



# UNEMPLOYMENT INSURANCE PRACTICE MANUAL

PUBLISHED FEBRUARY 26, 2016

SUSANA MARTINEZ  
GOVERNOR



CELINA BUSSEY  
SECRETARY

JOHN SANCHEZ  
LT. GOVERNOR

STATE OF NEW MEXICO  
DEPARTMENT OF WORKFORCE SOLUTIONS  
401 Broadway, NE  
P.O. Box 1928  
Albuquerque, NM 87103  
(505) 841-8471/ FAX (505) 841-9024

February 26, 2016

Honorable Secretary Celina Bussey

The New Mexico Department of Workforce Solutions (NMDWS) Office of General Counsel is proud to announce the publication of the Unemployment Insurance Practice Manual. This Practice Manual replaces and supersedes the NMDWS Unemployment Insurance Precedent Manual. The Office of the General Counsel has comprehensively reviewed applicable statutes, court decisions, constitutional provisions, regulations, administrative decisions, and policies to reflect the department's interpretation of current law governing New Mexico's Unemployment Insurance Program. The Unemployment Insurance Practice Manual guides the reader through many unemployment insurance law topics, including eligibility requirements, claims and tax issues, fraud, overpayments and the hearing and appeal process. The Unemployment Insurance Practice Manual also includes an examination of judicial decisions applying the Unemployment Compensation Law.

The statements in this Manual are not binding, as they constitute the Office of General Counsel's best interpretation of existing legal pronouncements. Nevertheless, the Manual provides in-depth analysis of the major legal issues arising in the context of Unemployment Insurance benefits and taxes. It therefore serves as a guide to businesses and individuals affected by the New Mexico Unemployment Compensation Law, whether they are litigating a claim administratively, supporting or challenging a Department action with respect to Unemployment Insurance, or seeking to understand their rights and obligations with respect to Unemployment Insurance.

With best regards,

Handwritten signature of Marshall J. Ray in black ink.

Marshall J. Ray  
General Counsel

Handwritten signature of Rudolph Arnold in black ink.

Rudolph Arnold  
Deputy General Counsel

Handwritten signature of Richard Branch in black ink.

Richard Branch  
Attorney

Handwritten signature of Elizabeth Garcia in black ink.

Elizabeth Garcia  
Attorney

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## **I. INTRODUCTION**

This Manual can be used as a reference guide to understand how the New Mexico Department of Workforce Solutions administers the Unemployment Insurance Program and applies the law and regulations that govern the Program. The Manual is also a compilation of the significant court or administrative decisions that have applied the law or regulations in particular circumstances or cases. Cited authorities include constitutional provisions, statutes, regulations, judicial decisions, and interpretive documents such as Unemployment Insurance Program Letters issued by the United States Department of Labor. This Manual also reflects the weight of the New Mexico Department of Workforce Solutions' administrative decisions on particular topics, though specific decisions are not referenced. While this Manual serves as a guide, the interpretations it contains are not binding.

The New Mexico Department of Workforce Solutions administers the Unemployment Insurance Program within guidelines established by both federal and state law. New Mexico's Unemployment Insurance Program provides for unemployment insurance benefits to assist persons who are generally attached to the job market, actively searching for new work, and temporarily unemployed through no fault of their own. Eligibility for unemployment benefits, unemployment benefit amounts, and the length of time benefits are available are determined according to the New Mexico Unemployment Compensation Law. In general, whether an individual can receive unemployment benefits depends on several factors:

- (1) Did the individual receive sufficient wages in employment to be covered by the law?
- (2) Is the individual able to work, available for work, and actively searching for work?
- (3) Is the individual disqualified from receipt of benefits because the individual voluntarily quit without good cause?
- (4) Is the individual disqualified from receipt of benefits because the individual was terminated for misconduct? Or
- (5) Is the individual disqualified from receipt of benefits because the individual refused an offer of suitable work without good cause?

The individuals who meet the coverage and eligibility provisions of the law can receive benefits, while those who fall within the disqualification provisions cannot. These factors are each discussed more in depth in the chapters of this Manual.

The benefits that claimants receive are financed mainly through state taxes imposed on the payrolls of New Mexico employers. These payroll taxes, called “contributions” in the New Mexico Unemployment Compensation Law, function like insurance premiums, with rates being based on a combination of employers’ individual experience with the Unemployment Insurance Program and economic factors. New Mexico employers who are required to pay contributions also pay federal unemployment taxes.<sup>1</sup>

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<sup>1</sup> Except when referencing federal taxes, the terms “taxes” and “contributions” are used interchangeably throughout this Manual.

## **II. FINANCING UNEMPLOYMENT BENEFITS**

New Mexico and the federal government are jointly responsible for administering the Unemployment Insurance system. With a few exceptions, employers in New Mexico finance unemployment benefits and program administration through taxes paid to the federal government pursuant to the Federal Unemployment Tax Act (FUTA)<sup>2</sup> and to the State government pursuant to the New Mexico Unemployment Compensation Law.<sup>3</sup> The unemployment taxes paid pursuant to state law are referred to under New Mexico law as “contributions”. All states participating in the state-federal partnership, including New Mexico, have some ability to establish their own structure, qualifying requirements, benefit levels, and eligibility and disqualification standards. State plans must meet federal requirements for employers to qualify for credits against the tax imposed under FUTA. Employers who pay contributions on services under an approved state plan may credit their state contributions against the Federal tax. The state contributions paid by each employer are deposited and pooled into the Unemployment Trust Fund in accordance with such regulations and at such times as the secretary may prescribe. The Trust Fund acts like an insurance reserve, and the money in the Trust Fund, with few exceptions, is used solely to pay unemployment benefits. Employers are not permitted to make deductions from an employee’s wages to pay the unemployment taxes.

Every employer doing business in the state of New Mexico, whether by succession to a business already being operated, by starting a new business, by change in partnership, merger, consolidation or other form of business organization, is required to register with the department and file a report to determine the liability of the business organization for taxes to the department. The time for filing the report to determine liability is based upon the type of employer.

**Non-Agricultural Employment**—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$450 or more, or if there are one or more persons (part-time workers included) in employment in any part of the week in each of 20 weeks within a calendar year.

**Agricultural Employment**—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$20,000 or more, or if there are ten or more persons (part-time workers included) in employment at any time in each of 20 weeks within a calendar year.

**Domestic Employment**—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$1000 or more.

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<sup>2</sup> 26 U.S.C. § 3301 et. seq.

<sup>3</sup> NMSA 1978, § 51-1-9.

### ***Quarterly Reporting and Contribution Procedures***

Employers must pay quarterly taxes to the Department. Each employer must keep true and accurate employment and payroll records, which must include the names of the individual employees, the dates on which the individual performed services, the total amount of wages paid to the individual for each separate payroll period, the date of payment of said wages, the hours and dates worked, and the reasons for an individual employee's separation from employment. In addition, every employer must maintain such records as will establish the ownership and any changes of ownership of the employing unit and the address at which such records are available for inspection or audit by the Department.

All employers must submit their quarterly reports to the Department unless the employer is exempt from paying unemployment insurance taxes. An employer's quarterly report must be filed on or before the last day of the month immediately following the end of the calendar quarter. All employers must file their quarterly reports electronically, using one of the acceptable formats prescribed by the Department.<sup>4</sup> Each quarterly report must include only wages paid during the quarter being reported. Unless the employer's liability has been terminated or suspended, the employer must file a quarterly report even though no wages were paid or no tax is due for the quarter.

Once the employer is obligated to file quarterly reports, all wages must be reported for employment during the entire calendar year and contributions paid when due. This is true regardless of the number of persons employed or the amount of the payroll for any particular quarter. Contributions or payments in lieu of contributions that are unpaid on the date on which they are due bear interest at the rate of one percent per month until payment is made.

Quarterly reports that contain extraneous information, are incomplete, or otherwise submitted or prepared improperly are subject to penalties if:

- (1) The required report for any calendar quarter is not filed within ten (10) days after due date;
- (2) The contributions due on such report are not paid in full within ten (10) days after due date; or
- (3) If any payment is attempted to be made by check which is not paid upon presentment.

If an employer fails or refuses to make quarterly reports, the Department will estimate the amount according to the process described in the New Mexico Administrative Code.<sup>5</sup> After the estimated contribution is calculated, the Department will mail a notice to the employer advising

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<sup>4</sup> 11.3.400.404(C) NMAC.

<sup>5</sup> 11.3.400.404 NMAC.

it that the Department is estimating the amount of contribution due, providing the estimated amount, and advising that, unless an appeal is initiated within fifteen (15) days pursuant to Subsection B of 11.3.500.8 NMAC, a lien may recorded against the employer's property ten (10) days after the notice is given or ten (10) days after any final decision on any appeal filed by the employer.

### ***Taxable Wage Base***

FUTA taxes and state Trust Fund contributions are assessed as a percentage of employers' taxable payrolls. The FUTA tax paid to the federal government is assessed on the first seven thousand dollars of wages paid to each employee. The state taxable wage base against which state contributions are assessed is indexed and must be calculated by the Department of Workforce Solutions each year. The base wage upon which contribution shall be paid during any calendar year is sixty percent of the state's average annual earnings computed by the department by dividing total wages reported to the department by contributing employers for the second preceding calendar year before the calendar year the computed base wage becomes effective by the average annual employment reported by contributing employers for the same period rounded to the next higher multiple of one hundred dollars. The minimum taxable wage base is \$7,000.<sup>6</sup>

### ***Method for Calculating Contribution Rates***

New employers that have been in operation in New Mexico for less than two years pay a rate reflecting their industries' average rate for Unemployment Insurance in New Mexico. The new employers' rate shall apply for up to two years, after which new employers will be assessed according to the "Benefit Ratio Formula."

Employers that have been in operation in New Mexico for two years or more pay contributions to the Department based on the Benefit Ratio Formula. The Benefit Ratio Formula is determined by dividing an employer's last three years of benefit charges by the employer's last three years of taxable payroll. Employers experience benefit charges on claims for which they are the last employer or are in a claimant's base period. When a claimant's base period contains multiple employers, benefit charges are prorated among the employers based on the proportion of wages each employer paid during the base period.<sup>7</sup> The Benefit Ratio will then be multiplied by a "Reserve Factor," which floats between 0.5 and 4.0 and may change annually based upon the solvency of the Unemployment Trust Fund. The minimum available contribution rate is 0.33%, while the maximum contribution rate is capped at 5.4%. There is an "Excess Claims Premium"

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<sup>6</sup> NMSA 1978, § 51-1-42(T)(1). Employers must report all wages, but are only required to pay on the taxable wage base. *Id.*

<sup>7</sup> NMSA 1978, § 51-1-11(A). Base period employers who are not reimbursable may challenge benefit charges on the grounds that the claimant separated voluntarily without good cause connected with the work or was fired for reasons constituting misconduct. NMSA 1978, §§ 51-1-11(A)(1)-(2). Such a challenge from a base period employer will not affect a claimant's eligibility for benefits. Base period employers' challenges to benefit charges must be brought at the time the employers receive notice. Employers may not normally challenge charges based on quarterly reports received from the Department.

assessed on employers who disproportionately draw on the Unemployment Trust Fund. The regulations cap the rate for calculating the “Excess Claims Premium” to a maximum of 1% of total payroll. The Excess Claim Premium is assessed in addition to the employer contribution rate. Employers with a maximum Excess Claim Premium effectively pay a 6.4% contribution rate.

Employers are able to identify what caused their rates to change, given that they know their benefit charges and payroll as well as the thresholds for setting the “Reserve Factor.” The Benefit Ratio Formula gives employers stability in budgeting for Unemployment Insurance. The Benefit Ratio Formula also allows employers to reconcile their contribution rate with their actual experience with unemployment claims.

Contributions payable to the Department accrue and become payable by Contributing Employers for each calendar year in which the Contributing Employers are subject to payment of contributions for wages paid to employees.<sup>8</sup> Nothing in the Unemployment Compensation Law grants employers or individuals a right to the amounts paid by the employers into the fund. Employers do not have an equity or other ownership interest in the contributions paid into the Trust Fund. Those amounts constitute non-refundable premiums. Moreover, no part of an employee’s wages can be deducted to pay the unemployment taxes.<sup>9</sup>

### ***Classification of Employees***

Like various regulatory entities that deal with the employer-employee relationship, the department must often determine whether an individual providing services is an employee or an independent contractor. The distinction has significant consequences because employers only pay contributions on the taxable wages of employees and not on the earnings of independent contractors.<sup>10</sup> Moreover, when a worker is paid as a contractor, the amounts paid will not be reported as wages for purposes of determining that worker’s monetary eligibility and benefit amounts on an unemployment claim.<sup>11</sup>

In New Mexico, four of the main legal frameworks under which employee or contractor status is relevant are federal payroll taxes, federal wage and hour law, state unemployment compensation law and state wage and hour law. The administrative agencies responsible for enforcing and implementing these laws are the Internal Revenue Service (IRS), the United States Department of Labor (DOL) and the New Mexico Department of Workforce Solutions (NMDWS). Each agency can audit a business and administratively determine whether an individual providing personal services is an independent contractor or employee.

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<sup>8</sup> NMSA 1978, § 51-1-9.

<sup>9</sup> NMSA 1978, § 51-1-37(A) (creating criminal penalties for employers who make deductions for the purpose of paying Unemployment Insurance contributions).

<sup>10</sup> NMSA 1978, § 51-1-42(T)(1). Employers must report all wages, but are only required to pay on the taxable wage base.

<sup>11</sup> NMSA 1978, § 51-1-4(B)(2).

NMDWS employs the “ABC Test,” which is set forth in the Unemployment Compensation Law to evaluate whether a worker is properly classified and to determine liability for unemployment contributions and eligibility for unemployment claims.<sup>12</sup> Under the ABC Test, a worker is an independent contractor if it is established by a preponderance of the evidence that: (a) the individual has been and will continue to be free from control or direction over the 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. When in doubt, potential employers should consult legal counsel about their business practices. Businesses with ongoing needs might be advised about the possibility of contracting with a company for temporary service employees rather than classifying an employee as an independent contractor.

### ***Challenging Contributions***

Employers receive notice in approximately November of each year stating what their rate will be for the upcoming calendar year. Employers have the right to challenge their annual contribution rate. Any appeal of contribution rate is limited to the issues regarding the annual tax rate. Employers cannot raise separation issues in their appeals of the annual tax rate. The Unemployment Compensation Law provides that an employer shall not have standing to contest the chargeability to the employer’s account in a proceeding involving the employer’s contribution rate except upon satisfying two conditions: first, the employer must not have employed the individual who collected benefits, and second, the employer must not have been a party to the separation determination. An employer’s appeal must meet both conditions of the standing requirements for a tax rate appeal to consider a separation issue.<sup>13</sup> Otherwise, chargeability on a particular claim must be timely raised by the employer during the administrative process for that claim.

Employers also receive quarterly notices identifying the amount of contributions that must be paid to the department for claims paid during the quarter. The same two conditions for challenging annual contribution rates also apply to quarterly liability charges. Any appeal of quarterly liability charges is limited to the issues regarding the correct individuals and wage calculations and not any causes related to the separation from employment.

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<sup>12</sup> NMSA 1978, § 51-1-42(F)(5).

<sup>13</sup> NMSA 1978, § 51-1-11(J). \*See also [\*Premier Home Care, Inc. v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2012-01765 (N.M. 2d Jud. Dist., Apr. 27, 2012) (upholding Secretary’s decision that employers may not use a quarterly notice as a vehicle for rearguing the reasons for an employee’s termination).

### ***Business Transfers***

Whenever all or part of one business enterprise acquires all or part of another business enterprise, either by merger, consolidation or other form of reorganization and there is a substantial change in ownership, the transaction is a business transfer for purposes of administration of the unemployment law.<sup>14</sup> The department will review the transaction and based upon the applicable rules determine what contribution rate will apply to the successor business enterprise.<sup>15</sup> The effective date of the acquisition and transfer of liability for contributions is the date the department determines that the change in ownership or possession and operation is actually consummated as evidenced by a legally valid instrument or by physical or constructive possession.

A successor business that has acquired all or part of the predecessor's business must notify the department of the acquisition by completing an electronic application for a total or partial experience history transfer on the department's webpage. The electronic application should be filed with the department sixty (60) days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition. If the successor employer fails to complete an electronic application before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition, when the department receives actual notice of the transfer, the department shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition and the successor shall pay a penalty of fifty (\$50.00) dollars.<sup>16</sup> All contributions, interest and penalties due from the predecessor employer must also be paid. All determinations of the rate of contributions the successor business must pay after a total or partial history transfers are subject to the rules of governing appeals of contribution or tax determinations.<sup>17</sup>

### ***SUTA Dumping***

"SUTA dumping" is a colloquial term that refers to various unlawful transactions businesses effectuate for the purpose of reducing Unemployment Insurance liability. Under New Mexico law, any person who transfers or acquires, or attempts to transfer or acquire, an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions or who knowingly advises another person to engage in that activity faces criminal fines and imprisonment, in addition to civil penalties.<sup>18</sup> Some of the more common schemes include purchased shell transactions and affiliated shell transactions. In a purchased shell transaction, Company A, which is just starting in business, purchases an existing business that has a low/minimum tax rate. The low/minimum tax rate is transferred to Company A under state laws dealing with employer succession and transfer of experience. Once the experience is transferred

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<sup>14</sup> NMSA 1978, § 51-1-11(E), 11.3.400.416 NMAC.

<sup>15</sup> NMSA 1978, § 51-1-11(E), 11.3.400.417(D) NMAC

<sup>16</sup> Id.

<sup>17</sup> 11.3.500.8 NMAC.

<sup>18</sup> NMSA 1978, § 51-1-11(E)(7).

and a low/minimum rate established, Company A begins operations. In an affiliated shell transaction, an already established and operating company forms a number of additional corporations, obtains a UI account number for each, reports wages for a small number of individuals and pays state UI taxes on those wages until each additional corporation earns a minimum tax rate. Then the major portion of the original company's employees is moved to a corporation with a minimum tax rate allowing it to effectively "dump" the higher tax rate earned by the original company and maintain a low UI tax rate.<sup>19</sup>

### ***Reimbursable Employers***

Reimbursable employers are entities that have elected or are required to reimburse the Department for the unemployment benefits paid to their former employees in lieu of paying contributions to the Department.<sup>20</sup> In other words, these entities are self-insured. Reimbursable employers pay an amount equal to the amount of regular benefits and of one-half of the extended benefits paid that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment that begin during the effective period of election. The election to be a reimbursable employer must be approved by the Secretary and is limited to certain non-profit organizations, state and local governments or Indian tribes, tribal units or a subdivisions, and subsidiaries or business enterprises wholly owned by a tribe. Non-governmental entities must provide a surety or cash bond in an amount of not more than 2.7% of their total taxable payroll.<sup>21</sup> Reimbursable employers do not pay FUTA taxes.<sup>22</sup> No part of an employee's wages can be deducted to repay unemployment benefits.<sup>23</sup> Reimbursable Employers that are not claimants' last employers cannot contest or appeal issues regarding the separation from employment. Reimbursable employers' accounts are liable for benefit charges regardless of the employee's cause of separation from employment.<sup>24</sup>

The Department is required to transmit to any Reimbursable Employer who remains delinquent for payments, interest or penalties, a notice of potential termination of the organization's election to be a Reimbursable Employer for the next calendar year. If payment is not forthcoming within thirty days from the date of said notice, the Department shall transmit a final determination to any Reimbursable Employer who remains delinquent that its election to be a Reimbursable Employer has been terminated for the next calendar year. Once the termination is final, the employer's status is converted to a contributing employer.

