, in a conspicuous and accessible place in each establishment where employees are employed, employers must display a poster that contains information in the mandatory notice. Generally, the individual notice must, and the poster should, be in English, Spanish or any language that is the first language spoken by at least 10% of the employer's workforce. Employers can comply with both requirements via a model notice and poster the state labor department will create.

Under the paid leave law, employers must report year-to-date accrual and usage to employees at least once every calendar quarter; employers can provide this information on regularly issued paystubs or electronically, including by email, website, mobile application, or other reasonable method.[321]

[318] N.M. CODE R. § 11.1.6.8(J).

[319] N.M. CODE R. § 11.1.6.8(H).

[320] N.M. CODE R. § 11.1.6.8(E).

[321] N.M. CODE R. § 11.1.6.8(G).

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Additionally, the state labor department says leave accrued under the paid leave law is a "benefit earned" that must be reported on paystubs under New Mexico's generally applicable paystub law.[322]

Under the HWA, for the immediately preceding 48-month period, employers must retain records documenting hours worked,[323] along with leave accrued and taken, by employees.[324]

Other Provisions. Like other protected paid leave laws, the New Mexico HWA does not require employers to cash out unused leave when employment ends; note, however, that payout obligations could change if employers comply with the law via a vacation or universal paid time off ("PTO") policy.[325] It does require, however, employers to reinstate this leave to employees rehired within 12 months of employment ending; unless, per the state labor department, the employer cashed out leave when employment ended.[326] Additionally, the law addresses paid leave banks when employees transfer or remain employed with a successor employer that takes the place of their original employer.

Prohibitions. Under the law, as a condition of taking leave, employers cannot require the employee search for or find a replacement worker to cover the hours during which the employee is using leave. As noted above, an employer's failure to provide leave based on its misclassification of an individual as an independent contractor is a violation of the law. Additionally, employees cannot waive the law's rights and protections. Corresponding rules also prohibit cutting employee hours when they take leave.[327]

The law contains numerous anti-retaliation protections. For example, employers cannot take or threaten any adverse action whatsoever against an employee that is reasonably likely to deter the employee from exercising or attempting to exercise a right granted pursuant to the law, or because the employee has exercised or attempted to exercise such rights, has reasonably alleged violations of the law, or has raised a concern about violations of the law to the employer, the employer's agent, other employees, a government agency or to the public through print, online, social or any other media. Under the law, retaliation includes applying an absence control policy that counts an employee's leave use as an absence that may lead to adverse action. Additionally, employers cannot count leave use in a way that will lead to discipline, discharge, demotion, non-promotion, less-favorable scheduling, reduction of hours, suspension or any other adverse action. The law also prohibits attempting to require employees to sign a contract or other agreement that would limit or prevent them from asserting rights under the law or that otherwise establishes a workplace policy that would limit or prevent exercising such rights.

Enforcement. Employees will be able to file administrative charges with the New Mexico Department of Workforce Solution's Labor Relations Division. Additionally, individually or on behalf of similarly situated

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[322] New Mexico Department of Workforce Services, Frequently Asked Healthy Workplaces Act Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave. *See also* N.M. STAT. ANN. § 50-4-2(B).

[323] Per the state labor department, this includes exempt employees who work fewer than 40 hours per week; however, when they work more than 40 hours, an employer can record 40 hours for accrual purposes. *See* New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[324] N.M. STAT. ANN. § 50-17-7; N.M. CODE R. § 11.1.6.8(F).

[325] *See* New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[326] New Mexico Department of Workforce Services, Frequently Asked Paid Sick Leave Questions, *available at* https://www.dws.state.nm.us/NMPaidSickLeave.

[327] N.M. CODE R. § 11.1.6.8(C).

