

## Day Laborer Act Regulations

**Issuing Agency:** New Mexico Department of Labor, Labor and Industrial Division.

**Scope:** All day labor employers in New Mexico.

**Statutory Authority:** Section 50-15-1 to 50-15-7 NMSA 1978.

**Duration:** Permanent.

**Effective Date:** June 17, 2005

**Objective:** The purpose of this rule is to define regulations necessary for the enforcement of the Day Laborer Act.

### Definitions:

- A. "allowable deduction" means a deduction or fee charged to a day laborer that has the express written authorization of the day laborer.
- B. "check cashing service" means a business that for a fee offers to cash checks or other payment instruments or that advertises that it cashes checks or other payment instruments;
- C. "day labor" means employment that is under a contract between a day labor service agency and a third-party employer, that is occasional or irregular and that is for a limited time period;
- D. "day labor service agency" means an entity, including a labor broker or labor pool, that provides day laborers to third-party employers and that charges the third-party employer for the service of providing day laborers for employment offered by the employer. The provisions of the Workers' Compensation Act [52-1-1 NMSA 1978] shall apply to day labor service agencies with three (3) or more employees.
- E. "day laborer" means a person who contracts for day labor employment with a day labor service agency or directly with a person or a business;
- F. "department" means the New Mexico Department of Labor;
- G. "employment" means a laborer acting in an employer's interest, who engages or suffers to work.
- H. "employer" means any person or entity that directly or indirectly, through an agent, day labor service agency or any other entity acting in the employer's interest, engages, suffers or permits a day laborer to work or otherwise exercises control over the wages, hours or working conditions of a day laborer. The term includes day labor service agencies and third party employers as defined in this act.
- I. "high percentage of workers" in 50-15-5(C) means if 10% or more of the workers at any given time speak a language other than English, Spanish or Navajo than check cashing notices must be posted in that language.
- J. "hours worked" means time day laborer spent actually working, time spent by a day laborer in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked, consistent with existing wage and hour law. A day laborer who is *required* to remain waiting or on call on the employer's premises is working while waiting or "on call", consistent with existing wage and hour law. Further, any preparation time *required* by the employer at an employer's premises or at a prescribed work place will be counted as hours worked, consistent with existing wage and hour law.

- K. "payment instrument" means a paycheck, payment voucher or other negotiable instrument from an employer provided to an employee to pay for hours worked; and
- L. "third-party employer" means a person that contracts with a day labor service agency for the employment of day laborers.

**Exempt Employers:**

- A. business entities registered as farm labor contractors;
- B. temporary services employment agencies where advanced applications, a screening process and job interviews are required;
- C. a labor union hiring hall; and
- D. a labor bureau or employment office operated by a business entity for the sole purpose of employing a person for its own use.

**Pursuant to 50-4-10 NMSA Any Employer of a Day Laborer Shall:**

- A. Designate regular payday, not more than sixteen days apart, as days fixed for the payment of wages to all employees paid in this state. The employer shall pay for services rendered from the first to the fifteenth days, inclusive, of any calendar month by the twenty-fifth day of the month during which services are rendered, and for all services rendered from the sixteenth to the last day of the month, inclusive, of any calendar month by the tenth day of the succeeding month. [50-4-2 NMSA 1978]. Where day labor employment lasts less than one week, wages shall be paid at the end of each workday.
- B. Any person who hires a day laborer and who fails to pay a day laborer for work performed or time due is liable for full payment of the wages not paid and civil damages equal to twice the value of the unpaid wages, court costs and attorney fees and costs. Additionally, any person who violates this provision of the day laborer act and/or any provision of 50-4-1 through 50-4-12 NMSA 1978 is guilty of a misdemeanor and upon conviction for a first offense shall be sentenced pursuant to Section 31-19-1 NMSA 1978. A person who is convicted of a second or subsequent offense of violating or failing to comply with any provision of Sections 50-4-1 through 50-4-12 NMSA 1978 is guilty of a misdemeanor and shall be sentenced pursuant to Section 31-19-1 NMSA 1978 and shall be fined no less than two hundred fifty dollars (\$250) and not more than one thousand dollars (\$1,000) for each offense for which the person is convicted, which fine shall not be suspended, deferred or taken under advisement.

**Pursuant to the Day Laborer Act, Every Day Labor Service Agency and Third Party Employer Shall:**

- A. Compensate day laborers for hours worked by providing or making available commonly accepted payment instruments that are payable in cash, on demand, at a financial institution.
- B. Provide each day laborer with an itemized statement showing in detail each allowable deduction made from wages.
- C. Not charge a day laborer any fees or make deductions from wages without the express written authorization of the day laborer. Authorization must specify the amount and

purpose of the fee or wage deduction. Authorization must be obtained in a language understood by the day laborer or orally if the day laborer is illiterate.

- D. Ensure that any deductions made other than those required by federal or state law, do not reduce a day laborer's wages below federal minimum wage for the hours worked.
- E. Pay a day laborer for all hours worked or otherwise due and owed to the day laborer. Failure to pay for each day and all hours worked is a violation of the Day Laborer Act [50-15-1 NMSA 1978].