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<sup>19</sup> Unemployment Insurance Program Letter (UIPL) 34-02.

<sup>20</sup> NMSA 1978, § 51-1-14(A).

<sup>21</sup> NMSA 1978, § 51-1-13(C)(4).

<sup>22</sup> See, e.g., 26 U.S.C. § 3306(c)(7)-(10) (excluding work performed for certain entities from the Federal Unemployment Tax Act's definition of "employment").

<sup>23</sup> NMSA 1978, § 51-1-37(A).

<sup>24</sup> NMSA 1978, § 51-1-11(A).

### ***Exemptions from Requirement to Pay Contributions***

Employers that may be exempt from the requirement to pay unemployment insurance taxes are outlined in detail in the Unemployment Compensation Law.<sup>25</sup> Some examples of employers who are exempt and not required to pay unemployment insurance taxes are: churches or ministers, certain nonprofit organizations, service performed by an individual in the employ of the individual's son, daughter or spouse, and service performed by a child under the age of majority in the employ of the child's father or mother, and some federal agencies. Individuals working for these employers do not qualify for unemployment benefits.<sup>26</sup>

### ***Election to Become Subject to the Unemployment Compensation Law***

An employer not otherwise subject to the Unemployment Compensation Law may file a written election to become subject to the Unemployment Compensation Law for a period of time not less than two calendar years. If the Secretary grants written approval of such election the employer becomes subject to the Unemployment Compensation Law to the same extent as all other employers. An Exempt Employer that desires to terminate coverage shall cease to be subject to the Unemployment Compensation Law as of January 1 of any calendar year subsequent to the initial two calendar years if the employer files a written notice requesting termination of coverage between January 1 and March 15, or if the Secretary, on the Secretary's own initiative, has given notice of termination of coverage.

### ***Collection of Contributions***

Employers must submit quarterly wage reports and pay their contributions to the Department based upon the quarterly wage reports.<sup>27</sup> Penalties are imposed for failure to file any quarterly wage and contribution report or failure to pay contributions when due.<sup>28</sup> If an employer fails or refuses to file quarterly wage reports the department's representative may estimate the amount due.<sup>29</sup> The estimated contribution is calculated at one and one-half times higher than the highest contribution reported in any quarter in the most recent eight quarters in which wage reports were filed.<sup>30</sup> After the estimated contribution is calculated, the department notifies the employer of the estimated amount of contribution due. The employer is advised that unless an appeal is initiated within fifteen days the estimated amount shown in the notice shall be the amount of the contribution due for the period stated in the notice.<sup>31</sup>

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<sup>25</sup> NMSA 1978, § 51-1-42(F)(12). *See also Santa Fe Lodge No. 460 v. Emp't Sec. Comm'n*, 1945-NMSC-022, 49 N.M. 149, 159 P.2d 312 (holding that exemption from payment of contributions by charitable corporations was to be liberally construed so as to further rather than hinder statute's beneficent purpose).

<sup>26</sup> *Graham v. Miera*, 1955-NMSC-054, ¶¶ 17, 19, 59 N.M. 379, 384, 285 P.2d 493, 496 (noting that an employer claiming an exemption from the unemployment tax carries a heavy burden because of the rule of decision that the grant of an exemption from the tax is strictly construed against the claimant).

<sup>27</sup> NMSA 1978, § 51-1-9, 11.3.400.405 NMAC.

<sup>28</sup> 11.3.400.404(C) NMAC.

<sup>29</sup> NMSA 1978, § 51-1-36(B).

<sup>30</sup> 11.3.400.404(E) NMAC.

<sup>31</sup> NMSA 1978, § 51-1-36(B), 11.3.400.404(D) NMAC.

Contributions unpaid on the date on which they are due and payable bear interest at the rate of one percent per month until payment is received by the department.<sup>32</sup> If any employer defaults in any payment of contributions or interest thereon, the department may seek to collect the amount due by civil actions.<sup>33</sup> The department after due notice to any employer that defaults may file a lien upon all property, real and personal, of the employer and the sheriff or a representative of the division may levy upon any property of the employer and the property so levied on may be sold in all respects with the like effect, and in the same manner with respect to executions against property upon judgments of a court of record, and the remedy of garnishment applies.<sup>34</sup>

The department may also seek to enjoin the employer from conducting any business in the State until the outstanding payments and wage reports are received by the department.<sup>35</sup> The department has sought and received judgments in the District Courts for enforcement of the department's right to contributions and injunctions.<sup>36</sup>

The contributions and excess claims premiums, together with interest and penalties thereon imposed by the Unemployment Compensation Law, cannot be assessed or a collection action commenced more than four years after a report showing the amount of the contributions was due.<sup>37</sup> There are exceptions to the four year limitation for cases of a false or fraudulent contribution reports or a willful failure to file a report of all contributions due. There is also an exception for written extensions agreed to by the employer and the Secretary that were entered before the four year limitation.<sup>38</sup>

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<sup>32</sup> NMSA 1978, § 51-1-36(A), 11.3.400.411 NMAC.

<sup>33</sup> [\*State of New Mexico Dep't of Workforce Solutions, UI Tax Division v. Sanchez\*](#), D-202-CV-2009-12669 (N.M. 2<sup>nd</sup> Jud. Dist. Ct. October 18, 2013) (awarding judgment against employer in the amount of \$9,379.40 in unpaid unemployment insurance contributions).

<sup>34</sup> NMSA 1978, § 51-1-36(B).

<sup>35</sup> NMSA 1978, § 51-1-40.

<sup>36</sup> [\*State of New Mexico Dep't of Workforce Solutions, UI Tax Division v. Sanchez\*](#), D-202-CV-2009-12669 (N.M. 2<sup>nd</sup> Jud. Dist. Ct. August 29, 2015)(denying Department's request to enjoin business; granting mandatory payment of \$2000 day after scheduled hearing or if not business would be enjoined; requiring open book policy on employer's business accounting and providing employer federal tax returns to DWS; post-judgment discovery regarding Respondent's recordkeeping; allowing court ordered lien to be placed on the percentage of the proceeds of Respondent's account receivables; and allowing execution on the Department's Transcript of Judgment).

[\*State of New Mexico Dep't of Workforce Solutions, UI Tax Division v. Cipta\*](#), D-1329-CV-2012-00911 (N.M. 13<sup>th</sup> Jud. Dist. Ct. February 25, 2015)(bench warrant issued for employer who failed to appear for multiple district court hearing and engaged in contempt of court for failing to provide state tax unemployment wage reports pursuant to court order and required bond to be posted in the amount of delinquent contributions. The bond was released to the assigned Department tax representative).

<sup>37</sup> NMSA 1978, § 51-1-11(L).

<sup>38</sup> *Id.*

### **III. FILING A CLAIM**

Individuals should contact the Department as soon as possible after becoming unemployed. Persons who file for benefits are referred to as “claimants.” Claimants, who file an initial, additional, transitional, or reopened claim for benefits, must provide the name and address of their last employer and register for work with the New Mexico Workforce Connection within 14 calendar days from the date the claim is filed. If the claimant lives out of State, they must register for work with the State’s local unemployment office within 14 calendar days from the date the claim is filed. The filing date of any initial, additional, transitional, or reopened claim is the Sunday of the week in which the claim is filed. New Mexico law requires a one-week waiting period before any benefits become payable. As a result, the second week claimed is the first week of payment, if the claimant is otherwise eligible. In general, benefits are based on a percentage of an individual’s earning over a recent 52-week period.

#### ***Backdating a Claim***

Upon a showing of good cause, an initial or additional claim may be back-dated to the Sunday of the week immediately following the week in which the claimant was separated from employment, and any reopened claim may be back-dated up to a maximum of twenty-one days from the preceding Sunday of the date of the request for back-dating. Good cause for backdating exists when it is established that factors or circumstances beyond the claimant’s reasonable control caused the delay in filing.

To establish and maintain eligibility for benefits or for waiting-period credit during a continuous period of unemployment, claimants must not be subject to a fraudulent overpayment penalty, must continue to report weekly as directed, and file continued claims for benefits through the interactive voice response (IVR) or through the Internet.<sup>39</sup> The Department may approve paper certification where the Department deems it necessary to provide prompt and efficient service to a claimant.

Claimants must go on line and file weekly certifications after the end of each week of unemployment, including their one week waiting period. All individuals applying for and receiving unemployment benefits are required to log into the New Mexico Workforce Connection Online System ([www.jobs.state.nm.us](http://www.jobs.state.nm.us)) first in order to access the Department’s UI Tax & Claims system. Certification requires claimants to respond to questions concerning their continued eligibility for benefits, report any earnings from work they had during the week and also report any job offers or refusal of work during the week. Individuals requesting to certify for their weekly benefits will be required to report their work search contacts at the time that they certify. Unless exempted by the Department, individuals are required to make a minimum of two different work search contacts every week to qualify for benefits. They will need to report: the date of their contact, the type of work it was, the employer’s name, the person or website

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<sup>39</sup> 11.3.300.302 NMAC.

address, the type of contact, contact information (such as a phone number or web address), and what was the result of the contact.

If it is determined that an unemployed claimant may benefit from re-employment services offered by the Department, the claimant may be directed to report to a local Workforce Connections Office or One Stop Office on a scheduled day and time. If the claimant fails to report as scheduled for any interview or training benefits may be denied.

Claimants who have lost their jobs and have not obtained new full-time employment must file a claim for regular benefits. If claimants who qualify for regular benefits have also obtained new, part-time employment they may be entitled to some weekly benefit amount after offset of their part-time wages and earnings. These claimants have established their claim and eligibility for benefits and are reporting partial wages or earnings as required by the Unemployment Compensation Law.<sup>40</sup> These claimants are eligible for a weekly benefit unless their earnings in any week exceed their weekly benefit amount.

### ***Partial Benefits***

Claimants may qualify for partial benefits only if their regular full-time employment was unilaterally reduced by their employers so that the claimants' earnings fall below their full potential weekly benefit amount.<sup>41</sup> For example, if claimants accept jobs that are considered full-time in a particular industry, even if the jobs are less than forty hours per week, and their employers unilaterally cut the claimants' hours, the claimants are eligible for partial benefits. They will be eligible to receive a partial benefit for each week that their earnings from their employment fall below their weekly monetary eligibility, notwithstanding the fact that they are employed. These partial benefits will be charged to their employer's account.

Individuals that are employed in part-time position and have earnings below what their weekly benefit amount would be if they had a claim are not eligible for partial benefits. These individuals are employed in part-time position not as a result of a unilateral reduction in their employment from full-time to part-time so they do not qualify for partial benefits.

### ***Claims for Benefits***

Claimants must make a claim for benefits in accordance with the regulations prescribed by the Secretary of the Department. Claimants are responsible for all responses made by them or on their behalf in their applications and certifications. For those individuals with limited English proficiency, the Department provides free language assistant services to those who need it. The regulations that apply to claims administration are found in 11.3.300 NMAC. After a claim is filed, the Department will notify the claimant's last employer of the claim. The claimant's last employer may be impacted by a decision in favor of the claimant and therefore has the right to

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<sup>40</sup> NMSA 1978, § 51-1-4(B)(2).

<sup>41</sup> 11.3.300.309 NMAC.

notice and an opportunity to be heard with respect to the claim for unemployment benefits. The last employer must provide the Department a substantive response within ten days of receiving notice of a claim.<sup>42</sup> Unless excused by the Department, the response must be electronic.<sup>43</sup> If the employer does not provide a timely response, the Department may immediately issue a determination in the claimant's favor and commence paying benefits.

A Department claims examiner must promptly review the application and make a determination that the claimant is eligible or is disqualified for benefits. The claims examiner must make the determination based on the Unemployment Compensation Law, the employer and the claimant cannot stipulate that the claimant is entitled to benefits.<sup>44</sup> After the claims examiner makes a determination that the claimant is eligible or is disqualified for benefits, a notice is sent to the claimant and the last employer. The claimant and the last employer have fifteen (15) days from the date of the notification or mailing of the determination to file an appeal to the Appeal Tribunal. If no appeal is filed, the determination of the claims examiner is final, subject to a redetermination within twenty days by the claims examiner if the specific criteria of the regulations at 11.3.300.308(D) NMAC are met.

The Department's regulations permit the department to reconsider a claim due to new or additional information within twenty days after the date of the initial determination or date of first payment. The Department's regulations provide specific time frames for the Department to act on claims. The New Mexico Court of Appeals has determined that an administrative agency is bound by its own regulations and thus the Department was precluded from reconsidering a worker's claim more than twenty days after the date of the initial determination or date the first payments begin.<sup>45</sup> If there is an appeal by the employer that results in a reversal of the determination of eligibility to receive benefits, it does not constitute a redetermination subject to the twenty-day deadline.

Any person aggrieved by an initial determination has a right to a *de novo* hearing before the Appeal Tribunal.<sup>46</sup> Appeal proceedings before an Administrative Law Judge of the Appeal Tribunal constitute fair hearings of record. This is the only hearing of record the parties will receive on appeal. All subsequent reviews, including judicial review at the district court, will be based upon the record made before the Appeal Tribunal.<sup>47</sup>

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<sup>42</sup> NMSA 1978, § 51-1-8(C) (stating factors affecting how the Department determines which employing unit is the claimant's "last employer" for purposes of adjudicating).

<sup>43</sup> 11.3.300.308(A) NMAC.

<sup>44</sup> See *Pinkerton v. N.M. Dep't of Workforce Sols.*, No. CV-2011-729 (N.M. 5th Jud. Dist. Ct. October 26, 2012) (holding that the Department was not bound by settlement between claimant and her employer which stipulated that the claimant was eligible for unemployment benefits).

<sup>45</sup> *Narvaez v. N.M. Dep't of Workforce Sols.*, 2013-NMCA-079, 306 P.3d 513. See also 11.3.300.308(D) NMAC.

<sup>46</sup> 11.3.500.8(A) NMAC. Administrative appeals are discussed more fully in Section IX.

<sup>47</sup> Rule 1-077(J) NMRA. See *Wakeland v. N.M. Dep't of Workforce Sols.*, 2012-NMCA-021, ¶¶ 4-5, 274 P.3d 766 (holding that while a party does have an appeal as a matter of right of final agency determinations to the district court in the county where the party seeking review resides, a party does not have an appeal as of right from the

Initial determinations of eligibility for unemployment benefits are not adjudicatory hearings. Rather, they are essentially investigative determinations, usually made on the basis of separate interviews with the claimant and the employer, documentary review, and a limited rebuttal under very restrictive time constraints. These determinations should be as accurate as possible, but they are not intended to be adjudicatory and are not done in the context of an evidentiary hearing.<sup>48</sup>

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decision of the district court on review of administrative decisions involving unemployment compensation benefits; Rule 12-505(B) NMRA (requires a party to seek discretionary review of the district court decision in the court of appeals by means of a petition for writ of certiorari).

<sup>48</sup> *Kennecott Copper Corp. v. Emp't Sec. Comm'n*, 1967-NMSC-182, ¶ 20, 78 N.M. 398, 432 P.2d 109 (holding that the Department's power, as granted to it by the legislature, to investigate facts and law deemed by it to be material to a decision is quasi-judicial in its nature).

#### **IV. COVERED EMPLOYMENT**

The coverage provisions of the Unemployment Compensations Law determine what employment services are subject to the Unemployment Compensation contributions and, therefore, what persons are entitled to file claims for benefits and participate in the unemployment compensation program. Generally, unless specifically excluded, all services performed for an employer by an employee for wages are covered.<sup>49</sup> Notable exclusions include service performed for the federal government (which is covered under a federal unemployment compensation program), services performed for churches and religious organizations, services performed for small farm employers, and services performed in domestic employment for an employer paying less than \$1,000 in any calendar quarter.<sup>50</sup>

Some other eligibility provisions apply only to particular individuals who perform services in specified occupations and test their unemployed status and attachment to the job market on the basis of conditions peculiar to those occupations or positions. Some services are explicitly excluded from receipt of unemployment benefits. Examples of services which are excluded from coverage include:

##### ***Services Performed for an Educational Institution or Educational Service Organization***

Individuals employed by an educational institution are not eligible for unemployment benefits for any week of unemployment between two successive academic years or term if they performed services during the first year or term and have reasonable assurance of performing services in the second year or term.<sup>51</sup> The rationale for these provisions of the law is that teachers and school employees are considered to be full-time employees, with summer and other between-term and in-term recesses being a normal and regular part of the terms and conditions of that employment, and that such recess periods do not really constitute periods of unemployment within the meaning and purposes of the unemployment compensation laws.

The prohibition against payment of benefits applies to all employees if they have reasonable assurance of performing services in an educational institution – any educational institution – in a second successive year or term. The assurance of reemployment does not have to be in the same institution in which the employee performed services in the first year or term. As a consequence, if claimants who have been told that they will not be rehired by the institution in which they were performing services in the first year or term, but have a contract or assurance of being hired at another institution in the second year or term, they are ineligible to receive unemployment benefits between terms.

If an employee other than instructional, research, or principal administrative personnel was denied benefits after filing a claim during a between-term period because that employee was

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<sup>49</sup> NMSA 1978, § 51-1-42(T)(1).

<sup>50</sup> NMSA 1978, § 51-1-42(F)(12).

<sup>51</sup> See NMSA 1978, § 51-1-5(C).

deemed to have a reasonable assurance for reemployment in the second year or term, the employee must reopen the claim for benefits and advise the Department that the employee was not reemployed. In this situation, the employee becomes entitled to receive retroactive payment of benefits for each week for which the employee filed a claim, certified for benefits and met any other applicable eligibility requirements under the Unemployment Compensation Law.<sup>52</sup>

The denial of benefits provided in these sections of the law also apply to individuals who perform services for an educational institution while employed by a state or local government educational service agency or other governmental entity or nonprofit organization.<sup>53</sup> It must be determined whether the individual is actually performing services for an educational institution or is simply performing services, incidentally on school premises, for the public entity that employs the individual.<sup>54</sup>

### ***Services Performed by Aliens***

The Unemployment Compensation Law provides that benefits shall not be paid to an alien unless the alien has been lawfully admitted for permanent residence at the time the alien performed the services upon which benefits are based, was lawfully admitted for the purpose of performing those services, or was permanently residing in the US under color of law at time the services were performed.<sup>55</sup>

The Department has established uniform procedures for purposes of administering these provisions of the Unemployment Compensation Law that are applicable to all claimants for unemployment benefits. The procedure is to ask all claimants if they are United States citizens. If the answer is yes, there is normally no further inquiry. If the answer is no, there are subsequent questions which must be answered by the claimant and instructions that the claimant present an United States Permanent Resident Card (USCIS Form I-551) formerly Alien Registration Receipt, (INS Form I-151), or other documentation showing that the claimant is living and working in the United States “under color of law.” If there is reasonable evidence that the claimant has answered “yes” incorrectly, some follow-up investigation may result.

### ***Participating in Sports, Athletic Events, or Training***

Benefits may not be paid to individuals on the basis of services which consist of participating in sports, athletic events, or training or preparing to participate in such activities for any week of unemployment which occurs between two successive sports or athletic seasons if the claimant performed in the former season and there is a reasonable assurance that the claimant will perform

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<sup>52</sup> NMSA 1978, § 51-1-5(C).