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employees, an employee can file a lawsuit within three years from the date an alleged violation occurred. Lawsuits can also be filed by an entity with a member who has been affected by a violation, the state labor department, and the attorney general. Generally speaking, the statute of limitations for administrative complaints and private lawsuits is three years.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[328] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[329] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[330] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

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[328] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[329] 29 C.F.R. § 825.202.

[330] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

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Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in 3.10(c). To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

In New Mexico, individuals affected by pregnancy, childbirth, or related medical conditions must be treated the same as other temporarily disabled employees with respect to leave policies, benefits, and other terms and conditions of employment.[331]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

New Mexico law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

New Mexico law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

New Mexico law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

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[331] N.M. CODE R. § 9.1.1.7.

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3.9(g)(ii) *State Voting Time Guidelines*

Employees who are eligible to vote must be provided up to two hours off work to vote, unless their shift begins two hours after the polls open or ends three hours before the polls close. An employer can adjust employees' election day schedules to qualify for the exception if the adjustment does not penalize employees or cause employees to be paid less than their standard wages for a full workday.

The law does not state whether employees must provide notice to take time off to vote. Moreover, although the law does not specify whether time off must be paid, at least one state court concluded that employees must be paid for their voting time.[332]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

New Mexico law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[333] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[334] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer must not deprive an employee of employment or threaten or otherwise coerce an employee because the employee received a summons for jury service, responded to the summons, attended court for prospective jury service, or served as a juror.

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[332] N.M. STAT. ANN. § 1-12-42; *State v. Kenneth P. Thompson Co*., 103 N.M. 453 (N.M. Ct. App. 1985); 1983-1986 N.M. Op. Att'y Gen. 481 (Nov. 4, 1985) (noting that under *Kenneth P. Thompson Co.*, employees could not be docked pay for adjustments in work day to permit time off for voting).

[333] 28 U.S.C. § 1875.

[334] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

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An employer is not required to compensate an employee for time spent on jury service.

An employer may not require or request that employees use annual leave, vacation leave, or sick leave for time spent responding to a jury duty summons, participating in the jury selection process or serving on a jury. An employer is not required to provide this type of leave to an employee who is not otherwise entitled to such benefits, however.

The court must postpone the service of a summoned juror who is one of five or fewer full-time employees (or their equivalent), if another employee is summoned to appear during the same period.[335]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

In New Mexico, employers must provide up to 14 days of leave for victims of domestic abuse. The leave may be unpaid; however, employees may choose to use any available sick leave or other paid time off during the leave. Health coverage and other eligibility for benefits continue to run during the leave. Leave may be used to obtain a protection order or similar judicial relief, to consult with attorneys or domestic abuse advocates, or to attend court proceedings related to the employee or for a family member of the employee.[336]

Employees or their representative must provide notice within 24 hours of taking leave, and an employer may require verification of the need for domestic abuse leave. One of the following may serve as verification:

- a police report indicating that the employee or a family member was a victim of domestic abuse;
- a copy of an order of protection or other court evidence produced in connection with an incident of domestic abuse, but the document does not constitute a waiver of confidentiality or privilege between the employee and the employee's advocate or attorney; or
- the written statement of an attorney representing the employee, a district attorney's victim advocate, a law enforcement official, or a prosecuting attorney that the employee or employee's family member appeared or is scheduled to appear in court in connection with an incident of domestic abuse.

Employers must keep all information regarding any domestic leave strictly confidential. Information may be disclosed only if the employee explicitly contents or as required by law.[337]

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[335] N.M. STAT. ANN. §§ 38-5-10.1, 38-5-18, and 38-5-19.

[336] N.M. STAT. ANN. §§ 50-4A-1 *et seq.*

[337] N.M. STAT. ANN. §§ 50-4A-1 *et seq*.

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3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[338]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[339] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[340] Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

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[338] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[339] 29 C.F.R. § 825.126(a).