**Pursuant to the Day Laborer Act Every Day Labor Service Agency Shall:**

- A. Not restrict the right of a day laborer to accept a permanent position with a third-party employer to whom the day laborer has been referred for work or restrict the right of a third-party employer to offer employment to a day laborer. A day labor service agency may collect a reasonable placement fee from a third-party employer.
- B. If it also provides a check cashing service or is operating a check cashing service within the office, not charge a day laborer an amount in excess of two dollars (\$ 2.00) for cashing a check or payment instrument that is issued by the agency.
- C. Not charge any fees for cashing a check or payment instrument unless the day laborer: is given the option of being paid with a check or payment instrument that is payable without a fee at a local financial institution; and voluntarily elects to cash the check or payment instrument at the day labor service agency or at a check cashing service operating within the office of the day labor service agency. The day labor service agency must have the day laborer voluntarily sign a waiver, indicating that the day laborer is aware they have the right to be paid with a payment instrument that can be cashed at a bank free of charge and they have voluntarily elected to cash their check with the day labor service agency. This waiver must be kept on file for one (1) year from the date it is signed.
- D. Post notices in the area where cashing of checks or payment instruments occurs. The notices shall be clearly visible and easily readable and shall state the fee for cashing a check or payment instrument. The day labor service agency is responsible for establishing a relationship with a local bank at which day laborers can cash checks for free. The day labor service agency shall post a notice of a bank location day laborers can cash their paychecks for free. Notices shall 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 Navajo workers, notice shall be posted in Navajo.
- E. Maintain true and accurate records of the day laborers employed and of the hours worked and wages paid to the day laborers for at least one year after the entry of the record. Such records shall be open at all reasonable hours to the inspection of the state labor commissioner [Director of the Labor and Industrial Division], his agents or agent, record of which is required to be kept as herein provided for.
- F. Keep a summary of the Day Laborer Act, furnished by the Director of the Labor and Industrial Division without charge, posted in a conspicuous place on or about the premises wherein any day laborer is seeking employment.

### **Day Laborer Act Complaints:**

- A. Complaint forms alleging a violation of the Day Laborer Act are available at the Labor and Industrial Division, 501 Mountain Rd. NE Room 106 Albuquerque, NM 87102 and on the Department of Labor website (<http://www.dol.state.nm.us>) in English and Spanish.
- B. Day Laborer Act complaint forms should be completed in English or Spanish, signed and returned to the Labor and Industrial Division, 501 Mountain Rd. NE, Room 106, Albuquerque, NM 87102.
- C. Upon receiving a complaint under 50-15-5(C) (check cashing signage) of the Act the Labor and Industrial Division will do an onsite inspection of the day labor agency within 3 days of receiving the complaint to verify non-compliance.
- D. Upon receiving a complaint under any other provision of the Act, the Labor and Industrial Division (LID) will notify the affected employer of the day laborer claim filed against him/her and allow ten (10) business days for him/her to file a written response. If the day labor service agency does not respond a finding will be made in favor of the complainant. If the day labor service agency disputes the claim, his/her written response will be given to the day laborer who will be allowed ten (10) business days in which to rebut the claim in writing.
- E. The labor law administrator (LLA) may schedule an administrative hearing when, in their judgment; it would facilitate resolution of the complaint. The conduct of the hearing is not governed by the Administrative Procedures Act, but rather by procedures established by the LID. (50-1-2).
- F. The LLA(s) may issue a Subpoena Duces Tecum to compel the production of records they believe are necessary for the resolution of the complaint.
- G. The LLA(s) will issue a written decision whenever they have sufficient evidence upon which to base their determination or within sixty (60) days, whichever is sooner.
- H. The LLA(s) may accept a notarized acknowledgment of indebtedness from the day labor service agency if they believe it is the best way to resolve the complaint.
- I. The LLA(s) may file a proof of claim on behalf of day laborers in any U.S. bankruptcy court when a day laborer files a wage claim, when in the LLA(s) judgment it is appropriate for the resolution of the claim.
- J. A person who violates the provisions of the Day Laborer Act: on a first offense, is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to Section 31-19-1 NMSA 1978; and for a second and subsequent offense, is guilty of a misdemeanor and shall be sentenced pursuant to Section 31-19-1 NMSA 1978 and shall be fined no less than two hundred fifty dollars (\$250) and not more than one thousand dollars (\$1,000) for each offense for which the person is convicted, which fine shall not be suspended, deferred or taken under advisement. In addition to any other fees or fines that may be imposed on an offender convicted pursuant to this section, the court may order the offender to pay restitution pursuant to Section 31-17-1 NMSA 1978. Each occurrence of a violation for which a person is convicted is a separate offense. Multiple violations arising from transactions with the same person or multiple violations arising from transactions with different people shall be considered separate occurrences.
- K. It is the duty of the Director of the Labor and Industrial Division of the Labor Department to report to the District Attorney of the district in which such violations occur, any violation of labor and industrial laws of New Mexico, and it is the duty of the District Attorneys of the several districts, upon the complaint of the Director, to prosecute all violations of law which may be reported to the District Attorney by the Director pursuant to 50-15-7 NMSA 1978.