<sup>53</sup> NMSA 1978, § 51-1-5(C)(4).

<sup>54</sup> [U.S. Department of Labor Unemployment Insurance Program Letter No. 18-78](#), State Option to Deny Benefits “Between Terms” and/or “Within Terms” to Employees of an Educational Service Agency Similar to Employees of Educational Institutions. If a claimant has sufficient non-school employment and earnings in the base period to qualify for benefits, these benefits would be payable during the between terms denial period if the claimant were otherwise eligible.

<sup>55</sup> NMSA 1978, § 51-1-5(F).

in the latter season.<sup>56</sup> This provision is intended to prevent persons who normally and regularly make their living participating in professional sports from claiming unemployment benefits during the off-season.

### ***Seasonal Ski Employees***

A seasonal ski employee employed on a regular, seasonal basis is ineligible for unemployment benefits between two successive ski seasons unless the employee establishes that the employee is available for and is making an active search for permanent full-time work.<sup>57</sup> A seasonal ski employee is defined as a person who works for a ski area fewer than six consecutive months of the previous twelve month period or fewer than nine total months out of the last twelve month period. A seasonal ski employee who has been employed by a ski area operator in two successive seasons is presumed unavailable for permanent new work, and thus ineligible for unemployment benefits.

Non-seasonal ski employees are not subject to the presumption of unavailability, but they remain subject to the availability and active search for work provisions of the Unemployment Compensation Law like all other claimants for unemployment compensation benefits.

### ***Services Performed in a Major Non-Tenured Policy-Making or Advisory Position***

The Unemployment Compensation Law exempts individuals serving in positions that are designated as a major non-tenured policy-making or advisory positions. The exemption in the law for major non-tenured policy makers and advisors originates in the Federal Unemployment Tax Act (“FUTA”), which governs all unemployment compensation programs in the United States. Pursuant to FUTA, states are required to exclude from coverage those positions which, “under or pursuant to the state or tribal law, [are] designated as a major non-tenured policymaking or advisory position.”<sup>58</sup> States are only permitted to create exemptions to unemployment coverage if FUTA and the Social Security Act allow for the exemptions. The federal law requirement that led to the exclusion set forth in the Unemployment Compensation Law<sup>59</sup> is itself a strong expression of federal policy that high level, non-tenured government officials are not intended to qualify for unemployment coverage.

The New Mexico Legislature is generally responsible for designating positions as major non-tenured policymaker or advisory positions, although the Legislature may delegate the ability to make such a designation to the appropriate executive officer.<sup>60</sup>

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<sup>56</sup> NMSA 1978, § 51-1-5(G).

<sup>57</sup> NMSA 1978, § 51-1-5(I).

<sup>58</sup> 26 U.S.C. § 3309(b)(3).

<sup>59</sup> NMSA 1978, § 51-1-44(A)(5)(a).

<sup>60</sup> *Perez v. N.M. Dep’t of Workforce Sols.*, 2015-NMSC-008, 345 P.3d 330

## V. MONETARY ELIGIBILITY

Claimants are not eligible for unemployment insurance benefits unless they have been paid sufficient wages during the base period preceding their claim. Furthermore, a claimant is eligible to receive benefits only if the claimant has been paid wages in at least two quarters of the claimant's base period.<sup>61</sup> As used in the Unemployment Compensation Law, "base period" means the first four of the last five completed quarters immediately preceding the first day of an individual's benefit year.<sup>62</sup> A "benefit year" is the one year period beginning the day the claimant files a claim.<sup>63</sup> A claimant's weekly and maximum benefit amounts are determined on the basis of wage reports submitted by the claimant's base period employers.<sup>64</sup> Employers are required to submit a quarterly wage report listing wages paid to all workers and pay a tax at the rate applicable to that particular employer account.

When claimants file claims for benefits, it is the Department's responsibility to issue a monetary determination. This determination is based upon the wages reported to the Department for the particular claimant. The monetary determination is the official notice to claimants and employers of the determination of monetary eligibility and potential liability for an employer. An initial determination of monetary eligibility provides claimants with information regarding employers for whom the claimant worked, the amount of wages earned, and the calculated weekly and maximum benefit amounts potentially due to the claimant. Allocation of base period wages to the proper quarters in the base period is critical to establishing monetary eligibility for claimants and to determining claimants' weekly benefit amounts. Normally, wages are credited to claimants when paid, but under some circumstances, such as an award of back pay, this may change. In such circumstances, wages will be credited to the claimant for the quarters wages are actually earned.

It is important for claimants to have a record of names and addresses of the employers for whom they worked, the dates worked, wages paid, and any proof of earnings such as check stubs or W-2s. Wage discrepancies may occur on the monetary determination. Claimants are provided a "Wage and Employer Correction Sheet" to correct any errors or omissions in the names and number of employers or the amount of wages listed. If an employer notices errors on the monetary determination, then the employer should log into its account under the employment and wage detail reporting screen and select the year and quarter for which any wages need to be added or make any other necessary corrections.

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<sup>61</sup> NMSA 1978, § 51-1-5(A)(5).

<sup>62</sup> NMSA 1978, § 51-1-42(A); 11.3.300.7(E) NMAC

<sup>63</sup> NMSA 1978, § 51-1-42(P).

<sup>64</sup> NMSA 1978, § 51-1-4 (An otherwise eligible individual is entitled during any benefit year to a total amount of benefits equal to whichever is the *lesser* of twenty-six times the individual's weekly benefit amount, plus any dependency benefit amount pursuant to Subsections C and D of this section, or sixty percent of the individual's wages for insured work paid during the individual's base period).

### ***Alternate Base Period***

Claimants who do not meet monetary eligibility under the regular base period will have their alternate base period wages used to determine monetary eligibility for benefits, provided that their work history indicates they may meet monetary eligibility requirements. An alternate based period consists of the last four completed calendar quarters immediately preceding the first day of the claimant's benefit year. Claimants bear the burden of providing the Department with documentary evidence of their wages from the quarter immediately preceding the quarter in which they file a claim for benefits.

The Department, on its own initiative, may reconsider a monetary determination whenever it is determined that an error in computation or identity<sup>65</sup> has occurred, the claimant has newly discovered wages that were not previously considered, or benefits have been allowed or denied on the basis of misrepresentation of fact, but no redetermination shall be made after one year from the date of the original monetary determination.<sup>66</sup> Notice of redetermination will be sent to all interested parties and is subject to an appeal, just like the original determination.<sup>67</sup>

### ***Requalifying Wages***

In addition to the monetary eligibility requirements discussed above, the Unemployment Compensation Law imposes two other earnings requirements on certain claimants which could affect eligibility. If a claimant has been disqualified from earning benefits because the claimant voluntarily quit without good cause, was discharged for misconduct, or failed to apply for available suitable work,<sup>68</sup> the claimant's disqualification will continue until the claimant has "purged" the disqualification by earning wages equal to five times the claimant's weekly benefit amount.<sup>69</sup> The employment and earnings must be from employment in insured (i.e., covered) work as defined in the Unemployment Compensation Law<sup>70</sup> or from other bona fide work as provided in the New Mexico Administrative Code.<sup>71</sup> Earnings from self-employment may not be used to purge a prior disqualification. If the earnings are not from insured work or other bona fide work, they cannot be used to purge the disqualification.

The Unemployment Compensation Law requires a claimant who has established one benefit year to earn requalifying wages in order to establish a second benefit year. Claimants must have had employment and earnings equal to five times the individual's weekly benefit amount (from the

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<sup>65</sup> See *Macias v. N.M. Dep't of Labor*, 21 F.3d 366 (10th Cir. 1994) (holding that where plaintiffs were recruited on a day-haul basis by "crew leaders" to perform agricultural labor for farm operators, it was both reasonable and plausible for the Department to identify the crew leaders as the covered employer of plaintiffs for purposes of reporting wages and paying taxes. "Typically, a crew leader recruits workers, picks up the workers at a designated pick-up site, transports them to the work site [and] then transport[s] the workers back to the pick-up site at the completion of the day's work or a particular job.")

<sup>66</sup> NMSA 1978, § 51-1-4(H).

<sup>67</sup> *Id.*

<sup>68</sup> See NMSA 1978, § 51-1-7(A).

<sup>69</sup> NMSA 1978, § 51-1-7(E).

<sup>70</sup> NMSA 1978, § 51-1-42(F).

<sup>71</sup> 11.3.300.319(E)(1)-(10) NMAC (providing a non-exhaustive list of factors to determine bona fide employment).

prior claim) before the individual can establish a second consecutive benefit year.<sup>72</sup> The purpose of this requalifying wage requirement is to prevent claimants from “double dipping” into a second consecutive year of unemployment benefits on the basis of wages earned prior to the first claim without having any more employment. Earnings from employment which are not covered under the Unemployment Compensation Law or from self-employment will not requalify a claimant for a second claim.<sup>73</sup>

The requalifying wage requirements of Unemployment Compensation Law affect the determination which employer of the claimant’s will be considered the claimant’s “last employer.” The “last employer” (also referred to in law as the “interested party”) for all claimants must be established for purposes of determining the eligibility of claimants for unemployment benefits. “Last employer” means the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or, in the event of a separation for lack of work, the employer or employing unit from which the claimant separated if the claimant, subsequent to the separation for reasons other than lack of work, has not worked and earned requalifying wages.<sup>74</sup>

If a claimant has been unemployed because of a continuous period of injury or sickness for which the individual has received benefits under the Worker’s Compensation Act or the New Mexico Occupational Disease Disablement Act, the claimant can preserve base period wage credits earned prior to such injury or sickness for purposes of filing a claim for unemployment benefits if the claimant meets the requirements provided in the Unemployment Compensation Law.<sup>75</sup>

The preservation of wage credits is an exception to the general rule governing base period wage credits. Generally, if a claimant has not worked for four or more calendar quarters, the claimant will have insufficient or no base period wage credits to support a claim. For periods less than four quarters, the claimant’s benefit amount would become smaller as each base period quarter expired. The Unemployment Compensation Law, however, freezes a qualifying claimant’s wage credits as of the commencement of the period of injury or sickness and preserves them for use when the claimant recovers. Nevertheless, the following limitations apply to this rule:

- (1) A claimant must file a claim for unemployment benefits within a 36-month period following the commencement of the continuous period of injury or sickness;
- (2) A claimant must file a claim for unemployment benefits with respect to a week which is not later than the fourth week after termination of the continued period of the injury or sickness; and

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<sup>72</sup> NMSA 1978, § 51-1-5(B).

<sup>73</sup> NMSA 1978, § 51-1-42(F).

<sup>74</sup> NMSA 1978, § 51-1-8(C)(2), 11.3.300.7(Q) NMAC

<sup>75</sup> NMSA 1978, § 51-1-6.

- (3) A lump-sum settlement award of a Workers' Compensation or Occupational Disease Disablement claim will be deemed to terminate the continuous period of injury or sickness for purposes of determining the above limitation periods. If a claim is not filed within four weeks of the award, it will be barred.<sup>76</sup>

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<sup>76</sup> *Santiago v. N.M. Emp't Sec. Dep't*, 1984-NMCA-065, 101 N.M. 387, 683 P.2d 69.

## VI. ABLE, AVAILABLE, AND ACTIVELY SEEKING WORK

The purpose of the Unemployment Compensation Law is to assist working people who are temporarily unemployed because of work-related circumstances beyond their control.<sup>77</sup> The Unemployment Compensation Law therefore places strong emphasis on claimants becoming re-employed in suitable work as soon as possible. Under the Unemployment Compensation Law, claimants must be able to work, available for work, and actively seeking work.<sup>78</sup> These requirements test claimants' attachment to the job market by determining their commitment to return to gainful employment. One of the primary purposes of unemployment benefits is to assist persons in becoming employed again.<sup>79</sup>

The Department monitors claimants throughout their claim to assure that they continue to be able to work and available for work and that they are making an active search for work.<sup>80</sup> Evidence that a claimant is failing to meet these requirements will result in an inquiry or audit and verification of some or all claimed work searches by the claimant and, possibly, a denial of benefits in the event the work searches cannot be verified.<sup>81</sup>

A claimant must be able to work.<sup>82</sup> This requirement means the claimant must be physically and mentally capable of performing part time work of at least 20 hours per week.<sup>83</sup> Although a claimant may not be able to work in the claimant's former occupation, the claimant is considered able to work so long as the claimant is capable of performing services in some occupation for which there is a demand in the claimant's job market. A claimant receiving benefits under the Workers' Compensation Act<sup>84</sup> or New Mexico Occupational Disease Disablement Law<sup>85</sup> is not

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<sup>77</sup> NMSA 1978, § 51-1-3, *Perez v. N.M. Dep't of Workforce Sols.*, 2015-NMSC-008, ¶ 12, 345 P. 3d 330 ("Consistent with Section 51-1-3, this Court construes the Unemployment Compensation Law liberally in favor of employees to afford them the benefits intended by law.") See *Emp't Sec. Comm'n v. C. R. Davis Contracting Co.*, 1969-NMSC-174, ¶ 13, 81 N.M. 23, 25, 462 P.2d 608, 610 (stating that unemployment compensation is remedial legislation with a humanitarian purpose). See also *Wilson v. Emp't Sec. Comm'n*, 1963-NMSC-085, ¶ 26, 74 N.M. 3, 14, 389 P.2d 855, 862-63 (stating that the New Mexico Supreme Court is committed to a liberal interpretation of the Unemployment Compensation law, "so as to provide sustenance to those who are unemployed through no fault of their own and who are willing and ready to work if given the opportunity.").

<sup>78</sup> NMSA 1978, § 51-1-5(A)(3).

<sup>79</sup> See *Int'l Minerals & Chem. Corp. v. Emp't Sec. Comm'n*, 1967-NMSC-175, ¶¶ 5-11, 78 N.M. 272, 274-275, 430 P.2d 769, 771-772 (noting that the purpose of the Unemployment Compensation law is to grant benefits promptly to only those persons entitled to those benefits and that claimants must be available for and actively seeking work to be eligible); *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶ 13, 71 N.M. 405, 409, 379 P.2d 57, 60 (noting the remedial and humanitarian ends intended by the legislature). See also *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 130-132, 91 S. Ct. 1347, 1353-54 (1971) (finding that unemployment compensation was intended to compensate unemployed workers with the expectation that they would seek reemployment and be reemployed soon); *Emp't Sec. Comm'n v. C. R. Davis Contracting Co.*, 1969-NMSC-174, ¶ 13, 81 N.M. 23, 25, 462 P.2d 608, 610

<sup>80</sup> NMSA 1978, § 51-1-5(A)(6).

<sup>81</sup> 11.3.300.320 NMAC.

<sup>82</sup> NMSA 1978, § 51-1-5(A)(3).

<sup>83</sup> NMSA 1978, § 51-1-42(I).

<sup>84</sup> NMSA 1978, §§ 52-1-1 to -70.

<sup>85</sup> NMSA 1978, §§ 52-3-1 to -60.

necessarily unable to work for purposes of unemployment compensation eligibility.<sup>86</sup> Even a designation of “total” disability under those programs may not always mean that the claimant is unable to work within the meaning of the Unemployment Compensation Law.

A claimant’s ability to work must be determined on a case-by-case basis. If there is a genuine issue about a claimant’s ability to work, the claimant must prove the claimant’s ability to work.<sup>87</sup> The claimant may be required to produce medical evidence of the claimant’s physical or mental capacity to perform such work. If the claimant fails or refuses to produce the required evidence, the claimant’s claim will be denied benefits.

To be available for work within the meaning of the Unemployment Compensation Law, a claimant must be ready and willing to accept substantially part-time employment of at least twenty hours per week.<sup>88</sup> The claimant must genuinely and unequivocally pursue reemployment without undue restriction as to the type of job the claimant will accept.<sup>89</sup> Claimants who unduly restrict their willingness to accept employment have failed to establish their availability within the meaning of the statute.<sup>90</sup>

A claimant is required only to be available for and seeking “suitable work.”<sup>91</sup> A claimant need not be available for or seeking work which is unsuitable in terms of the claimant’s abilities, skill and experience, or that pays wages and includes terms and conditions of work which are substantially less favorable than similar work in the claimant’s area or that the claimant performed in the past.<sup>92</sup> However, a claimant may only reject an offer of suitable work for good cause, including good personal cause.<sup>93</sup>

Claimants are informed of their obligation to actively search for work when they file their claim for unemployment benefits. The Department has the right to verify a claimant’s job search contacts, and claimants may be asked to produce a record of such work search contacts at any time during a benefit year. All information provided to the Department must be true and accurate. The Department rules require that claimants actively search for work and contact at least two employers every week.<sup>94</sup> Failure to make a reasonable search may result in a denial of benefits.<sup>95</sup> Further, benefits may be delayed or denied if a claimant fails to provide a record of

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<sup>86</sup> NMSA 1978, § 51-1-6.

<sup>87</sup> *Int’l Minerals & Chem. Corp. v. Emp’t Sec. Comm’n*, 1967-NMSC-175, ¶¶ 5-11, 78 N.M. 272, 274-275, 430 P.2d 769, 771-772.

<sup>88</sup> NMSA 1978, § 51-1-42(I).

<sup>89</sup> NMSA 1978, § 51-1-7(A)(3); *Parsons v. Emp’t Sec. Comm’n*, 1963-NMSC-007, ¶¶ 15-17, 71 N.M. 405, 410-11, 379 P.2d 57, 60.

<sup>90</sup> *See Moya v. Emp’t Sec. Comm’n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925 (claimant who declined employment opportunity because of unfavorable shifts and conflict with familial responsibilities unduly restricted his employment availability and was not “available for work” within meaning of statute).

<sup>91</sup> NMSA 1978, § 51-1-7(B).

<sup>92</sup> NMSA 1978, § 51-1-7(B)(2), 11.3.300.320 NMAC.

<sup>93</sup> *Moya v. Emp’t Sec. Comm’n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925.

<sup>94</sup> NMSA 1978, § 51-1-48(I), 11.3.300.320(A)(4) NMAC.

<sup>95</sup> 11.3.300.320 NMAC.

his or her job search within ten calendar days of the Department's request.<sup>96</sup> The essence of the work-search requirement is that the search be active and offer reasonable opportunity for reemployment. Claimants must report: the date of their work search contact, the type of work it was, the employer's name, the person or website address, the type of contact, contact information (such as a phone number or web address), and what was the result of the contact.

The Department informs claimants of the standards applicable to their availability and search for work. When claimants file claims for benefits, they are instructed that they must be available for work and actively searching for work or their benefits will be denied or discontinued. Claimants must certify each week that they are available for at least 20 hours of work per week, and must seek new employment with two new employers each week.<sup>97</sup> Claimants who fail to demonstrate their availability, or fail upon request to demonstrate their work search activity, may be denied benefits. Some circumstances beyond the claimant's control may excuse the certification requirements, depending on whether those circumstances demonstrate good cause.<sup>98</sup>

A claimant generally establishes eligibility for unemployment compensation by filing a claim and stating, under penalty of perjury, that the claimant is unemployed, able to work, available for work, and actively searching for work, and has been separated from the last employment under non-disqualifying conditions. When claimants file unemployment insurance claims and certify that they meet the eligibility conditions of the law, they have made a prima facie showing of eligibility. A claimant has the burden of establishing by reasonable evidence that the claimant is able to work, available for work, and actively searching for work.<sup>99</sup> For more information regarding New Mexico's unemployment insurance program, see [Unemployment Insurance Handbook](#).