[340] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

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2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Employers are prohibited from discharging or otherwise discriminating in employment against any person because of membership in the National Guard. Employers are further prohibited from preventing employees who are National Guard members from performing any military service they may be called to perform.[341]

The rights, benefits, and protections of the USERRA applies to a member of the National Guard and to members of the National Guard of any other state ordered to federal or state active duty for a period of 30 or more consecutive days.[342]

Permanent employees who leave a job to enter the U.S. armed forces, National Guard, or reserves are entitled to a leave of absence for the period of their military service.[343] Members of the civil air patrol must also be permitted military leave not to exceed 15 working days per year for search and rescue missions.[344]

Employees who have been on military leave are to be treated as if they have been on a leave of absence. They must be restored without a loss of seniority and are entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices related to employees on leaves of absence in effect at the time the employee entered military service.[345]

Employers must reinstate individuals honorably discharged from the military to their former position or a position of like seniority, status, and pay, provided they:

- apply within 90 days of their release or within two years of service-related hospitalization; and
- are still qualified to perform their previous job.

Employers must reinstate these individuals unless circumstances make their reinstatement impossible or unreasonable. Employers are prohibited from discharging a reinstated employee without cause for one year following reemployment.[346]

Other Military-Related Protections: Spousal Unemployment. A worker will not be disqualified from benefits for leaving work voluntarily if the leave was because the worker's spouse is in military service of the United States or New Mexico National Guard and received permanent change of station orders,

[341] N.M. STAT. ANN. § 20-4-6.

[342] N.M. STAT. ANN. § 20-4-7.1.

[343] N.M. STAT. ANN. § 28-15-1.

[344] N.M. STAT. ANN. § 20-7-5.

[345] N.M. STAT. ANN. § 28-15-2.

[346] N.M. STAT. ANN. § 28-15-1.

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activation orders, or deployment orders.[347] An employer's account will not be charged under these circumstances.[348]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Emergency Responder. An employer may not terminate or otherwise discriminate against an employee who is a volunteer emergency responder and misses work to respond to an emergency. The leave may be unpaid, but the employee must make a reasonable effort to notify the employer of the emergency. The leave may not last more than 10 days. Upon request, an employee must provide written documentation from a supervisor of the time, date, and employee's response to the emergency.[349]

Local Ordinances. Effective in October 2020, Bernalillo County enacted the Employee Wellness Act, which requires employers within the unincorporated limits of Bernalillo County to provide paid time off to eligible employees (those who work for at least 56 hours in a year) to be used for any purpose.[350]

The amount of paid time off will vary based on how many employees an employer has:

- employees of all employers shall not accrue or use more than 28 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual;
- employees of employers with 11 or more employees shall not accrue or use more than 44 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual; and
- employees of employers with 35 or more employees shall not accrue or use more than 56 hours of earned paid time off in a year, unless the employer's policy provides for a higher limit on use or accrual.

Employees accrue one hour of paid time off for every 32 hours worked, on a fractional basis. Employers may choose a higher accrual rate or may provide for accrual of all earned paid time off at the beginning of the year. If an employer decides to annually frontload leave, an enforcement agency frequently asked question says carry-over is not required. Earned paid time off begins to accrue on the employee's date of employment. An employee cannot use accrued paid time off until the employee has worked 56 hours in a year. Employees may use accrued paid time off beginning on the 90th calendar day following the date of employment, unless the employer's policy provides that employees may use accrued paid time off earlier. Note that employers who comply with the law via separate sick leave and vacation policies may use longer waiting periods if their policies provide an amount of leave that equals or exceeds what the law requires.

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[347] N.M. STAT. ANN. § 51-1-7(a)(1)(c).

[348] N.M. STAT. ANN. § 51-1-11(D)(3).

[349] N.M. STAT. ANN. § 12-10C-3.

[350] BERNALILLO CNTY., N.M. ORDINANCE 2019-17, 2019-29 & 2019-32, §§ 1 *et seq*. Bernalillo County Planning and Development Services, Employee Wellness Act Guidance.

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An employer must provide earned paid time off upon an employee's request. When possible, the request must include the expected duration of the absence. When the use of paid time off is foreseeable, such as a scheduled medical appointment or similar matters, the employee must provide notice to the employer as soon as practicable, and when possible, must schedule the use of paid time off for these purposes in a manner that does not unduly disrupt the employer's operations. Advance notice cannot be required for paid leave taken due to an emergency or illness.

At the time of employment, an employer must provide notice to each employee:

- of the entitlement to earned paid time off, the amount of paid time off provided to employees, and the terms under which earned paid time off may be used;
- ways in which an employee may submit a request for, or notify, an employer of the use of paid time off, whether orally, in writing or electronically, and to whom;
- that retaliation by the employer against the employee for requesting or using paid time off for which the employee is eligible is prohibited; and
- that the employee has a right to file a complaint with the County for any violation of the ordinance.

Employers may comply with the notice provisions by displaying a poster in a conspicuous place, accessible to employees, at the employer's place of business that contains the required information in both English and Spanish.

When employment ends, the enforcement agency says employers need not cash-out unused leave.

An employee alleging a violation of the ordinance may file an administrative complaint with the County. Upon exhausting administrative remedies, the employee may file a civil action. The County may also bring a civil action upon the employee's behalf. In addition to available damages, an employer found to be in violation of the ordinance may incur a civil penalty of up to $500 for each offense.

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[351] Employers are also required to comply with all applicable occupational safety and health standards.[352] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping

[351] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[352] 29 U.S.C. § 654(a)(2).

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requirements related to workplace accidents. For more information on this topic, see **LITTLER ON WORKPLACE SAFETY**.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[353] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

New Mexico, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[354] Thus, New Mexico is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards.[355] New Mexico's Occupational Safety and Health Act ("New Mexico OSH Act") covers all private employers, but activities of an employer that are subject to the jurisdiction of and are regulated by any federal agency are exempted.[356] Under the New Mexico OSH Act, employers may not discharge or discriminate against an employee because the employee has filed a complaint or caused to be instituted a proceeding under or related to the Act.[357]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In New Mexico, drivers are prohibited from reading, viewing, or manually typing a text message on a handheld mobile communication device for any purpose while driving a motor vehicle, except where necessary to summon emergency services. The law defines *text message* as a digital communication transmitted or intended to be transmitted between communication devices and includes electronic mail, an instant message, a text or image communication, and a command or request to an internet site.

A *handheld mobile communication device* is a wireless communication device that is designed to receive and transmit text or image messages, but excludes GPS or navigation systems, devices that are physically or electronically integrated into a motor vehicle, and voice-operated or hands-free devices that allow users to compose, send, or read a text message without using their hands. Notably, the texting restriction does not apply to users who use such voice-operated or hands-free devices to text without using their hands.[358]

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[353] 29 U.S.C. § 667(c)(2).

[354] 29 U.S.C. § 667.

[355] N.M. STAT. ANN. §§ 50-9-1 *et seq.*

[356] N.M. STAT. ANN. §§ 50-9-3, 50-9-23.

[357] N.M. STAT. ANN. § 50-9-25.

[358] N.M. STAT. ANN. §§ 66-5-1.1, 66-7-374.

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The prohibition against texting while driving applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, state law.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

An employer may prohibit firearms on company property by posting signs prohibiting the carrying of concealed weapons or verbally communicating the ban to anyone on company property.[359] This includes both the employer's workplace and company parking lots, provided it is company property.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in indoor workplaces in New Mexico; however, there is an exemption for workplaces with two or fewer employees as long as a smoke-free area is also available for nonsmokers.[360] Outdoor smoking areas may be established at workplaces only if a reasonable distance is established and employees or the public are not required to walk through the smoking area in order to enter the building. *Smoking* includes: (1) inhaling from, exhaling from, burning, carrying, or holding a lighted or heated cigar, cigarette, hookah or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including cannabis, whether natural or synthetic; or (2) any use of an e-cigarette that creates an aerosol or vapor. *E-cigarette* is defined as a product containing or delivering nicotine or another substance intended for human consumption that can be used by a person in any manner for the purpose of inhaling vapor or aerosol from the product, including a device, whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe, e-hookah or vape pen, or under another product name or descriptor. In addition, the exemption for certain workplaces with two or fewer employees is repealed.[361]