Former employers may challenge a claimant's asserted ability to work, availability for work, or a search for work. If evidence or allegations are presented that legitimately call into question a claimant's ability to work, availability for work, or search for work, or raising an issue with respect to any other eligibility requirement, the claimant must rebut this evidence and establish that the claimant substantially meets the eligibility requirements of the law.

A claimant who fails to make an adequate personal search for work, as required by law and directed by the Department, will be subject to a denial of unemployment benefits.<sup>100</sup> New Mexico law requires both registration for work with the Department and a minimum of two personal work searches per week. The personal work search must be of a degree and quality

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<sup>96</sup> 11.3.300.320(A)(5) NMAC.

<sup>97</sup> See NMSA 1978, § 51-1-48(I), 11.3.300.320(A)(4) NMAC.

<sup>98</sup> See [Jaramillo v. N.M. Dep't of Workforce Sols.](#), No. CV-2011-07113 (N.M. 2d Jud. Dist. Ct. Apr. 20, 2013) (finding good cause when a claimant failed to certify because of a technical malfunction with the Department's online certification system and because the claimant received incorrect information from a Department customer service agent).

<sup>99</sup> *Int'l Minerals & Chemical Corp. v. Emp't Sec. Comm'n*, 1967-NMSC-175, 78 N.M. 272, 275, 430 P.2d 769, 775 .

<sup>100</sup> NMSA 1978, § 51-1-5(A)(3).

sufficient to reasonably canvass the claimant's job market and realistically result in re-employment.<sup>101</sup> The reasonableness of the work search will be influenced by the claimant's job market locality.<sup>102</sup>

### ***Unreasonable Restrictions on Job Search***

A claimant does not meet the work-search requirements by simply stating that the claimant is searching for work, especially where the claimant is engaged in other activities, such as self-employment. The claimant is not searching for work if the claimant is engaged in other activities that interfere with a realistic search for work. Employers normally do their interviewing and hiring during normal, daytime working hours, rather than at night. A claimant who cannot search for work during normal, daytime hours because of other activities or obligations is not making a reasonable search for work.

### ***Insincere Job Searches***

A refusal of a referral to or offer of work may result in a denial of benefits based on a finding that the claimant is not able, available, or actively seeking work. Any evidence that a claimant is actively discouraging prospective employers from hiring the claimant will be construed to mean that the claimant is not actively searching for work. If a claimant fails to respond to a Department request for additional information or other notices, or if the claimant's address of record with the Department, the claimant may be subject to denial of benefits for being unavailable for work.<sup>103</sup>

### ***Labor Union Hiring Hall Membership***

Claimants who are members in good standing of a labor union with a hiring hall are generally considered to be engaged in an active work search. Claimants who are registered with the union are eligible to have the standard-work search requirements waived by the Department, unless such registration will not be effective or will not result in the claimant's re-employment.<sup>104</sup>

### ***Customary Job Market***

Claimants must be available for and actively seeking work within the customary job market in which they reside and they must also be available for work within distances that are usual and customary in the industry or occupation in which claimants seek employment.<sup>105</sup> Although a job market is often difficult to define in rural New Mexico's areas, generally, an appropriate work search area would be an area in which some work which claimant is qualified to do exists.<sup>106</sup> Claimants are encouraged, and may be required, to extend their search to include the nearest

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<sup>101</sup> See *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶¶ 13-17, 71 N.M. 405, 410-11, 379 P.2d 57, 60

<sup>102</sup> *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶¶ 15-16, 71 N.M. 405, 409-11, 379 P.2d 57, 60-61

<sup>103</sup> 11.3.300.320(A)(5) NMAC.

<sup>104</sup> 11.3.300.320 NMAC

<sup>105</sup> NMSA 1978, § 51-1-7(A)(3) (claimant must seek work "in accordance with the terms, conditions and hours common to the occupation or business in which the individual is seeking work"); *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶¶ 13-17, 71 N.M. 405, 410-11, 379 P.2d 57, 60.

<sup>106</sup> *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶¶ 13-17, 71 N.M. 405, 410-11, 379 P.2d 57, 60.

urban or tourist center. If claimants cannot get to a location within the usual and customary distances, they are not available for or actively seeking work.

If claimants remove themselves from the locality where work for which they are qualified is offered, then the claimants are subject to denial of benefits. If claimants are not willing to travel the distances required to find an existing job market claimants are not available for or actively seeking work.<sup>107</sup> However, if work for which the claimant is qualified is offered in the claimant's locality, then the claimant will not be ineligible for benefits merely because there are no vacancies or because claimant is having difficulty in finding work.<sup>108</sup>

### ***Restrictions on Work Availability***

A claimant must be able and available for work when the work they are searching for is commonly performed, including both the days and hours the work is commonly performed.<sup>109</sup> If shift work is common in the industry or occupations for which the claimant is suited and searching for work, the claimant must generally be available for such work. This is especially true where shift work is common and shift assignments are normally made on the basis of seniority.

Although the New Mexico Unemployment Compensation Law does not provide a good cause exception for restricting availability to certain hours of work,<sup>110</sup> serious personal or domestic obligations which limit a claimant's ability to accept employment during certain hours of the day or days of the week may be taken into consideration. The balancing factor in such decisions, however, is whether a substantial amount of work is offered during the hours that the claimants are available. If claimants' personal or domestic obligations materially reduce or restrict their prospects for obtaining work, they must be disqualified no matter how compelling the personal limitations may be.<sup>111</sup>

Claimants whose family obligations only partially restrict their availability may still be eligible, depending on the degree of the restriction. Claimants whose partial restriction substantially reduces their chances of finding employment may be subject to denial of benefits. Unavailability

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<sup>107</sup> *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶ 17, 71 N.M.405, 410-11, 379 P.2d 57, 61 (“the requirement of ‘actively seeking work’ is something more than passively being willing and ready if an opportunity presents itself. To be eligible, a claimant must have done everything reasonably to be expected under the circumstances present of one wanting work in order to find it.”).

<sup>108</sup> *Parsons v. Employment Security Comm'n*, 1963-NMSC-007, ¶ 15, 71 N.M. 405, 409-10, 379 P.2d 57, 60 (“‘Market’ in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of appropriate job vacancies.”).

<sup>109</sup> NMSA 1978, § 51-1-5(A)(3) (claimant must seek work “in accordance with the terms, conditions and hours common to the occupation or business in which the individual is seeking work.”).

<sup>110</sup> *See* NMSA 1978, § 51-1-7(A)(1),(3). *But see* NMSA 1978, § 51-1-7(B)(2) (an otherwise eligible claimant will not be disqualified from receiving benefits “if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.”).

<sup>111</sup> *Moya v. Emp't Sec. Comm'n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925 (holding that claimant's caretaking responsibilities were not compelling enough for claimant to deny offer of employment).

due to personal affairs will result in a denial of benefits for the time such affairs render claimants unavailable, or materially interfere with their search for work.<sup>112</sup>

Claimants who are completely unable to work and are unavailable for work due to personal illness or disability are ineligible for unemployment benefits for the duration of illness or disability. In cases where claimants' conditions are only partially disabling, i.e., they are able to perform and are available for some work, their eligibility will depend upon the extent to which they are restricted.

Claimants may be subject to denial of benefits because they are unavailable for work whenever job market circumstances<sup>113</sup> or personal restrictions<sup>114</sup> substantially and adversely affect their prospects for obtaining work. The test in availability cases is whether a job market exists for the type of employment services the claimant offers in the geographic area in which the claimant offers them.<sup>115</sup>

In determining whether such a limited "job market" is realistic, two additional factors should be considered: whether the claimant can reasonably extend the work search to include areas of greater job availability, and whether the claimant can enlarge the scope of the work search to include additional occupations and skills. If the claimant can reasonably extend the geographic limits of the work search or broaden the search to include additional occupations and skills, then a limited work search would generally not be sufficient.<sup>116</sup>

Arbitrary limitations on work or earnings may also render claimants unavailable within the meaning of the law. Claimants may not place an upper limit on the amount of earnings they will accept if the limitation results in periods of compensable unemployment, as in the case of a retirement earnings limitation under social security. Claimants will generally not remain eligible if they restrict their availability because they are engaged in other, substantially full-time activity, such as self-employment or volunteer public service.

Special limitations which materially restrict a claimant's prospects for obtaining work in a certain occupation may render a claimant unavailable within the meaning of the law if the claimant continues to limit the search for work to occupations which are affected by those limitations. Examples of such limitations include cases where a claimant has been medically impaired or restricted from performing a previous skill or occupation and will not, as a result, be considered for hire by employers. Under such circumstances a claimant may be required to look for work in other occupations which are not affected by the limitations.

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<sup>112</sup> *Moya v. Emp't Sec. Comm'n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925

<sup>113</sup> *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, ¶¶ 12-17, 71 N.M. 405, 409-11, 379 P.2d 57, 59-61.

<sup>114</sup> *Moya v. Emp't Sec. Comm'n*, 1969-NMSC-022, ¶¶ 5-8, 80 N.M. 39, 41, 450 P.2d 925, 927

<sup>115</sup> *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, 71 N.M. 405, 379 P.2d 57

<sup>116</sup> See *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, 71 N.M. 405, 379 P.2d 57 ("To be eligible [for unemployment benefits], a claimant must have done everything reasonably to be expected under the circumstances present of one wanting work in order to find it.").

Claimants who materially reduce their opportunities for work for which they are reasonably fitted by maintaining habits of dress and personal appearance or hygiene which are demonstrably incompatible with such work may be determined to be unavailable for work and subject to denial of benefits. Employees have a right to personalize their dress and appearance so long as it does not adversely affect an employer's interests.<sup>117</sup> In availability cases regarding appearance, the employer bears the responsibility of demonstrating that the claimant's appearance is incompatible with accepted business practice in the business or industry in which the claimant is seeking work. A claimant who refuses to abide by or to accommodate a prospective employer's reasonable rules in dress or appearance may be subject to denial of benefits.

### ***Impact of Incarceration on Availability***

Generally, claimants who are incarcerated or held in detention are not available for or seeking work within the meaning of the Unemployment Compensation Law, and will be subject to disqualification during a period when they are incarcerated or held in detention because they are not available to accept substantially full-time or part-time suitable employment of at least 20 hours per week.<sup>118</sup> To avoid disqualification while incarcerated or otherwise detained, claimants must show that either the terms of their detention provide that they may be released if they are referred to or offered work, or the claimant can seek work and is in fact seeking work while in detention.

Occasionally, the circumstances of a claimant's incarceration or detention do not interfere with employment or the opportunity to seek employment, e.g., week-end confinement, home confinement, etc. If incarceration or detention does not interfere with a claimant's availability to seek employment, then the incarceration will not, on its own, disqualify the claimant from receiving benefits.

### ***Volunteerism and Public Service***

Claimants will not be eligible for benefits if they are engaged in full-time public service, or are paid remuneration in excess of their weekly benefit amount for activities performed in public service. Volunteer workers will be denied benefits if their volunteer services interfere with their availability or search for employment.

### ***Self-employment***

A self-employed individual is not eligible to receive unemployment compensation benefits because the individual is not available for or actively searching for employment within the meaning of the Unemployment Compensation Law. The Unemployment Compensation Law defines "unemployment" as, "with respect to an individual, any week during which the

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<sup>117</sup> *It's Burger Time, Inc. v. N.M. Dep't of Labor Emp't Sec. Dep't (In re Apodaca)*, 1989-NMSC-008, 108 N.M. 175, 769 P.2d 88 (employer had failed to show how the color of the claimant's hair affected its business; therefore, the claimant's refusal to return her hair to its original color did not rise to the level of misconduct required for denial of benefits).

<sup>118</sup> NMSA 1978, § 51-1-42(I)

individual performs no services and with respect to which no wages are payable to the individual and during which the individual is not engaged in self-employment.”<sup>119</sup> Self-employed persons will be ineligible for benefits regardless of the amount of profits or income they receive from their self-employment activities if they are engaging in those activities substantially full-time or such activities constitute their primary occupation.<sup>120</sup>

Seeking work as an independent contractor constitutes self-employment and does not constitute a search for employment for wages. Individuals who regularly hold themselves out as independent contractors are not available or searching for “employment” within the meaning of the Unemployment Compensation Law and are not eligible for benefits while seeking to establish themselves in self-employment.

If claimants engage in self-employment activities only intermittently and as a secondary activity to their search for work in their normal occupation as an employee, they may be eligible for benefits despite their incidental self-employment activities to provide partial earnings while looking for work. The earnings obtained from any incidental self-employment must be reported to the Department and offset against the claimant’s weekly benefit amount.<sup>121</sup>

### ***Labor Union Hiring Hall Membership***

Claimants that are union members and seek union work through the union’s hiring hall<sup>122</sup> are available for and actively seeking work unless their union work search is restricted to the extent that it makes them substantially unemployable in the locality or occupation in which they are seeking work. Claimants who are registered with the union are eligible to have the standard-work search requirements waived by the Department, unless such registration will not be effective or will not result in the claimant’s re-employment.<sup>123</sup>

Claimants should have a reasonable opportunity to test the job market for suitable work within their occupational skills. Claimants’ occupational skills and usual work may be identified with their union affiliation. Such affiliation should not be discouraged by operation of the Unemployment Compensation Law. Claimants who hold themselves out for only union work do not render themselves unavailable if their commitment and affiliation with the union does not unduly restrict their prospects for work.

Where it is clear from the facts and the job market situation in claimants’ locality that registration with their union hiring facility will not result in employment, they must expand their

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<sup>119</sup> See NMSA 1978, § 51-1-42(I).

<sup>120</sup> See *Puccini v. N.M. Dep’t of Workforce Sols.*, No. CV-2013-00214 (N.M. 2d Jud. Dist. Ct. Apr. 1 2014) (affirming denial of benefits for claimant who worked full-time in self-employment, notwithstanding claimant’s claim that she was available for work despite spending fifty plus hours a week in self-employment.); *Hickey v. NMDWS*, D-202-CV-2014-00162 (2d Jud. Dist. Ct. March 7, 2014) (a self-employed person is engaged in work for his or her own business and is thus unavailable and not actively seeking work).

<sup>121</sup> NMSA 1978, § 51-1-4(B)(2)

<sup>122</sup> 11.3.300.320 NMAC

<sup>123</sup> 11.3.300.320 NMAC.

personal work search and be available for referrals by the Department. Where these facts also indicate a lack of union work, claimants must be available for other suitable work. Union rules that discipline claimants for accepting nonunion work do not exempt claimants from the requirements of the Unemployment Compensation Law.

### ***Restrictions on Availability Based on Wages***

Generally, claimants must be available for work at wages which are prevailing or common in their locality for similar occupations, training, and experience. Claimants looking for new work cannot realistically expect the same wage they were receiving in their former employment. They can expect only a commensurate wage within a range that reflects their experience and skills and is prevailing for their occupation in their locality. If the claimant's craft or occupation is unionized and union work is available in the locality, the claimant should be allowed a reasonable time to find work paying union wages.

The length of time claimants may restrict themselves to their former wage scale or union wages depends on the length of their unemployment, the prospects of obtaining work at those wage levels, and their present job market. Claimants are expected to relax their wage demands to increase prospects for re-employment as the length of their unemployment increases.

Overtime work and fringe benefits are wage related considerations in determining claimants' availability. Generally, claimants must be willing to accept overtime working conditions and fringe benefits that are common and prevailing in the industry or occupation in which they are searching for work. Claimants may refuse work paying less than the legally applicable minimum wage without losing their eligibility for unemployment benefits.

### ***Denial of Benefits Solely on the Basis of Pregnancy or Termination of Pregnancy***

The Unemployment Compensation Law provides that a person shall not be denied benefits solely on the basis of pregnancy or the termination of pregnancy.<sup>124</sup> A claimant, however, must meet all other eligibility requirements to collect benefits.<sup>125</sup> A claimant must therefore be able to work, available for work, and actively seeking work during a period of pregnancy in order to be eligible for benefits. Pregnancy is treated the same as any other condition in cases involving ability to work, availability for work, and active search for work.<sup>126</sup> Pregnancy does not affect the claimant's eligibility so long as the claimant meets the requirements of being able, available, and actively searching. Whenever a claimant is medically restricted and has not been released to return to work, the claimant does not meet unemployment eligibility requirements.

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<sup>124</sup> NMSA 1978, § 51-1-7(A)(1)(a)

<sup>125</sup> *Wimberly v. Labor & Indus. Relations Comm'n of Missouri*, 479 U.S. 511, 516-17 (1987) (“[T]he plain import of the language of § 3304(a)(12) is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment. The text of the statute provides that compensation shall not be denied under state law ‘solely on the basis of pregnancy[ . . . ]’ [I]f a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made ‘solely on the basis of pregnancy.’”).

<sup>126</sup> *Wimberly*, 479 U.S. at 516-17).

### ***Students***

Students who are enrolled in a full-time or part-time course schedule in an educational or training institution or program other than an approved vocational training program under the Unemployment Compensation Law are not eligible for unemployment benefits unless the student can demonstrate to the Department's satisfaction that the student is able, available, and actively seeking full or part-time work in accordance with rules prescribed by the Department.<sup>127</sup>

### ***Approved Training***

Claimants do not have to conduct work searches while in approved training.<sup>128</sup> Approved training includes any training program funded and administered through the New Mexico Workforce Connection Centers (Workforce Innovation Opportunity Act (WIOA), Trade Adjustment Act (TAA), etc.).

### ***Temporary Layoffs***

The Secretary has the authority to waive the requirement that a claimant be available for and actively seeking work in two situations: if the claimant is on temporary lay-off status from regular employment with an assurance from the employer that the lay-off shall not exceed four weeks; and if the claimant has an express offer in writing of substantially full-time work which will begin within a period not exceeding four weeks.<sup>129</sup>

Claimants will be ineligible for unemployment benefits for the period during which they are determined by the Department to be unable to work, unavailable for work, or not actively seeking work. A claimant's ability, availability, and active search for work are determined on a weekly basis. A determination that a claimant is not able to work, available for work, or actively seeking work may be for a specified week or weeks, or it may be open-ended until the claimant corrects all eligibility restrictions. The burden is on the claimant to demonstrate that the eligibility restrictions have been corrected and that the claimant again meets the eligibility requirements.

### ***Medical Issues or Injury***

Claimants who leave their employment because of an illness or injury that is not connected with the work will generally be disqualified for leaving employment without good cause in connection with their employment. Two major policies are at play in cases involving non-work-related medical issues. First, the unemployment compensation program is designed to relieve workers from the impact of involuntary unemployment. At the same time, claimants are required to be able, available, and actively searching for suitable work. Decisions in cases involving non-work related medical issues turn on two inquiries: (i) Is the claimant able and available to work during the period of the claim? And (ii) how did the claimant separate (i.e., did he or she quit or

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<sup>127</sup> NMSA 1978, § 51-1-5(H)

<sup>128</sup> NMSA 1978, § 51-1-5(E)

<sup>129</sup> NMSA 1978, § 51-1-5(A)(3)

was she discharged)? To be eligible, claimants must be able, available, and actively seeking work, and must not have a disqualifying separation from their last employer. Each of these issues is discussed below.

### ***Able and Available***

Claimants are only eligible for unemployment benefits if they are able, available, and actively seeking work.<sup>130</sup> Thus, when claimants separates from work for a non-work-related medical issue that render them unable to work, they should be denied benefits, regardless the manner of separation (i.e., voluntary quit or termination), because they cannot satisfy the able-and-available requirement. If claimants cannot work during the period of their claims, they cannot properly collect benefits.