Written Policy & Posting Requirements. "No smoking" signs must be posted at the entrances to workplaces. Where smoking is permitted, "Smoking Permitted" signs must also be posted. In addition, employers must maintain and post a written smoking policy.

Antiretaliation Provisions. Employers may not discharge or retaliate against an employee due to the employee reporting a violation or otherwise exercising the employee's rights under this law.

359 N.M. CODE R. § 10.8.2.16(F).

360 N.M. STAT. ANN. §§ 24-16-1 *et seq.*

361 N.M. STAT. ANN. § 24-16-3.

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3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

New Mexico previously required employers to provide seats to female employees, but this provision was repealed.[362]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

New Mexico law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[363] (2) the Americans with Disabilities Act (ADA);[364] (3) the Age Discrimination in Employment Act (ADEA);[365] (4) the Equal Pay Act;[366] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[367] (6) the Civil Rights Acts of 1866 and 1871;[368] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;

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[362] N.M. STAT. ANN. § 50-5-10.

[363] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[364] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[365] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[366] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[367] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[368] 42 U.S.C. §§ 1981, 1983.

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- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[369]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[370] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[371]

3.11(a)(ii) *State FEP Protections*

In New Mexico, the FEP protections include:

- race;
- color;
- national origin;
- ancestry;
- religion;
- sex (defined as a person's categorization as male, female, or intersex based on biology, physiology, and physical characteristics);
- pregnancy, childbirth or conditions related to pregnancy or childbirth defined as including current, past, potential, or intended pregnancy issues related to reproductive risk, choosing to have or not have an abortion, use of contraception, fertility treatment, or medical conditions related to pregnancy or childbirth, including chestfeeding or lactation);[372]
- age (40+);
- physical or mental disability, and a serious medical condition;
- spousal affiliation (for employers with 50 or more employees);
- sexual orientation (meaning a person's physical, romantic, or emotional attraction to persons of the same or different gender or the absence of any such attraction);[373]

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[369] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[370] The EEOC's website is available at http://www.eeoc.gov/.

[371] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[372] N.M. CODE R. § 9.1.1.7.

[373] N.M. STAT. ANN. § 28-1-2.

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- gender identity (meaning a person's self-perception, based on the person's appearance, behavior, or physical characteristics, that the person exhibits more masculinity or femininity, or the absence of such, whether or not it matches the gender or sex assigned at birth);[374]
- genetic information;
- HIV/AIDS status;
- military status (meaning a person's active membership in the armed forces or state defense force, or being a veteran. Also includes a spouse or child of an active member or veteran); National Guard or state militia membership;[375] and
- gender.

Hairstyles and head coverings associated with a protected class are covered protections under race. Race includes traits historically associated with race, including hair texture, length, protective hairstyles, and cultural or religious headdresses. Cultural or religious headdresses include hijabs, head wraps and other headdresses used as part of an individual's personal cultural or religious beliefs. Protective hairstyles includes braids, locs, twists, tight coils or curls, cornrows, [376]

Employers with four or more employees are subject to New Mexico's fair employment practices law.[377]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Agency Enforcement. An individual who wishes to assert a violation of the state fair employment practices laws may file a claim with the New Mexico Human Rights Commission within 180 days of the alleged violation.[378]