If claimants become able and available for work after their separation, their eligibility will depend on the circumstances regarding their separation. For example, if a claimant's separation stemmed from a total inability to work, the claimant may initially be ineligible, but may become physically able to work very soon after the separation. In such instances, the claimant will be able to satisfy the able-and- available requirement. The separation, however, must still be analyzed.

### ***Quit or Discharge***

If claimants are able and available for work, their separation from employment is the key issue in determining eligibility. Employees who are discharged are presumed eligible for benefits unless the discharge was for misconduct.<sup>131</sup> On the other hand, employees who voluntarily quit are presumed ineligible unless they quit for good cause connected with the work. Whether an individual was discharged or quit is a fact-specific question. If there is a question regarding whether claimants quit or were discharged, New Mexico courts ask who initiated the separation. In other words, who was the moving party to the separation?

Under the moving-party analysis, the Department must look at the subjective intent of the parties.<sup>132</sup> In cases involving non-work-related medical issues, the subjective intent of the parties will usually be dispositive because a non-work-related medical issue is not misconduct, nor is it good cause to justify a voluntary quit.<sup>133</sup> As a result, if the employer is the moving party, then the discharge will not be disqualifying because the medical problem is not misconduct. Similarly, if

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<sup>130</sup> See NMSA 1978, § 51-1-5(A)(3).

<sup>131</sup> *Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, ¶ 17, 104 N.M. 518, 520–21, 724 P.2d 227, 229 (holding that there is no distinction between “discharge for misconduct” and “suspension without pay for misconduct” because the employee is performing no services and no wages are payable to the employee in both circumstances).

<sup>132</sup> See, e.g., *Fitzhugh v. N.M. Department of Labor*, 1996-NMSC-044, ¶ 3, 122 N.M. 173, 181, 922 P.2d 555, 563 (“Among the most important considerations in resolving whether an employee quit or was fired is an examination of the subjective intentions and understandings of that employee.”).

<sup>133</sup> See *Gomez v. N.M. Dep't of Workforce Sols.*, D-202-CV-2012-01707 (N.M. 2d Jud. Dist. Ct. Feb. 15, 2012 (finding that claimant's request for additional FMLA leave showed claimant had no subjective intent to leave and was therefore eligible for benefits); See also *Enriquez v. N.M. Dep't of Workforce Sols.*, D-202-CV-2015-07466 (N.M. 2d Jud. Dist. Ct. Dec. 14, 2015

the claimant is the moving party, then the separation will be disqualifying because the non-work-related medical problem is not good cause connected with the work.<sup>134</sup>

Evaluating the parties' subjective intent can be difficult, and a number of facts are relevant and should be ascertained during the claim examination or appeal process. For example, it is important to know: (1) whether claimants were given a deadline to receive medical clearance to return to work after which they would be replaced; (2) whether employers informed claimants that they would be rehired upon demonstration that they were medically cleared to return to work; and (3) whether claimants reapplied for their jobs or for a similar position with the employer after receiving medical clearance to work.

Claimants who leave work because of an illness or injury which is connected with the work have good cause in connection with the work for leaving the employment and will not be disqualified so long as they are otherwise eligible for benefits. Where there is any dispute whether the claimants' illness or injury is work connected, claimants have the responsibility for establishing, by reasonable evidence, that their illness or injury is substantial enough to constitute good cause and that it was causally connected to the employment.<sup>135</sup>

If claimants' illness or injury is work connected, they must still establish that all reasonable steps were taken to preserve their employment.<sup>136</sup> Reasonable steps include: complying with their employer's established sick leave policies and rules; keeping their employer reasonably notified of medical progress, either in accordance with the employer's policies or on a periodic basis; returning to work as soon as medically released for work by the treating physicians; and providing all medical records or physicians' statements reasonably requested by their employer. If claimants' illness or injury is work connected and their employers replaces or refuses to reinstate them upon medical release, the separation becomes a discharge. If claimants refuse to return to available work upon medical release, the issue is whether they have refused suitable work.

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<sup>134</sup> *LeMon v. Emp't Sec. Comm'n*, 1976-NMSC-064, ¶ 8, 89 N.M. 549, 551, 555 P.2d 372, 374

<sup>135</sup> *Kramer v. N.M. Emp't Sec. Div.*, 1992-NMSC-071, ¶¶ 6-10, 114 N.M. 714, 716-17, 845 P.2d 808, 810-11

<sup>136</sup> *Fitzhugh v. N.M. Department of Labor*, 1996-NMSC-044, ¶ 3, 122 N.M. 173, 181, 922 P.2d 555 (holding that because employee had taken steps to remain employed by applying for transfers, workers' compensation, and disability, employee did not abandon her employment as a matter of law).

## VII. VOLUNTARY QUILTS

The policy of the Unemployment Compensation Law is to pay unemployment benefits to those who are involuntarily unemployed through no fault of their own.<sup>137</sup> Those who voluntarily leave their employment are generally not considered to be involuntarily unemployed. The Legislature has therefore enacted an express disqualification from benefits applicable to claimants found to have left their employment voluntarily without good cause in connection with their employment.

When there is a separation from employment, the threshold question is which party caused the separation, the claimant or the employer? Under New Mexico law, a leaving is voluntary if it is initiated by the claimant and is not compelled by the employers.<sup>138</sup> Whether claimants have voluntarily left their employment is a factual question. The employee's subjective intentions and understandings are among the most important considerations in resolving whether an employee voluntarily quit or was fired.<sup>139</sup> If claimants voluntarily leave work without good cause, they will be disqualified from unemployment benefits.

The question of voluntariness and the question of good cause connected with the work are separate issues. A leaving initiated by the claimant does not necessarily become "involuntary" because it was compelled by good cause—it becomes involuntary only if compelled by the employer.<sup>140</sup> Good cause goes to the issue of justification for leaving, not to whether the leaving was voluntary.

### *Good Cause Connected with the Work*

If a claimant has voluntarily left his or her job, the next question is whether the leaving was for good cause. Claimants will not have good cause for leaving work until they have reasonably exhausted other opportunities for resolving their employment problems, including utilization of available grievance procedures, discussing the problems with supervisors or management, and using safety devices and other preservation strategies. Leaving employment without any effort to resolve problems or grievances with the employer does not reflect a genuine desire to remain employed.<sup>141</sup>

New Mexico applies an objective standard in determining good cause. Good cause is an objective measure of real, substantial, and reasonable circumstances which would cause the average, able, and qualified worker to quit.<sup>142</sup> Good cause also includes the concept of good

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<sup>137</sup> NMSA 1978, § 51-1-3

<sup>138</sup> *LeMon v. Emp't Sec. Comm'n*, 1976-NMSC-064, ¶ 8, 89 N.M. 549, 551, 555 P.2d 372, 374 (holding that claimant's quit was "voluntary" because it "was not impelled in any sense by either his employer or any demonstrable condition of his employment.").

<sup>139</sup> *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 30, 122 N.M. 173, 181, 922 P.2d 555, 563

<sup>140</sup> *See, e.g., LeMon v. Emp't Sec. Comm'n*, 1976-NMSC-064. 89 N.M. 549, 555 P.2d 372 (employee's illness, which compelled him to quit his job, did not make his quitting "involuntary").

<sup>141</sup> *See Molenda v. Thomsen*, 1989-NMSC-022, ¶¶ 6-7, 108 N.M. 380, 381, 772 P.2d 1303, 1304

<sup>142</sup> *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 6, 108 N.M. 380, 381, 772 P.2d 1303, 1304

faith, meaning claimants must have a genuine desire to work and be self-supporting.<sup>143</sup> Purely subjective or personal reasons, or supersensitive reactions to working conditions or circumstances, will not support a finding of good cause.<sup>144</sup> To avoid disqualification, the reason or cause for leaving must be directly and causally connected with the employment.<sup>145</sup> If a leaving is determined to be voluntary, it is the claimant's responsibility to establish by reasonable evidence that the claimant had good cause in connection with the employment for leaving.

Once an individual has accepted work, the individual may not voluntarily leave it without being subject to possible disqualification from employment benefits. If claimants accepts work knowing the terms and conditions of the work, they cannot thereafter voluntarily quit the work and allege that the terms and conditions were sufficiently adverse to constitute good cause for leaving.

### ***Employer Policies Defining Voluntary Quits***

Frequently, employers have policies that purport to classify certain violations of their attendance policies as "voluntary quits." These policies are not controlling with respect to the question of whether one has voluntarily quit. A violation of the employer's reasonable attendance policy may be misconduct but will not necessarily be considered a voluntary or constructive quit. The principle of "constructive quit" is not favored by New Mexico courts when interpreting the Unemployment Compensation Laws.<sup>146</sup> A separation from employment should not be considered a voluntary quit in a situation where the employer has decided to discharge a claimant for specific acts which violates the employer's policy, such as failing to report to work for a specific number of days.

The subjective intent of the parties is critical to assessing whether a quit was voluntary. A finding of voluntary leaving is warranted where the evidence shows that the claimant did not intend to return to work.

### ***EXAMPLES OF REOCCURRING CIRCUMSTANCES WHICH DO NOT ESTABLISH GOOD CAUSE TO VOLUNTARY QUIT:***

#### ***Failure to Continue or Complete a Program of Study or Training***

A separation from employment resulting from the claimant's failure to continue in a course of study or training that is a required component of the employment will be treated as a voluntary leaving without good cause in connection with the employment. Some occupations, such as those associated with apprenticeship programs, require the employee to continue in a course of study

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<sup>143</sup> *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 6, 108 N.M. 380, 381, 772 P.2d 1303, 1304.

<sup>144</sup> *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 6, 108 N.M. 380, 381, 772 P.2d 1303, 1304.

<sup>145</sup> *Kramer v. N.M. Emp't Sec. Div.*, 1992-NMSC-071, ¶ 10, 114 N.M. 714, 716-17, 845 P.2d 808, 810-11 (claimant voluntarily left employment with good cause when job duties were the cause of claimant's aggravated medical condition).

<sup>146</sup> See *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 36, 122 N.M. 173, 182, 922 P.2d 555, 564

or training to be employed in the related job. The responsibility to continue in the required course of study or training rests with the employee. If, as a condition of employment, a claimant must complete a course of study or training and fails to attend the mandatory training or quits the school, the Department will consider that the claimant voluntarily left employment without good cause connected with the employment.

### ***Leaving in Anticipation of Discharge***

Claimants will be disqualified from receiving benefits if they leave work prematurely in anticipation of discharge or because they erroneously assume that they are discharged when there is no official notice of discharge from the employer. If a definite layoff notice has been given, however, claimants may leave their jobs in anticipation of discharge if necessary to develop or to look for new work. Departure in anticipation of discharge because of a definite layoff notice does not constitute a voluntary leaving.<sup>147</sup>

### ***Retirement***

Leaving available work to accept a voluntary retirement constitutes a voluntary leaving without good cause in connection with the employment and is, therefore, disqualifying. Claimants who accept voluntary retirement, as opposed to mandatory or enforced retirement, are treated as voluntary leaving because their separation is within their voluntary power and action. A forced retirement, as opposed to a voluntary retirement, pursuant to a maximum age policy, an employer-instituted reduction in force, or a union agreement imposing mandatory retirement, is not considered a voluntary leaving and will be treated as a discharge.<sup>148</sup>

If claimants take early retirement pursuant to a formally established reduction-in-force plan, certified to the Department by their employer, the Department will treat such early retirement as a layoff. To be considered a layoff, the election to take early retirement cannot be made

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<sup>147</sup> The legal principles governing voluntary quits in the context of the Unemployment Insurance strongly resemble those of constructive discharge in other employment law settings. Indeed, the standard for “good cause” for voluntarily quitting is virtually the same as the standard for constructive discharge in employment retaliation claims. Compare *Gormley v. Coca-Cola Enterprises*, 2005-NMSC-003, 137 N.M. 192, 194-95, 109 P.3d 280, 282-83 (“An employee must allege facts sufficient to find that the employer made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign. Essentially, a plaintiff must show that she had no other choice but to quit.”)(internal citations and quotation marks omitted) and *Molenda v. Thomsen*, 1989-NMSC-022, 108 N.M. 380, 381, 772 P.2d 1303, 1304 (“Good cause is established when an individual faces compelling and necessitous circumstances of such magnitude that there is no alternative to leaving gainful employment. Good cause is an objective measure of real, substantial and reasonable circumstances which would cause the average able and qualified worker to quit gainful employment.”)(internal citations and quotation marks omitted). Similarly, the general refusal to find good cause when an individual quits prematurely in anticipation of discharge derives, at least in part, from courts’ unwillingness to treat unrealized threats of termination (or other adverse action) as adverse employment actions sufficient to carry a claim for constructive discharge. See, e.g., *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1268 (10th Cir. 2005). This approach to premature quits furthers the broader policy of the Unemployment Compensation Law of limiting benefits to those who demonstrate that they are involuntarily unemployed – i.e., claimants who have taken reasonable steps to preserve their employment and quit only when forced to or under circumstances that constitute good cause.

<sup>148</sup> *Duval Corp. v. Emp’t Sec. Comm’n*, 1972-NMSC-007, ¶ 18, 83 N.M. 447, 449-50, 493 P.2d 413, 415-16

unilaterally by claimants. Rather, it must be offered by the employer as part of the reduction-in-force plan.

### ***Part-Time or Temporary Employment***

Voluntarily leaving any work, including part-time and temporary work, without good cause in connection with the employment, which remains available and otherwise suitable, is disqualifying as a voluntary quit without good cause in connection with the employment.<sup>149</sup>

The Unemployment Compensation Law expressly favors work over the receipt of unemployment benefits. Remunerative work of any kind demonstrates a sincere attachment to the job market and a commitment to availability. If part-time and temporary work significantly impairs claimants' ability to find full-time employment, or, because of additional costs, becomes demonstrably cost-prohibitive, claimants' failure to continue in or accept part-time or temporary work will not be disqualifying.

### ***Accepted Conditions of Employment***

In many occupations the expected duties are general and unspecific. Changes would not, therefore, be clearly contrary to the terms of the original agreement of hire and do not provide good cause to quit. Claimants do not have good cause in connection with the employment to quit if they accept relocation or agree to commute an unusual distance as an express condition of employment and subsequently quit because of the relocation or commute. If relocation of the work is a regular and customary practice and condition of employment in the industry, such as in heavy construction, claimants who make this work their customary career must "follow" the work as required. A refusal to go where the work is performed will generally be treated as a leaving without good cause in connection with the employment.

The employer normally has the prerogative to set the hours of work. If shift work is customary in the industry or business when the claimants accepted the employment, then claimants are expected to be available for work in accordance with the customary terms and conditions in that industry or business. If the term of employment is established for the convenience of the claimant, and the work would continue but for the claimant's limitations, the separation will be treated as a voluntary leaving without good cause.

Claimants will be subject to disqualification for refusing an assignment to a different work site if the assignment is only temporary or occasional and does not cause a substantial harm or detriment to the claimants. A change in the hours of work, with no loss of earnings, is not generally good cause for leaving employment. A reduction in the hours of work, alone, is

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<sup>149</sup> NMSA 1978, § 51-1-7(A)(1); But see *Bradley v. N.M. Dep't of Labor Emp't Sec. Div.*, 1991-NMSC-024, 111 N.M. 524, 525, 807 P.2d 222, 223 (holding that a one-day absence from temporary work alone did not disqualify the claimant from unemployment benefits).

generally not good cause for quitting employment.<sup>150</sup> A reduction in wages must have significant consequences to establish good cause for leaving employment. Minor or temporary adjustments or reductions in wages, especially when supported by justifiable business reasons, will not generally be considered good cause for quitting work.

### ***Leaving to Accept a Better Job***

Leaving work to accept other employment does not constitute good cause in connection with the present employment for quitting. When a claimant leaves one job to take another which they consider more advantageous, the departure is voluntary without good cause attributable to the former employer. This voluntary leaving is disqualifying with respect to unemployment compensation benefits.

This issue seldom arises from claimants' perspective because the employees who are leaving one job to start another will not file a claim. In cases where the new employment does not work out, and claimants file claims before they have earned qualifying wages, they are subject to disqualification for having left their former employment without good cause connected with the work.

### ***Leave of Absence***

A leave of absence, whether initiated or requested by a claimant or mutually agreed upon for the benefit of the claimant, constitutes a voluntary leaving without good cause for the duration of the leave. The disqualification will last for the duration of the leave regardless of any intervening employment. There must be an assurance of reinstatement at the end of the leave period, for the leave to be considered a "leave of absence" within the meaning of the Unemployment Compensation Law. Under these circumstances, if there is no assurance of reinstatement, the disqualification continues until the claimant returns to some work and earns qualifying wages.

If there is an actual leave of absence with assured reinstatement and the claimant fails to return at the end of the period, the disqualification for voluntarily leaving continues until the claimant returns to some work and earns qualifying wages. If the employer refuses to reinstate the claimant at the end of the period of leave, the separation is a discharge effective at that time.

A leave of absence imposed on claimants for the benefit of their employers will be treated as a discharge for the period of the leave. If claimants refuse reinstatement at the end of the leave period, their separation will be adjudicated as a refusal of suitable work.

### ***Personal or Domestic Reasons***

A personal, subjective dissatisfaction with work conditions or supervision is not good cause in connection with the work for quitting. A claimant who leaves employment for personal or domestic reasons will be disqualified for leaving work without good cause in connection with the

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<sup>150</sup> *Begay v. N.M. Emp't Sec. Dep't*, 1983-NMSC-106, ¶ 16, 100 N.M. 529, 532, 673 P.2d 509, 509 (1983) (holding reduced hours is a "personal" reason and not "good cause" for terminating employment).

work. Personal cause (i.e., cause that is not directly and causally connected with the employment), no matter how serious, will not constitute good cause in connection with the employment. The following are examples of personal reasons that do not constitute good cause in connection with the employment: quitting after refusing to work with a supervisor and rejecting a new work schedule;<sup>151</sup> quitting to take care of a family member's health;<sup>152</sup> dissatisfaction with a change in work site;<sup>153</sup> a personal dissatisfaction with pay;<sup>154</sup> a landlord/tenant dispute with an employer<sup>155</sup>; lack of childcare<sup>156</sup>; lack of transportation; and leaving to relocate to a company with spouse (but see military exemption<sup>157</sup>).

### ***Leaving Employment to Attend School***

Leaving employment to attend school does not constitute good cause in connection with the employment for leaving work. Leaving to attend school is a personal cause unconnected to the employment and is disqualifying.<sup>158</sup>

### ***Reasonable Efforts to Preserve Employment***

Claimants must show that they have made reasonable efforts to preserve their employment by pursuing available opportunities to resolve their problems or grievances with their employer before leaving their employment. Reasonable efforts to resolve grievances include using available grievance procedures, informing and discussing problems with supervisors or management, and taking advantage of other reasonable avoidance strategies. When employees have viable options available to them, voluntarily leaving without exploring these options is considered a voluntary quit without constituting good cause. The result may be different if a claimant can establish that exploring other options with the employer would be futile.<sup>159</sup> Simply leaving work without any efforts to resolve grievances or problems is not consistent with a genuine desire to be employed.<sup>160</sup> Courts have generally found that claimants who resign or quit without exploring all options for resolving conflicts with their employers have not established good cause for voluntarily quitting.<sup>161</sup>

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<sup>151</sup> [\*Silvas v. N.M. Dep't of Workforce Sols.\*](#), D-504-CV-2012-00245 (N.M. 5th Jud. Dist. Ct. Apr. 16, 2014)

<sup>152</sup> [\*Rodriguez v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2014-05653 (N.M. 2d Jud. Dist. Ct. Dec. 11, 2014)

<sup>153</sup> [\*Zimmerman v. N.M. Dep't of Workforce Sols.\*](#), D-1226-CV-2013-00009 (N.M. 12th Jud. Dist. Ct. May 24, 2013);

[\*Benally v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2012-01501 (N.M. 2d Jud. Dist. Ct. Apr. 3, 2012)

<sup>154</sup> [\*Bohnstehn v. N.M. Dep't of Workforce Sols.\*](#), D-504-CV-2012-00773 (N.M. 5th Jud. Dist. Ct. May 30, 2013)

<sup>155</sup> [\*Lester v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2014-03968 (N.M. 2d Jud. Dist. Ct. Dec. 11, 2014)

<sup>156</sup> [\*Tucker v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2015-2322, (N.M. 2d Jud. Dist. Ct. June 15, 2015)

<sup>157</sup> NMSA 1978, § 51-1-7(A)(1)(c)

<sup>158</sup> [\*Phelps Dodge Corp. v. N.M. Emp't Sec. Dep't\*](#), 1983-NMSC-068, ¶ 11, 100 N.M. 246, 248, 669 P.2d 255, 257 (holding that leaving one's employment to attend school is generally regarded to be a voluntary leaving without good cause related to the employment).

<sup>159</sup> See [\*Chavez v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2015-07867 (N.M. 2d Jud. Dist. Ct. Dec. 15, 2015).

<sup>160</sup> [\*Molenda v. Thomsen\*](#), 1989-NMSC-022, 108 N.M. 380, 772 P.2d 1303.

<sup>161</sup> See, e.g., [\*Love v. N.M. Dep't of Workforce Sols.\*](#), D-101-CV-2013-01546 (N.M. 1st Jud. Dist. Ct. May 5, 2014) (affirming denial of benefits because claimant did not allow employer any time to investigate and possibly remedy claimant's issues); [\*Murray v. N. M. Dep't of Workforce Sols.\*](#), D-503-CV-2012-01334 (N.M. 5th Jud. Dist. Ct. Oct. 24, 2013) (affirming the Secretary's decision finding no good cause for voluntarily quitting where claimant quit her

Claimants must take action to preserve their employment. Claimants should not leave employment and apply for unemployment benefits until their discharge is official and final. Claimants must make a reasonable effort to determine whether they have been discharged. If, based upon the facts and the custom of the work place, it is reasonable for claimants to rely upon the apparent authority of the persons discharging them, then the employers will be bound by the actions of their representatives and claimants' leaving will be treated as a discharge.

### ***Resignations***

Generally, a resignation is evidence of a voluntary quit. Under a subjective-intent analysis, the existence of an apparent resignation does not always control. Where a resignation is imposed or coerced by the employer's actions, the separation is treated as a discharge rather than a voluntary leaving. But, if a claimant initiates separation by submitting a definite resignation, the claimant will be bound by his or her statements regarding the reasons for resignation.<sup>162</sup>

### ***Resignation in lieu of Discharge***

When a claimant is allowed to resign in lieu of a decision by the employer to discharge the claimant, the separation will generally be treated as a discharge. To find a discharge instead of a voluntary quit, the Department must determine whether the employer's intent to discharge the claimant was definite and whether the employer's actions were explicit and presented the claimant with no reasonable alternative to submitting the claimant's resignation.<sup>163</sup> A separation from employment which arises in the context of a "quit or be fired" situation is not voluntary for unemployment compensation purposes.

### ***Employers' Early Acceptance of Resignation***

If a claimant initiates a separation by submitting a resignation effective sometime in the future, the separation is considered to be a voluntary leaving even if the employer accepts the resignation effective before the time specified by the claimant. An employer can accept an employee's resignation at the employer's convenience. The employer is not bound to accept the date of leaving designated by the employee. If the employer accelerates the resignation to become effective immediately or at some date earlier than the date designated by the claimant, the separation is still treated as a voluntary leaving because the claimant initiated the separation by tendering a resignation. If claimants quit and then have a change of heart and want to return to

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employment without pursuing her options with the employer's Human Rights department); [Boot v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-12652 (N.M. 2d Jud. Dist. Ct. Feb. 21, 2012) (affirming Secretary's decision finding no good cause for voluntarily quitting where the claimant did not wait for the employer to finish its investigation of her complaints before resigning).

<sup>162</sup> See [Taylor v. N.M. Dep't of Workforce Sols.](#), D-307-CV-2011-02663 (N.M. 3rd Jud. Dist. Ct. Oct. 11, 2013 (holding that claimant voluntarily quit when resignation letter stated she was retiring, though claimant later argued she was discharged); [Silva v. N.M. Dep't of Workforce Sols.](#), D-412-CV-2012-00570 (N.M. 4th Jud. Dist. Ct. Mar. 28, 2013 (affirming determination that claimant voluntarily quit when resignation letter stated claimant was resigning due to poor health, though claimant later argued she was constructively discharged due to harassment).

<sup>163</sup> [Molenda v. Thomsen](#), 1989-NMSC-022, ¶ 6, 108 N.M. 380, 381, 772 P.2d 1303, 1304.

work, their employers do not have to allow them to return to work. The separation is still treated as a voluntary leaving because the respective claimant initiated the separation by quitting.<sup>164</sup>

### ***Disciplinary Action***

An employer has authority to control the work place and to establish reasonable rules of discipline. The imposition of a reasonable reprimand or disciplinary action is not good cause for a claimant to quit employment. Quitting work in anticipation of being fired does not constitute good cause.<sup>165</sup>

A disciplinary system should be applied uniformly. A disciplinary system is not invalid or discriminatory, however, simply because it treats different classes of employees differently, such as supervisory employees from non-supervisory employees.

### ***Opposition to or Refusal to Submit to Drug Testing Policies***

If claimants quit work because they oppose, refuse to comply with, or refuse to submit to their employers' drug and alcohol testing policies, they have voluntarily quit without good cause connected to the work and are therefore disqualified from receiving benefits.

In voluntary quit cases involving drug testing, the core question is whether opposition to reasonable drug testing policies constitutes good cause for voluntarily quitting. The employers' and the public's right to a drug-free work force and work place outweighs any alleged injuries to claimants' personal rights and privacy.<sup>166</sup>

### ***Refusal to Take Polygraph Test***

Claimants who voluntarily leave their jobs rather than submit to their employers' lawful request or demand to take a polygraph test are determined to have voluntarily quit without good cause in connection with their employment. If their employers' polygraph requirements are not lawful, claimants have good cause to quit.

The Employee Polygraph Protection Act of 1988 ("the Act"), 29 U.S.C. §§ 2001–2009 (2014), controls the use of polygraph tests in the workplace of most private employers, though the Act does not cover federal, state, and local government agencies. The Act severely restricts the use of polygraphs for purposes of hiring, firing, or disciplining employees or prospective employees. The Act provides that private employers may not take any adverse employment action or discriminate against an employee or prospective employee who refuses, declines, or fails to take or submit to a polygraph test. Additionally, the Act forbids termination of any employee solely

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<sup>164</sup> See [Livingston v. N.M. Dep't of Workforce Sols.](#), D-1333-CV-2012-00142 (N.M. 11th Jud. Dist. Ct. July 13, 2012) (holding that claimant who quit and then changed her mind and want to return to work was a voluntarily quit).

<sup>165</sup> See [Bustos v. N.M. Dep't of Workforce Sols.](#), D-1333-CV-2011-00212 (N.M. 13th Jud. Dist. Ct. Oct. 12, 2012) (holding that claimant who quit in anticipation of being fired was a voluntarily quit without good cause).

<sup>166</sup> *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674, 109 S. Ct. 1384, 1395, 103 L. Ed. 2d 685 (1989) (American workplaces are not immune from "drug abuse [which] is one of the most serious problems confronting our society today.").

on the basis of a polygraph test. The Act specifies that government employees are exempt from the Act<sup>167</sup> and details who may administer the test and the conditions and types of inquiries that can be made of the individual being tested.

### ***Union Membership Requirements***

Claimants that quit their job because of dissatisfaction with union membership requirements will be disqualified for leaving their employment without good cause in connection with the employment. This policy relating to dissatisfaction with union membership requirements should not be confused with the “Labor Dispute Disqualification” under the Unemployment Compensation Law.<sup>168</sup> A claimant that must join or leave a labor union for a job can refuse the job and not be disqualified under the refusal of suitable work statute.<sup>169</sup> Disputes may arise in the context of a change in union membership requirements or provisions covering existing employees.<sup>170</sup> A union shop agreement may be discontinued by the employer over the objection of the union members, and some union membership benefits may be eliminated or curtailed or nonunion employees may object to the imposition of a union shop. If a claimant leaves employment for these reasons, the separation should be treated as a voluntary leaving without good cause connected with the employment.

In the case of nonunion employees who objects to a union shop, prevailing labor law precedents do not establish an absolute right for an individual to work free of any union agreement legally contracted between a union and the employer.<sup>171</sup> With some limitations, union shop agreements are enforceable against employees unless the provisions of the agreement violate an employee’s specific legal rights or the particular employment is covered by a state “right-to-work” law. There is presently no right-to-work law in New Mexico.

Certain activities on the part of the employer will give rise to good cause for a claimant to voluntarily leave employment.<sup>172</sup> For example, a union may not require, and the employer may not withhold, union dues or maintenance of effort charges in excess of the amount required for

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<sup>167</sup> 29 U.S.C.A. § 2006

<sup>168</sup> *Wellborn Paint Mfg. Co. v. N.M. Emp’t Sec. Dep’t*, 1984-NMCA-075, ¶ 25, 101 N.M. 534, 539-540, 685 P.2d 389, 394-95 (stating that the question of whether an employee qualifies for unemployment benefits or falls within the disqualifying labor dispute provision under NMSA 1978, § 51-1-7(C) requires a determination that a labor dispute existed and that the employee’s unemployment resulted from the labor dispute; the latter determination requires a causal connection between the employer’s decision and a controversy relating to terms or conditions of employment). See further discussion on vacancies due to a labor dispute *infra* on page 69.

<sup>169</sup> NMSA 1978, § 51-1-7(B)(3)

<sup>170</sup> See *Wilson v. Emp’t Sec. Comm’n*, 1963-NMSC-085, ¶¶ 25–27, 74 N.M. 3, 14, 389 P.2d 855, 862-63 (stating that a “grade or class” of employees means an organized group, or at least a cohesive group, acting in concert, where the striking member acts with the sanction of his associates, in their behalf, but that “integral functioning” was rejected as one of the basic tests of grade or class under the Unemployment Compensation Act).

<sup>171</sup> *Steele v. Louisville & N.R. Co.*, 15 LRRM 708 (1944) (“The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them.”).

<sup>172</sup> See *Kennecott Copper Corp. v. Emp’t Sec. Comm’n*, 1967-NMSC-182, 78 N.M. 398, 432 P.2d 109 (upholding a decision, on procedural grounds, that non-union workers were eligible for unemployment benefits during a strike).

collective bargaining expenditures, contract administration, and grievance adjustment procedures without the consent of the employee. The employer may not interfere with employees' rights to engage in concerted activities which are protected under the law. An employer may not retaliate against employees for engaging in protected activities.<sup>173</sup>

***EXAMPLES OF REOCCURRING CIRCUMSTANCES WHICH ESTABLISH GOOD CAUSE TO VOLUNTARY QUIT:***

The reason for leaving employment must constitute good cause and must be connected with employment to avoid disqualification under the New Mexico Unemployment Compensation Law.<sup>174</sup> Claimants have the burden of establishing by reasonable evidence that the reason for leaving employment constitute good cause connected with employment.<sup>175</sup>

***Changes in the Terms and Conditions of Employment***

Changes in the terms and conditions of employment may give rise to good cause connected with the work. The specific facts of each case must be examined to determine if claimants have proven good cause for voluntarily leaving their employment. Several factors generally considered in the determination of good cause are: whether the change in the terms and conditions is substantial; whether the changes were imposed exclusively by the employers without the claimants either encouraging or accepting the changes; and whether the changes were contrary to the terms and understandings of the parties at the time of the original hire.

If employers unilaterally and substantially changes the terms and conditions of the work from the original hiring agreement and a claimant leave his or her job because of the change in the terms and conditions of the work, the leaving will be treated as a voluntary leaving with good cause. Claimants have the responsibility to prove that voluntarily leaving the employment was with good cause in connection with the work by establishing that their employers unilaterally and substantially changed the terms and conditions of the work from the original agreement of hire.<sup>176</sup>

Claimants are not required to relocate their residences or travel beyond their recognized job market area to maintain their employment. A transfer of claimants' work beyond their

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<sup>173</sup> *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006)

<sup>174</sup> *Kramer v. N.M. Emp't Sec. Div.*, 1992-NMSC-071, 114 N.M. 714, 716-17, 845 P.2d 808, 810-11.

<sup>175</sup> See [Liquiserve, LLC v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-05049 (N.M. 2d Jud. Dist. Ct. Sept. 18, 2013) (claimant had established good cause in connection with the work by reasonable evidence when human resources manager and CEO both told claimant to ignore racist remarks made by claimant's supervisor).

<sup>176</sup> See [Sanchez v. New Mexico Dep't of Workforce Solutions](#), D-202-CV-2015-05258 (N.M. 2<sup>nd</sup> Jud. Dist. Ct. August 13, 2015) (While the Board of Review recognized that Respondent changed the terms and conditions of employment that could constitute good cause for quitting, Petitioner did not make reasonable efforts to preserve her employment by pursuing available options of resolving her concerns because she resigned before the matter could have been addressed through the employer appeal process).

recognized job market area would be good cause in connection with the employment for quitting that work. However, each case must be decided based upon the facts of the required relocation.

If a claimant had a definite understanding or commitment for specific work hours in the employment agreement, a change in those work hours that is imposed unilaterally by the employer and causes the claimant a detriment or hardship may give the claimant good cause to leave the employment.

If a reduction in hours causes a drop in total earnings below claimants' weekly benefit amounts, the claimants will normally be entitled to partial benefits. The reduction in hours may allow the claimants to search for new, full-time work in the claimants' off-hours. If claimants can establish that the reduction in hours results in a corresponding reduction in income to the point that the cost of continuing at the reduced work, including child care, transportation, etc., is greater than the income from the work plus partial benefits, they have good cause to quit the part-time work and will not be disqualified from receiving benefits.

### ***Employment for a Fixed Term***

If employers offer only employment for limited time periods and claimants accept offers of employment for the limited time periods, the claimants have not voluntarily quit at the end of the limited time periods. Acceptance of employment by claimants, knowing that the employment is only for a fixed or limited time period, does not affect the involuntary nature of the separation at the end of the term. The separation at the end of the term will generally be treated as a discharge, not a voluntary quit.

### ***Dissatisfaction with Pay and Benefits***

If employers fail to pay wages in accordance with the agreement or understanding of the parties at the time of hire, then that the failure to pay wages amounts to a breach of the employment agreement. If claimants prove that their reason for leaving employment was because their employers failed to pay wages in accordance with the employment agreement, good cause connected with the employment is established.

Employees are entitled by the employment agreement, public policy, and law to be paid on a timely basis. Claimants have good cause for leaving employment if they prove repeated failure by their employers to pay wages or other remuneration when due.<sup>177</sup> Claimants will have a good cause for leaving work if their wages are reduced substantially below the wage agreed upon at the time of hire or below the prevailing wage for similar work in the same job market.

Where part of the agreement of hire is that the employer will provide certain non-wage, personal, or fringe benefits, such as health insurance, transportation and per diem, or other valuable benefits, an elimination of these benefits unilaterally imposed by the employer is a breach of the employment agreement. Fringe benefits are often as important to an employee as paid wages and

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<sup>177</sup> *Randolph v. N.M. Emp't Sec. Dep't*, 1989-NMSC-031, ¶ 9, 108 N.M. 441, 444, 774 P.2d 435, 438.

benefits constitute part of the agreed upon wage package. A unilateral change in benefits that causes significant detriment to the claimant may amount to good cause connected with the employment for leaving.

### ***Unsafe Working Conditions***

Claimants who are subjected to unsafe working conditions generally have good cause in connection with employment for leaving the work and will be eligible for unemployment benefits. Claimants bear the evidentiary responsibility for establishing the truth of allegations of unsafe working conditions. Claimants must demonstrate either that they have made their concerns known to management in an effort to resolve the safety problems or that such action would be futile and would not result in a solution to the safety problem. In determining whether or not working conditions are unsatisfactory for an individual, the degree of risk involved to the individual's health, safety, and the working conditions or workers engaged in the same or similar work for the same and other employers in the locality should be considered. Hazardous working conditions means such conditions that could result in a danger to the physical or mental well-being of the worker. No work will be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity.

### ***Discrimination***

Discrimination based upon race, color, religion, sex, ethnicity, national origin, age, spousal affiliation, sexual orientation and gender identity, or other invidious discrimination is good cause for quitting if it is established by reasonable evidence. Harassment, unwarranted or discriminatory treatment and verbal abuse will constitute good cause in connection with the employment for leaving a job when such abuse renders the working conditions untenable and there is no reasonable alternative to quitting.<sup>178</sup>

To establish good cause in connection with the employment for leaving on the basis of alleged discrimination, claimants must present evidence that shows the alleged discrimination was serious, repeated, and directed toward or significantly affected the claimants' working conditions. In addition claimants must establish that they made reasonable attempts to discuss the problems with the employer in an effort to resolve the problem to no avail.<sup>179</sup>

### ***Leaving Due to Pregnancy***

The Unemployment Compensation Law prohibits pregnancy discrimination but does not mandate preferential treatment. Individuals cannot be disqualified from unemployment benefits solely on the basis of pregnancy.<sup>180</sup> The provision of the Federal Unemployment Tax Act which

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<sup>178</sup> See *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 6-7, 108 N.M. 380, 381-82, 772 P.2d 1303, 1304-05.

<sup>179</sup> See *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 7, 108 N.M. 380, 382, 772 P.2d 1303, 1305.

<sup>180</sup> NMSA 1978, § 51-1-7(A)(1)(a); 26 U.S.C. § 3304(a)(12).

mandates that no person shall be denied compensation solely on the basis of pregnancy only prohibits singling out pregnancy for unfavorable treatment; it does not mandate preferential treatment for women who leave work because of pregnancy.<sup>181</sup>

The regular principles of voluntary quit and good cause still apply to all claimants. The Federal Unemployment Tax Act does not prohibit States from denying benefits to pregnant or formerly pregnant individuals who fail to satisfy neutral eligibility requirements such as ability to work and availability for work.<sup>182</sup> New Mexico neutrally disqualifies workers who leave their jobs for reasons unrelated to their employment.<sup>183</sup> Thus, a claimant who voluntarily leaves work without good cause attributable to work will be denied unemployment compensation benefits.<sup>184</sup>

Claimants must utilize and comply with their employers' leave of absence policies covering pregnancy or disability. Claimants are ineligible for benefits if they voluntarily leave work or stay away from work for any period prior to or following actual medical confinement.<sup>185</sup> Claimants cannot take an unauthorized extended leave for childcare or child-rearing purposes and remain eligible for unemployment benefits. Declining to return to work or failure to re-enter the job market after being medically released constitutes leaving for a reason other than "solely due to pregnancy." Such a separation constitutes voluntarily leaving employment without good cause.