After conducting an investigation, the director of the Human Rights Commission will issue a determination. Following a probable cause determination, the case will proceed with conciliation attempts and a commission hearing, unless the complainant has sought a waiver to pursue a trial in district court in lieu of a commission hearing. Within 60 days of receiving a determination of probable cause, the complainant can make a written request for a waiver of the right to a commission hearing and seek a trial in district court. Timely waiver requests will be granted. The complainant will then have 30 days to request a trial de novo. If the director issues a "no probable cause" determination, the complainant will have 30 days after receipt of the determination to appeal the determination in district court.[379]

If the matter proceeds to a commission hearing, a three-member panel of commissioners will announce its decision and final order within 30 days of the hearing. If the hearing is conducted by a hearing officer, the commission may then adopt, modify, or reject the findings of fact, conclusions of law, and recommended action of the hearing officer and will issue a final order.[380]

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[374] N.M. STAT. ANN. §§ 28-1-2; 28-1-7; N.M. CODE R. § 9.1.1.7(HH)(2).

[375] N.M. STAT. ANN. §§ 24-21-4 (genetic information), 28-10A-1 (HIV/AIDS), 20-4-6 (National Guard), and 20-5-13 (National Guard).

[376] N.M. STAT. ANN. §28-1-2

[377] N.M. CODE R. § 9.1.1.7.

[378] N.M. CODE R. §§ 9.1.1 *et seq.*

[379] N.M. CODE R. §§ 9.1.1.10, 9.1.1.11.

[380] N.M. CODE R. § 9.1.1.13.

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Confidentiality. The commission complaint, decision, and orders are considered public records. Information contained within a division investigation file will not be considered public records.[381]

3.11(a)(iv) *Additional Discrimination Protections*

Tobacco Products. It is unlawful for an employer to:

- refuse to hire or discharge an individual, or otherwise disadvantage an individual, with respect to compensation, or other terms or conditions of employment because the individual is a smoker or nonsmoker, provided the individual complies with applicable laws or policies regarding workplace smoking; or
- require as a condition of employment that an employee or applicant abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regarding workplace smoking.

All employers are covered by this requirement and all employees and applicants are considered protected individuals under the state statute.[382]

This section does not protect activity that:

- materially threatens an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information, or other proprietary interest; or
- relates to a *bona fide* occupational requirement and is reasonably related to the employment activities and responsibilities of a particular employee or group of employees, rather than to all of the employer's employees.[383]

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in Albuquerque are subject to a local fair employment practices ordinance. Specifically, employers employing one or more persons must extend antidiscrimination protections on the basis of: age; color; national origin or ancestry; physical or mental disability; race; religion; sex; race-related hairstyle; and cultural headdress, pregnancy, childbirth or condition related to childbirth or pregnancy, sexual orientation, gender, or gender identity.[384] Any person claiming to be aggrieved by an unlawful discriminatory practice may file a written complaint with the Human Rights Board within 90 days after the alleged act was committed.[385]

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[381] N.M. CODE R. § 9.1.1.15.

[382] N.M. STAT. ANN. § 50-11-2.

[383] N.M. STAT. ANN. § 50-11-3.

[384] ALBUQUERQUE, N.M., CODE OF ORDINANCES §§ 11-3-3 (definitions), 11-3-7 (includes a *bona fide* occupational qualification exception), and 11-3-12 (exemptions, including religious or denominational institutions or organizations).

[385] ALBUQUERQUE, N.M., CODE OF ORDINANCES § 11-3-8.

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3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[386] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[387]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

The New Mexico Fair Pay for Women Act prohibits employers with four or more employees from discriminating within any establishment between employees on the basis of sex by paying wages to employees in the establishment at a rate less than the rate that the employer pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.[388] A wage differential is permitted where the payment is made pursuant to a: (1) seniority system; (2) merit system; or (3) system that measures earnings by quantity or quality of production. An employer cannot reduce the wage of an employee to comply with the statute.