### ***Leaving Due to Religious Beliefs and Practices***

Claimants who leave employment because of conflicts between work and religious convictions and practices will be treated as voluntarily leaving with good cause in connection with their employment. On several occasions, the Supreme Court of the United States has invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by the claimant's religion.<sup>186</sup>

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<sup>181</sup> *Wimberly v. Labor & Indus. Relations Comm'n of Missouri*, 479 U.S. 511, 516-17 (1987) ("[T]he plain import of the language of § 3304(a)(12) is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment. The text of the statute provides that compensation shall not be denied under state law 'solely on the basis of pregnancy [ . . . ]' [I]f a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made 'solely on the basis of pregnancy.'").

<sup>182</sup> 26 U.S.C. § 3304(a)(12); *Wimberly*, 479 U.S. at 518.

<sup>183</sup> NMSA 1978, § 51-1-7(A)(1).

<sup>184</sup> For recent analysis on pregnancy in Title VII employment law context, see *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1341 (2015) (An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework.)

<sup>185</sup> See *Huerta v. N.M. Dep't of Workforce Sols.*, No. D-307-CV-2014-2023 (N.M. 3d Jud. Dist. Ct. Dec. 19, 2014) (upholding Department determination that a claimant was disqualified from receiving benefits after the claimant did not return to work after leave of absence for pregnancy).

<sup>186</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963) (South Carolina could not constitutionally apply eligibility provisions of unemployment compensation statute so as to deny benefits to claimant who had refused employment, because of her religious beliefs, which would require her to work on Saturday), overruled in part by *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883, 110 S. Ct. 1595, 1602, 108 L. Ed. 2d 876 (1990) (State, consistent with free exercise clause, could deny unemployment benefits for work related misconduct).

In *Sherbert v. Verner*, 374 U.S. 398, 399, 83 S. Ct. 1790, 1791, 10 L. Ed. 2d 965 (U.S.S.C. 1963), Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. The United States Supreme Court held that South Carolina could not constitutionally apply eligibility provisions of unemployment compensation statute so as to deny benefits to claimant who had refused employment, because of her religious beliefs, which would require her to work on Saturday.

In *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 707 (1981), the United States Supreme Court held that the State's denial of unemployment compensation benefits to petitioner violated his First Amendment right to free exercise of religion. Petitioner, a Jehovah's Witness, was initially hired to work in his employer's roll foundry, which fabricated sheet steel for a variety of industrial uses, but when the foundry was closed he was transferred to a department that fabricated turrets for military tanks. Since all of the employer's remaining departments to which transfer might have been sought were engaged directly in the production of weapons, petitioner asked to be laid off. When that request was denied, he quit, asserting that his religious beliefs prevented him from participating in the production of weapons. The Court noted that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. Where the state conditions receipt of an important benefit upon conduct prescribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

In *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 146 (1987), the United States Supreme Court held that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment. After two and a half years, appellant informed her employer that she was joining the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work at the employer's jewelry store on her Sabbath. When she refused to work scheduled shifts on Friday evenings and Saturdays, she was discharged. Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment. The United States Supreme Court held that the State may not force an employee "to choose between following the precepts of her religion and forfeiting benefits, and abandoning one of the precepts of her religion in order to accept work.

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based on use of drug (peyote); rejecting the notion that people are entitled to religious exemption from generally applicable laws, but preserving the *Sherbert* test to unemployment compensation programs); Indiana's denial of unemployment compensation benefits to claimant, who terminated his job because his religious beliefs forbade participation in production of armaments, violated his First Amendment right to free exercise of religion; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) ( Florida's refusal to award unemployment compensation benefits violated free exercise clause of First Amendment).

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-882 (1990), the Supreme Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment. Claimants sought review of determination that their religious use of peyote, which resulted in their dismissal from employment, was “misconduct” disqualifying them from receipt of Oregon unemployment compensation benefits. The United States Supreme Court held that the free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and thus state could, consistent with free exercise clause, deny claimants unemployment compensation for work-related misconduct based on use of drug.

Three years after the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993 in order to provide greater protection for religious exercise than is available under the First Amendment.<sup>187</sup> RFRA provides that “[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>188</sup>

Employers are required to make a reasonable effort to accommodate employees’ bona fide religious beliefs and practices.<sup>189</sup> Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship.<sup>190</sup> Beliefs and practices are not only those associated with mainstream religious organizations—this exception to churches that practice body modification, Native American spiritual practices, Wiccan religions, etc. The EEOC defines religious practices to include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>191</sup> The EEOC further states that no specific religious organization is required to espouse the beliefs held by a protected individual.<sup>192</sup> Employees have the responsibility of informing an employer of the conflict with employment and religious practice and working with the employer to find a reasonable accommodation that does not unduly burden the employer or other employees in the workplace.<sup>193</sup>

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<sup>187</sup> Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq; *Holt v. Hobbs*, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015).

<sup>188</sup> 42 U.S.C. §§ 2000bb–1(a)

<sup>189</sup> *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (a job applicant seeking to prove a Title VII disparate treatment claim need only show that the need for a religious accommodation was a motivating factor in the prospective employer’s adverse decision, and need not show that the employer actually knew that the applicant’s practice was a religious practice that required an accommodation).

<sup>190</sup> 42 U.S.C. § 200e-2(a)

<sup>191</sup> 29 C.F.R. § 1605.1

<sup>192</sup> 29 C.F.R. § 1605.1

<sup>193</sup> EEOC Compliance Manual, § 12-IV(A)(2).

### ***Domestic Abuse***

Claimants that leave work because of circumstances directly resulting from domestic abuse will not be disqualified from the receipt of unemployment benefits. Although domestic or personal issues are considered to be disqualifying reasons for voluntarily separating from work, for public policy reasons the state Legislature carved out an exemption for victims of domestic abuse.<sup>194</sup>

“Domestic abuse” includes but is not limited to any incident by a household member against another household member resulting in: physical harm; severe emotional distress; bodily injury or assault; a threat causing imminent fear of bodily injury by any household member; criminal trespass; criminal damage to property; repeatedly driving by a residence or work place; telephone harassment; stalking; harassment, or harm or threatened harm to children.<sup>195</sup>

“Household member” means a spouse, former spouse, family member, including relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, intimate partner or a person with whom the claimant has had a continuing personal relationship. Cohabitation is not necessary for an individual to be deemed a household member.<sup>196</sup>

Claimants must indicate at the time they file for benefits that the reason they left work was domestic abuse, and they must provide satisfactory documentation in the form of medical documentation, legal documentation or a sworn statement from the claimant. Employers are not required to be notified before separation that their employee is leaving due to domestic abuse. Further, if a claimant is determined to have left work with an employer because of domestic abuse, and the employer is a contributing employer, the employer’s account will not be charged.<sup>197</sup>

### ***Military Service***

If claimants leave work to relocate due to a spouse, who is in the United States military or New Mexico National Guard, and that spouse receives permanent change of station orders, activation orders, or unit deployment orders, then they will not be disqualified from the receipt of benefits.<sup>198</sup> Claimants must provide the Department with documentation of military orders to substantiate their claims.

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<sup>194</sup> NMSA 1978, § 51-1-7(A)(1)(b)

<sup>195</sup> NMSA 1978, § 40-13-2(D)

<sup>196</sup> NMSA 1978, § 40-13-2(E)

<sup>197</sup> NMSA 1978, § 51-1-11(C)(1)

<sup>198</sup> NMSA 1978, § 51-1-7(A)(1)(c).

## VIII. MISCONDUCT

The policy of the law is to pay unemployment benefits to those who are involuntarily unemployed through no fault of their own. NMSA 1978, § 51-1-3. Persons who are discharged for misconduct connected with their work are disqualified from benefits. NMSA 1978, § 51-1-7(A)(2).<sup>199</sup> In the context of unemployment benefits, as explained in *Fitzhugh v. N.M. Dep't of Labor*, the term “misconduct” has a precise meaning. The New Mexico Supreme Court defined misconduct in *Fitzhugh*:

Misconduct is limited to conduct in which employees bring about their own unemployment by such callousness, and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits. The employee's actions may evince a willful or wanton disregard of an employer's interests as is exemplified by deliberate violations of or indifference to the employer's reasonable standards of behavior. The employee's misconduct may demonstrate carelessness or negligence of such degree or recurrence so as to suggest equal culpability, wrongful intent, or evil design, or so as to reveal an intentional and substantial disregard of the employer's interests, or of the employee's duties and obligations to his employer.<sup>200</sup>

Whether misconduct has occurred depends upon the facts of each case, although in all cases where misconduct is alleged, the standard articulated in *Fitzhugh* serves as the guiding principle. In *Fitzhugh* the Supreme Court of New Mexico construed the Unemployment Compensation Law as favoring the granting of unemployment benefits. The Court noted that an employee's conduct may justify an employer's decision to terminate his or her employment. That same conduct, however, may or may not rise to the level of misconduct as defined by law so as to justify the denial of unemployment benefits.<sup>201</sup>

Whether a claimant engaged in disqualifying misconduct is determined by examining the totality of the circumstances. The employer bears the burden of proving that the employee was discharged for willful misconduct and must demonstrate more than the simple fact that the discharge was justifiable in reference to business interests. The ultimate question before the Department in any misconduct case is whether the employers have met their burden of proving that claimants engaged in conduct which amounts to a willful, deliberate, intentional, and substantial disregard of the employer's interests or the employee's obligations and duties to the employer. The “willful” and “intentional” components reflect the general proposition, reflected in the Unemployment Compensation Law, that an employee should lose access to unemployment benefits if the employee is at fault for his or her unemployment.

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<sup>199</sup> See also *Warren v. Emp't Sec. Dep't*, 104 N.M. 518, 521, 724 P.2d 227, 230.

<sup>200</sup> *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 42, 122 N.M. 173, 183–84, 922 P.2d 555, 565–66.

<sup>201</sup> *Fitzhugh*, 1996-NMSC-044, ¶ 39.

In light of this standard, the Department is required by law to determine whether a claimant has been discharged for misconduct and will satisfy the duty imposed by law by judging a claimant's eligibility based on the totality of the evidence,<sup>202</sup> ensuring that *at-fault* unemployed claimants are not paid benefits.<sup>203</sup> In making determinations under the Unemployment Compensation law, the Department engages in its own independent fact-finding in each case prior to reaching an administrative decision.

Mere inadvertencies, mistakes, isolated instances of poor judgment, and inefficiency or inability to perform to the employer's standards are not misconduct.<sup>204</sup> Such things do not demonstrate a willful or wanton disregard of the employer's interests, nor does carelessness or negligence of such degree or recurrence so as to suggest equal culpability, wrongful intent, or evil design, as set forth under the *Fitzhugh* definition of misconduct.<sup>205</sup> Essentially, the Department must find that the claimant's conduct significantly infringes an employer's legitimate interests and expectations for the claimant's behavior to rise to disqualifying misconduct.<sup>206</sup>

### ***Last Incidents and Patterns of Misconduct***

From time to time, Department decision-makers have used the phrase "last incident" when evaluating allegations of behaviors that, while in isolation might not be disqualifying, become disqualifying because the behaviors are repeated or constitute a pattern. The guiding principle in all such cases should be whether there is a causal connection between the asserted misconduct and the discharge. Usually, a long lapse in time from the alleged incident (or incidents) of misconduct to the discharge undermines any causal relationship. Essentially, if the employer waits a long time after an incident or asserted pattern of misconduct to fire someone, it is unlikely that the alleged misconduct was the reason for the termination.

The temporal relationship is important in misconduct cases because employers often raise misconduct after the fact to support denial of benefits. Moreover, employers have been known to discharge individuals on pretext. For example, an employer may decide a certain individual is no longer fitting in or is about to blow the whistle on illegal conduct. To get rid of the individual, the employer might be tempted to dig into the individual's personnel file and find bad acts upon which to predicate a termination. If the bad acts are old, then it is less likely that those acts were truly the reason for the discharge.

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<sup>202</sup> NMSA 1978, § 51-1-7(A)(2).

<sup>203</sup> *Int'l Minerals & Chem. Corp. v. Emp't Sec. Comm'n*, 1967-NMSC-175, ¶ 6, 78 N.M. 272, 274, 430 P.2d 769, 771 (noting that the purpose of the Unemployment Compensation law is also to grant benefits promptly only to those persons entitled to those benefits).

<sup>204</sup> See *Mitchell v. Lovington Good Samaritan Center, Inc.*, 1976-NMSC-071, ¶ 8, 89 N.M. 575, 577, 555 P.2d 696

<sup>205</sup> *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 40, 122 N.M. 173, 183, 922 P.2d 555, 565

<sup>206</sup> *It's Burger Time, Inc. v. N.M. Dep't of Labor Emp't Sec. Dep't (In re Apodaca)*, 1989-NMSC-008, ¶¶ 10-11, 108 N.M. 175, 177-78, 769 P.2d 88, 90-91 (employer required to prove that employee's conduct negatively affected the employer's business when employee was terminated for misconduct).

It has been suggested that, where there is no clear last incident and yet there is a pattern of bad behavior in the record, misconduct can still be shown. This may be true in some instances, but causation must be established. The existence of causation is determined on a case-by-case basis, based on whether so much time has passed since the asserted misconduct that it is unfair to infer a causal relationship between misconduct and discharge. To find causation, Department decision makers strive to be satisfied that the discharge came reasonably soon after the incident occurred or was discovered. Individual circumstances can affect whether the time lapse is reasonable. The employer might need to conduct an investigation before acting upon serious charges, for example.<sup>207</sup> The Department considers such facts as part of the “totality of the circumstances.”

### ***Burden of Proof***

Where misconduct is alleged, the employer bears the burden of proof, not the claimant. A claimant will be disqualified for misconduct connected with the work only if the misconduct is the actual and real cause for the claimant’s discharge. If the employer is unable to support allegations of misconduct with sufficient, admissible evidence, and there is no other evidence of misconduct in the record, the employer will not prevail.<sup>208</sup> The failure by the employer to present evidence of misconduct does not automatically entitle a claimant to benefits. A decision cannot be based solely on the employer’s failure to respond without any consideration of other evidence in the file, including statements claimants make against their own interest or other disqualifying evidence.

### ***Employee’s Understanding of Employer’s Expectations***

Unemployment compensation law emphasizes advance notice or warnings from employers to employees that certain conduct will be considered misconduct before the employer imposes a disciplinary discharge. Nevertheless, certain conduct may disqualify a claimant from receiving benefits even where no notice of behavioral standards was given.<sup>209</sup> Employers have the right to discharge “at will” employees, but the Department will determine whether behavior resulting in employment separation rises to the level of disqualifying misconduct.

For the Department, the guiding principle is the employee’s awareness of proper conduct. Consequently, a key inquiry is whether the claimant knew or should have known that such behavior was adverse to the employer’s legitimate business interest. Some actions or behaviors will not be considered disqualifying misconduct unless an employee has received explicit notice, warning, or some other kind of communication informing and correcting the employee as well as notifying the employee that, should the conduct going forward not conform to employer expectations, the employee will be dismissed. Repeated behavior after such communications is considered disqualifying.

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<sup>207</sup> See [Sisneros v. N.M. Dep’t of Workforce Sols.](#), No. 202-CV-2015-02732 (N.M. 2d Jud. Dist. Ct. July 16, 2015)

<sup>208</sup> See [YMCA v. N.M. Dep’t of Workforce Sols.](#), No. 202-CV-2014-00451 (N.M. 2d Jud. Dist. Ct. Mar. 31, 2014)

<sup>209</sup> [Akers v. N.M. Dep’t of Workforce Sols.](#), D-202-CV-2013-05206 (N.M. 2d Jud. Dist. Ct. October 3, 2013) The Secretary’s decision was reversed where there was no testimony that claimant was warned that she could be terminated for violating the employer’s call-in rule or because her absences were excessive.

Although notice and a warning are often required to sustain an assertion of disqualifying misconduct, some actions and behaviors are so widely known and understood to be unacceptable that the employer may safely assume that the employee is aware of the standard, regardless of whether the employer has given any kind of notice or warning. For example, an employer need not expressly warn or give notice through conversations, signs in the workplace, policy manuals, training materials, or any other type of communication that theft from the employer and criminal activity at the workplace constitute misconduct.

### *The Sufficiency of Warnings*

The term “warning” under the Unemployment Compensation Law has a specific meaning. A warning must expressly caution employees that engaging in the prohibited conduct will place their job in jeopardy. Informal counseling sessions or discussions with an employee that contain no reference to the potential consequences of engaging in the prohibited conduct will most likely not suffice as warnings. Even so, it may be enough warning that the employer has published standard rules and policies in a manner reasonably calculated to put employees on notice that certain conduct will be subject to discharge. For example, “zero tolerance” policies classifying certain egregious workplace behaviors as being subject to immediate discharge may be sufficient to put employees on notice that their job is in jeopardy. Instructive examples of this are drug use or violence in the workplace.

One frequently litigated issue is whether warnings must be written, or whether verbal warnings suffice? The law does not require warnings to be in writing. The question, then, is one of proof. The employer bears the burden of proving disqualifying misconduct. If an employer only gives the claimant verbal warnings and the claimant denies being warned, the Department must resolve the question by making a credibility determination. This determination is made difficult in instances where opposing parties giving contradictory testimony and no documentation exists to illuminate which party is testifying more accurately or truthfully. Department decision-makers are bound base all decisions on some residuum of admissible evidence.<sup>210</sup>

Consequently, an employer will generally be more successful at proving that a warning occurred where the warning is administered in writing. In that regard, Department and Court decisions give the most weight to evidence of warnings that contain a clear description of the employee’s undesirable behavior, the employer’s expectations going forward, clearly stated timelines for correction of the undesirable behavior (for example, excessive tardiness), and the potential consequences should the undesirable behavior persist (for example, discharge). The key is that employers must meet their burden of proving that an employee knew or should have known that the employee’s behavior was adverse to the employer’s legitimate business interest.

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<sup>210</sup> *Trujillo v. Emp’t Sec. Comm’n*, 1980-NMSC-054, ¶ 8, 94 N.M. 343, 344, 610 P.2d 747, 749 (“The benefits in this case may not be denied on the basis of controverted hearsay alone. Controverted hearsay under these facts does not qualify as substantial evidence.”)

As such, the quality and import of a warning will be evaluated based on the totality of the circumstances. Moreover, as discussed above, warnings are not required in all cases.<sup>211</sup> If the conduct is sufficiently egregious and infringes on the employer's legitimate business interests, and the employee knew or should have known that the conduct was impermissible, discharge may be imposed without prior warnings, and disqualifying misconduct may be found. Examples of such conduct include, but are not limited to, employee theft, insubordination, workplace violence, or impairment by illegal drugs or alcohol while on duty.

The Supreme Court is "reluctant to adopt a bright-line approach in all cases,"<sup>212</sup> and while other states have chosen to do adopt such an approach, in New Mexico, the burden is on the employer to show that the employee's misconduct was willful.