An employee alleging a violation of the Fair Pay for Women Act may file a civil action within two years of the alleged violation, or may elect to file an administrative claim under the New Mexico Human Rights Act.[389]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in 3.9(c)(i), the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

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[386] 29 U.S.C. § 206(d)(1).

[387] 42 U.S.C. § 2000e-5.

[388] N.M. STAT. ANN. §§ 28-23-2, 28-23-3.

[389] N.M. STAT. ANN. § 28-23-4.

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Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[390]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[391]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[392] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[393] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot

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[390] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[391] 29 C.F.R. § 1636.3.

[392] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[393] 29 C.F.R. § 1636.3.

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perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[394]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[395]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[396]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in 3.9(c)(ii). For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

[394] 29 C.F.R. § 1636.4.

[395] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[396] 29 C.F.R. § 1636.3.

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3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The New Mexico Human Rights Act makes it an unlawful discriminatory practice for covered employers (those with four or more employees) to refuse or fail to make available reasonable accommodations for any employee or job applicant, when the need for the accommodation arises from pregnancy, childbirth, or a related condition.[397] *Reasonable accommodation* means a modification or adaptation of the work environment, schedule, rules, or job responsibilities that is reached through good faith efforts to explore less restrictive or expensive alternatives that will enable an employee to perform the essential functions of the job, and that does not impose an undue hardship on the employer.[398] An *undue hardship* is an accommodation that requires significant difficulty or expense when the following are considered:

- the nature and cost of the accommodation;
- the employer's financial resources;
- the number of persons the employer employs;
- the effect of the accommodation on expenses and resources;
- other impacts of the accommodation on the employer's business;
- the overall size of the employer's business with regard to the number, type, and location of its facilities;
- the type of operations, including the composition, structure, and functions of the employer's workforce; and
- the geographic separateness or administrative or fiscal relationship to the employer of the employer's facilities.[399]

The Human Rights Act also prohibits an employer from requiring an employee that needs a reasonable accommodation to take a paid or unpaid leave, if another reasonable accommodation can be provided. This prohibition does not apply if an employee voluntarily requests to be placed on leave, however, or if the employee is placed on leave pursuant to federal law.[400]

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[401] Multiple decisions of the U.S. Supreme Court[402] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will

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[397] N.M. STAT. ANN. § 28-1-7.

[398] N.M. STAT. ANN. § 28-1-2.

[399] N.M. STAT. ANN. § 28-1-2.

[400] N.M. STAT. ANN. § 28-1-7.

[401] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[402] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

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subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[403] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in New Mexico.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

New Mexico does not have a state whistleblowing law that covers private employees. New Mexico's Whistleblower Protection Act applies only to public employers.[404]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[405] and the Railway Labor Act (RLA)[406] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible

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[403] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[404] N.M. STAT. ANN. § 44-9-3.

[405] 29 U.S.C. §§ 151 to 169.

[406] 45 U.S.C. §§ 151 *et seq*.

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for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

New Mexico is not a right-to-work state. New Mexico explicitly permits unions and employers to enter into collective bargaining agreements to establish wages or other conditions of work.[407]

3.12(c) *New Mexico's Day Laborer Act*

Day Laborer Act. New Mexico's Day Laborer Act (NMDLA) applies to any employer that directly or indirectly engages day laborers to work, including day labor services agencies and third-party employers. However, farm labor contractors and temporary services employment agencies where advanced applications, screening, and interviews are required are exempted.[408]

Employers covered by the NMDLA must designate regular paydays, not more than sixteen days apart. The employer must also provide each day laborer with an itemized statement showing any deductions made from wages, and may not make any deductions without the express written authorization of the day laborer.[409]

Employers also may not restrict the right of a day laborer to accept a permanent position with a third-party employer. If the employer also provides check cashing services, the NMDLA restricts the amount an employer may charge for cashing a check to two dollars and requires that employers post notices stating the fees for cashing a check.[410]

The NMDLA also provides a mechanism by which complaints alleging violations of the NMDLA can be submitted to the Labor and Industrial Division. Any complaint will trigger an onsite inspection of the day laborer agency within three days, and an administrative hearing may be conducted to facilitate resolution of the complaint.

Failing to pay for each day and all hours worked is a violation of the NMDLA, and an employer will be liable for full payment of the missed wages, as well as liquidated damages equal to twice the value of the unpaid wages, court courts, and attorneys' fees and costs.[411] An employer that violates the provisions of the NMDLA will be guilty of a misdemeanor on a first offense; at the second offense, the employer will also be fined no less than $250 and no more than $1,000 for each offense. Multiple violations arising from the

407 N.M. STAT. ANN. § 50-4-28.

408 N.M. STAT. ANN. §§ 50-15-1 *et seq.*

409 N.M. STAT. ANN. § 50-15-4.

410 N.M. STAT. ANN. § 50-15-5.

411 N.M. STAT. ANN. § 50-15-6.

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same set of circumstances with the same person or from multiple violations with different people are considered separate occurrences.[412]

Union Security Agreements. Under state law, an employer or labor organization located in New Mexico may execute an agreement requiring membership in a labor organization as a condition of employment to the full extent allowed by the National Labor Relations Act. The law further specifies that no political subdivision may regulate the negotiation, execution, or application of agreements requiring union membership as a condition of employment.[413]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[414] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[415] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

New Mexico does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

New Mexico does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under federal law.

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[412] N.M. STAT. ANN. § 50-15-7.

[413] N.M. STAT. ANN. § 50-4-35.

[414] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[415] 20 C.F.R. §§ 639.4, 639.6.

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Table 11. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[416] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[417]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 12 lists the documents that must be provided when employment ends under state law.

Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits, Mini-COBRA, etc.	The insurer must provide notice in writing to each employee or member, upon that employee's or member's termination of employment or membership with the group insured, of the continuation and conversion provisions of the policy. In New Mexico, the insurer bears the responsibility to provide this notice of continuation coverage. The employer *may* give this written notice, however. In any event, the employer should notify the insurer of the employee's or member's change of status and last known address. "Under no circumstances shall the employer have any civil liability under the conversion provisions of the Insurance Code."[418]

[416] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[417] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[418] N.M. STAT. ANN. § 59A-18-16(E).

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Table 12. State Documents to Provide at End of Employment	
Category	**Notes**
	At the inception of continuing coverage, an insurer must furnish to each covered family member who is 18 years of age or over, and to each employee or member of the group insured, a summary of the coverage and conversion provisions of the policy.[419]
Unemployment Notice	**Generally.** New Mexico does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, employers generally must post and maintain conspicuous notice informing employees of unemployment coverage, summarizing their rights, and instructing them how to file for benefits.[420] Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends. **Multistate Workers.** Whenever an individual covered by an election is separated from employment, an employer must again notify the individual as to the jurisdiction under whose unemployment compensation law the individual's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, an employer must notify the individual as to the procedure for filing interstate benefit claims.[421] In addition to this notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

Blacklisting. A New Mexico employer may give an accurate report or honest opinion of the qualifications and performance of a former employee to a potential employer. However, an employer may not blacklist an employee, that is, an employer may not prevent or attempt to prevent a former employee from obtaining other employment.[422]

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[419] N.M. STAT. ANN. § 59A-18-16(D), (E).

[420] N.M. STAT. ANN. § 51-1-8; N.M. CODE R. § 11.3.400.403. This notice is obtained from the insurance carrier or from the Department of Labor upon initial unemployment insurance tax registration.

[421] N.M. CODE R. § 11.3.400.420.

[422] N.M. STAT. ANN. § 30-13-3.

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References. An employer that provides a reference for a former or current employee when requested is immune from liability for comments about the employee's job performance, if the employer acted in good faith.[423]

[423] N.M. STAT. ANN. § 50-12-1.

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