### ***Absenteeism and Tardiness***

Persistent and chronic absences that are without adequate notice to the employer or excuse and are continued in the face of warnings by the employer constitute misconduct in connection with the work.<sup>213</sup> Absenteeism and tardiness are treated similarly under the Unemployment Compensation Law. Regardless of the employer's policies, whether absenteeism or tardiness rises to the level of misconduct depends upon the particular facts in each case.<sup>214</sup>

Courts place reliance on the "*Chavez* rule" to determine whether absenteeism amounts to misconduct. As reaffirmed by the Supreme Court,<sup>215</sup> Under the *Chavez* rule, persistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes willful misconduct.<sup>216</sup> Given persistent or chronic absenteeism, the Supreme Court in *Fitzhugh* clarified that application of the *Chavez* rule requires evaluation of two factors. First, whether the claimant's absence was without notice or excuse to the employer and second, whether the claimant had been adequately warned by the employer. If employers can establish these two factors when absenteeism has been persistent or chronic, misconduct will be found.<sup>217</sup> On the other hand, if claimants can establish either that they gave

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<sup>211</sup> *Sanchez v. N.M. Dep't of Labor*, 1990-NMSC-016, 109 N.M. 447, 786 P.2d 674. *But see, e.g., Trujillo v. N.M. Dep't of Workforce Sols.*, D-202-CV-2013-01936 (N.M. 2d Jud. Dist. Ct. June 13, 2013) (claimant was disqualified from receiving benefits for missing five consecutive days of work, even though there was no prior warning).

<sup>212</sup> *Chicharello v. N.M. Dep't of Labor*, 1996-NMSC-077, ¶¶ 5-6, 122 N.M. 635, 930 P.2d 170

<sup>213</sup> *Chavez v. Emp't Sec. Comm'n*, 1982-NMSC-077, ¶ 4, 98 N.M. 462, 463, 649 P.2d 1375, 1376

<sup>214</sup> *See, e.g., Macias v. N.M. Dep't of Workforce Sols.*, No. D-504-CV-2012-599 (N.M. 5th Jud. Dist. Ct. Oct. 21, 2014) (upholding an Administrative Law Judge's finding of misconduct based on excessive absenteeism and credibility determination, which is a fact-sensitive inquiry).

<sup>215</sup> *Fitzhugh* 1996-NMSC-044, ¶ 34

<sup>216</sup> *Chavez v. Emp't Sec. Comm'n*, 1982-NMSC-077, ¶ 1, 98 N.M. 462, 649 P.2d 1375.

<sup>217</sup> Claimant's persistent attendance problems continued after several warnings and were without excuse, constituted misconduct. *See C. De Vaca v. N.M. Dep't of Workforce Sols.*, D-202-CV-2012-09551 (N.M. 2d Jud. Dist. Ct. November 19, 2012). The fact that employer's policy did not call for termination did not excuse claimant after warnings regarding attendance and absences were without adequate notice to the employer. *Valenzuela v. N.M. Dep't of Workforce Sols.*, D-202-CV-2014-03325 (N.M. 2d Jud. Dist. Ct. August 5, 2014) Claimant's failure to report for work without adequate notice and without the required physician's excuse in the face of explicit warning constituted misconduct. *Gose v. N.M. Dep't of Workforce Sols.*, D-202-CV-2013-02836 (N.M. 2d Jud. Dist. Ct.

notice and excuse to the employer or that the employer did not give warnings, misconduct will not be established.<sup>218</sup>

The consequence of the *Chavez* Rule is that absenteeism will not automatically constitute disqualifying misconduct even with a written policy in place.<sup>219</sup> Employers have the right to define their own policies and set forth their expectations of their employees. These policies may set forth what employers view as dischargeable misconduct. The employers' definition of misconduct, however, does not alter the statutory definition of misconduct for the purposes of disqualifying a claimant from unemployment benefits.<sup>220</sup>

This means that employer policies attempting to classify a stated number of consecutive absences without notice as a "voluntary quit" or as misconduct are not dispositive. As discussed elsewhere, the law requires evidence of a subjective intent to quit in order for the Department to find that a quit has occurred.<sup>221</sup> An extended absence may or may not, under the totality of the circumstances, lead to a valid inference that an individual intended to leave employment. Furthermore, for absences to constitute misconduct, the elements set forth in *Chavez v. Emp't Sec. Comm'n* and elaborated upon in *Fitzhugh* must be present.<sup>222</sup> Thus, irrespective of an employer's policies, *Chavez* holds that absenteeism will only be deemed to be misconduct where the absences are chronic and persistent, are without adequate notice or excuse, and are continued in the face of warnings.<sup>223</sup> An employer cannot convert non-chronic absenteeism into misconduct by attempting to define it as such in the employer's policy manuals or notices.

For example, an employer's policies may attempt to define two unexcused absences as excessive sufficient to support a finding of misconduct or a voluntary quit. The courts, however, have consistently held that two unexcused absences do not amount to disqualifying misconduct. Two absences cannot be fairly characterized as "chronic "and persistent." This holds true even in the case of "no-call/no-shows," where employees fail to call in and advise the employer of their absence in accordance with company policy. While the employer is free to discharge the employee for violating the company call-in policy, unless the record establishes, consistent with

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April 2, 2014) Claimant's excuse that she was sick was not acceptable under the circumstances of the case so that her decision not to work on Super Bowl Sunday was a conscious decision adverse to the employer's interest, allowing termination for misconduct. [Goddard v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-10441 (N.M. 2d Jud. Dist. Ct. December 13, 2011)

<sup>218</sup> See [Pollock v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-08424 (N.M. 2d Jud. Dist. Ct. December 19, 2012)

<sup>219</sup> See *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 55, 122 N.M. 173, 186, 922 P.2d 555, 568 (holding that employee's violation of company policy that required her to notify employer on a daily basis of her absence from work was not misconduct sufficient to warrant denial of unemployment benefits).

<sup>220</sup> See [Deal v. N.M. Dep't of Workforce Sols.](#), D-1113-CV-2012-00047 (N.M. 11th Jud. Dist. Ct. May 25, 2012) (finding no misconduct due to absenteeism despite the fact that claimant violated employer's absenteeism policy).

<sup>221</sup> *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 30, 122 N.M. 173, 181, 922 P.2d 555, 564 ("Among the most important considerations in resolving whether an employee quit or was fired is an examination of the subjective intentions and understandings of the employee.").

<sup>222</sup> *Chavez v. Emp't Sec. Comm'n*, 1982-NMSC-077, 98 N.M. 462, 649 P.2d 1375.

<sup>223</sup> *Chavez v. Emp't Sec. Comm'n*, 1982-NMSC-077, ¶ 4, 98 N.M. 462, 463, 649 P.2d 1375, 1376

*Chavez*, a pattern of chronic or persistent absence coupled with warnings by the employer, the discharge does not rise to the level of misconduct for the purposes of disqualification from unemployment benefits. Individual circumstances may warrant special consideration given the surrounding facts.

### ***Violation of Rules and Policies***

Deliberate failure to follow known, reasonable rules or policies without good reason or excuse constitutes misconduct in connection with the work.<sup>224</sup> There is no requirement that actual harm result from every violation of an employer's rules or policies. If the rule or policy serves an important employer interest, a violation may be considered misconduct.<sup>225</sup> Claimants must have notice of their employer's rules and policies before a violation will be considered misconduct. If claimants have been informed of the rules and policies in particular, or the rules and policies have been published in the work place, claimants will be presumed to have knowledge of the rules and policies.<sup>226</sup>

To provide a foundation for misconduct, the employer's rules and policies must be reasonably related to the employer's legitimate business interests and must not unduly intrude on the employees' rights or privacy. When an employer's rule conflicts with or violates an employee's legitimate rights and interests, those policies will not serve as a basis for establishing misconduct.

Because a finding of misconduct depends on the totality of the circumstances, notice of the existence of rules and policies may not always be sufficient to establish misconduct. To be recognized as the predicate for a finding of misconduct, an employer's rules and policies must be uniformly enforced in similar situations among similar classes of employees. Arbitrary and inconsistent enforcement of rules and policies, or imposition of discipline, may relieve a claimant from disqualification. Inconsistent enforcement of rules and policies negates the claimant's knowledge that violation of such rules and policies is subject to discharge. However, uniformity of application of rules and policies among different classes of employees, such as supervisory and non-supervisory personnel, or in enforcement of the rules and policies in materially dissimilar situations is not required and will not mitigate a claimant's particular misconduct.

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<sup>224</sup> *Sanchez v. N.M. Dep't of Labor*, 1990-NMSC-016, 109 N.M. 447, 786 P.2d 674

<sup>225</sup> See *Pinon v. N.M. Dep't of Workforce Sols.*, D-101-CV-2014-01248 (N.M. 1st Jud. Dist. Ct. August 6, 2014) (misconduct found where claimant failed to follow a known rule relating to cash handling procedures demonstrating a disregard for the employer's asserts and the duties and obligations under the area manager's cash handling rules); *Gomez v. N.M. Dep't of Workforce Sols.*, D-50-CV-2011-463 (N.M. 5th Jud. Dist. Ct. April 23, 2012 (claimant, who worked for the employer for fifteen years in a managerial capacity, left a client's personal confidential financial information on the outside doorknob of a client's form residence after a visit for loan collection purposes, creating a perceiving violation of federal collection laws and implicated a client's privacy rights, which infringed upon the employer's legitimate business interests).

<sup>226</sup> See *Kopan v. N.M. Dep't of Workforce Sols.*, D-202-CV-2014-5621 (N.M. 2d Jud. Dist. Ct. Oct. 24, 2014) (finding misconduct where employee accessed patient records in violation of HIPAA after being trained in HIPAA law and employer's rules and policies).

### ***Insubordination***

Insubordination can consist of the willful disrespect for management's legitimate authority to conduct its business and to control the business premises or the deliberate refusal to obey an employer's reasonable instructions or orders. Insubordination can also include using obscene language or disobeying a supervisor.<sup>227</sup> Employee challenges and disobedience to the employer's legitimate authority for personal reasons may constitute misconduct,<sup>228</sup> although employees do have the right to inquire, discuss, or to express valid concerns about orders and instructions. Employees also have a right to refuse orders and instructions if they have objectively genuine and supportable fears for their safety.

### ***Refusal to Work***

Refusal to perform assigned work which is reasonably within the scope of the employment agreement constitutes misconduct connected with the work. Dismissal for Failure or refusal to do assigned work will result in a denial of unemployment benefits if the failure or refusal evinces disregard of standards of behavior employers can rightfully expect from their employees. If the employer's request is reasonable in the context of the particular employment relationship and the claimant's refusal is unjustified, the refusal will be considered misconduct sufficient to disqualify the claimant from benefits.<sup>229</sup>

Generally, an employee must perform work as assigned by the employer unless such assignment is in direct conflict with an employment agreement or is clearly beyond the employee's ability. In this context, relevant agreements controlling an employee's work assignment would be union collective bargaining agreements or specific professional employment contracts. Outside of these employment agreements, employers have broad authority to assign work which is reasonably within an employee's skill level.

A claimant's refusal to work overtime when overtime is reasonable and customary in the industry or business, or is necessitated by emergency circumstances, will be considered misconduct in connection with the work. Where overtime work assignments are controlled by a collective bargaining agreement or a formal policy of the employer, overtime assignments must be made in accordance with the agreement or policy. Otherwise, an employer has authority to

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<sup>227</sup> See [\*Estrada v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2013-08757 (N.M. 2d Jud. Dist. Ct. January 10, 2014) (claimant dismissed for using obscene language toward a supervisor).

<sup>228</sup> See [\*Serna v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2014-04598 (N.M. 2d Jud. Dist. Ct. August 18, 2014) (Claimant's choice not to proceed with the Action Plan and not to follow her manager's instructions was substantial evidence of insubordination and is misconduct.); [\*Miranda v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2012-07331 (N.M. 2d Jud. Dist. Ct. April 10, 2013) (Employer discharged claimant for insubordination based on claimant's arguments with the customer's management and his refusal to follow instructions.); [\*Goold v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2013-09870 (N.M. 2d Jud. Dist. Ct. February 23, 2014) (Claimant was terminated for insubordination, disrespect, and threatening and intimidating behavior.).

<sup>229</sup> See [\*Kelly v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2015-02759 (N.M. 2d Jud. Dist. Ct. May 20, 2015) (finding that employer had a reasonable expectation that Petitioner, a nurse, would carry out a telemetry order and that failing to do so evinces a willful disregard of the employer's interests).

request overtime in accordance with the needs of the business, as long as the requests are reasonable and in accordance with the Fair Labor Standards Act and its exemptions.<sup>230</sup>

### ***Unsatisfactory Performance***

Willful or negligent inattention to duty, particularly if repeated or when it constitutes a risk to the safety of persons or property, will be considered misconduct connected with the work. Employees have a duty to their employer to perform their work with competence and attention. Carelessness or neglect in the performance of assigned duties harms the employer's legitimate business interests.<sup>231</sup> Isolated instances of ordinary negligence or inadvertence are not misconduct, but repeated inattention or neglect of duties creates unacceptable risks for the employer.<sup>232</sup> Mistakes caused by occasional negligence generally do not constitute misconduct, but persistent neglect of employment duties demonstrates a willful and wanton disregard of an employer's interests and constitutes misconduct.<sup>233</sup> Should the neglect be persistent, the employer must give warnings that performance must improve and the consequences of not improving must be explained.<sup>234</sup>

Discharging claimants simply because of their inability to meet the employers' performance standards does not establish misconduct.<sup>235</sup> If, however, employers present evidence that claimants previously met the employers' performance standards but through willful or negligent inattention to duty, particularly if repeated after receiving warnings that they face potential termination from employment based on their performance errors, and those performance errors continue courts will affirm the Department's findings of misconduct.<sup>236</sup>

Leaving the assigned work area without authorization or substantial cause is misconduct connected with the work.<sup>237</sup> Leaving the assigned work area without permission creates a

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<sup>230</sup> 29 U.S.C. § 201 et. seq.

<sup>231</sup> See [Smith v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-03509 (N.M. 2d Jud. Dist. Ct. July 17, 2013) (finding misconduct because claimant was aware of employer policies and procedures but failed to follow proper procedure because the claimant was rushed and not paying attention, caused significant cost to the employer, and was not forthcoming with the employer after learning of the mistake).

<sup>232</sup> See [Martinez v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-00704 (N.M. 2d Jud. Dist. Ct. September 2, 2011) (finding misconduct where claimant was disciplined and warned multiple times on substandard performance, counseled on various occasions for failure to complete shift duties, failure to make necessary entries in resident records, and failing to provide proper resident care on at least two occasions).

<sup>233</sup> [Chicharello v. N.M. Dep't of Labor](#), 1996-NMSC-077, 122 N.M. 635, 930 P.2d 170.

<sup>234</sup> [Chicharello v. N.M. Dep't of Labor](#), 1996-NMSC-077, 122 N.M. 635, 930 P.2d 170.

<sup>235</sup> [Gonzalez v. N.M. Dep't of Workforce Sols.](#), D-101-CV-2013-01542 (N.M. 1st Jud. Dist. Ct. November 21, 2013)

<sup>236</sup> See [Starkey v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-6656 (N.M. 2d Jud. Dist. Ct. December 13, 2012) [Gallegos v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-02257 (N.M. 2d Jud. Dist. Ct. November 9, 2012) [Lowman v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-12260 (N.M. 2d Jud. Dist. Ct. May 2, 2012) [Chavez v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-08668 (N.M. 2d Jud. Dist. Ct. November 28, 2012) [Martinez v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-00704 (N.M. 2d Jud. Dist. Ct. September 2, 2011) [Gieri v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-04721 (N.M. 2d Jud. Dist. Ct. October 25, 2013)

<sup>237</sup> See [Vizcaino v. N.M. Dep't of Workforce Sols.](#), D-307-CV-2011-312 (N.M. 3d Jud. Dist. Ct. April 26, 2012) (misconduct found where claimant left the work site during his shift and then lied to his employer regarding the reason the claimant left).

presumption that an employee is not performing one's work. Leaving an assigned work area without authorization may expose the employer to theft or safety problems. An employee who leaves the work area without authorization has the burden of showing that the absence does not infringe upon the employer's interests in orderly work procedures.<sup>238</sup>

Sleeping on the job is clearly contrary to the employer's interests and violates an employee's duty to the employer. As such, sleeping on the job constitutes misconduct connected with the work.<sup>239</sup> Sleeping on the job raises a presumption that the employee is not performing the work in an acceptable manner. If an employer meets its burden of showing that an employee was sleeping on the job, then the employee has the burden of showing that such conduct does not infringe upon the employer's legitimate business interests or that it does not violate the employee's duties to the employer.

Conducting personal business during hours of employment or extensive use of the employer's communication equipment—including telephone and computer equipment—for personal reasons, especially after warnings, is misconduct connected with the work and will disqualify a claimant from unemployment insurance benefits.<sup>240</sup> When an employee is at work, the employee is expected to attend to the employer's business, not the employee's personal business.<sup>241</sup> Repeated and unauthorized use of the employer's equipment and time for personal matters not only interferes with the employee's work but frequently the employee's co-workers activities as well.<sup>242</sup> Such conduct infringes upon the employer's legitimate business interests and the employee's duty to the employer.

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<sup>238</sup> See [Kelley v. N.M. Dep't of Workforce Sols.](#), D-820-CV-2012-00073 (N.M. 8th Jud. Dist. Ct. October 2, 2013) (one time incident of leaving the job early did not disqualify the claimant for unemployment benefits).

<sup>239</sup> See [Sanchez v. N.M. Dep't of Workforce Sols.](#), D-1329-CV-2013-2162 (N.M. 13th Jud. Dist. Ct. September 9, 2014) (finding misconduct where employee slept while on duty and had done so on previous occasions).

<sup>240</sup> See [Rodman v. N.M. Emp't Sec. Dep't](#), 1988-NMSC-089, 107 N.M. 758, 764 P.2d 1316 (employee who repeatedly received phone calls and visitors at work despite warnings and reprimands engaged in disqualifying misconduct).

<sup>241</sup> See [Sandler v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-0122 (N.M. 2d Jud. Dist. Ct. November 26, 2013) (claimant's continued unauthorized involvement in personal business during work hours, despite being previously reprimanded for such conduct, is supported by substantial evidence and constitutes misconduct); [Renteria-Garcia v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-7211 (finding misconduct where claimant had a history of poor job performance and continued to do personal business during his working hours).

<sup>242</sup> See [Rodman v. N.M. Emp't Sec. Dep't](#), 1988-NMSC-089, ¶ 5, 107 N.M. 758, 760, 764 P.2d 1316, 1318 (detailing disruption employee's personal matters disrupted work for others). See also [Rodriguez v. N.M. Dep't of Workforce Sols.](#), No. D-202-CV-2014-06502 (N.M. 2d Jud. Dist. Ct. Dec. 15, 2014) (upholding decision that an employee engaged in misconduct when employee repeatedly used company property to attend to personal business and was warned that doing so violated company policy); [Garcia v. N.M. Dep't of Workforce Sols.](#), D-202-CV- 2010-14414 (N.M. 2d Jud. Dist. Ct. July 26, 2012) (claimant acted in a manner that caused harm to employer's business interests and could have harmed employer's relationship with its customer by leaving the job site of which he was in charge and of which employer was contractually obligated to provide supervision, and also admittedly removing pavers belonging to the customer without permission).

## ***Dishonesty***

Dishonesty and falsification of work records are contrary to the interests of the employer, conflict with the employee's duty of candor toward the employer and can constitute misconduct connected with the work.<sup>243</sup> Submitting a falsified job application in whole or in part is misconduct and can give the employer false information about an applicant's job qualifications or criminal background.<sup>244</sup> A lack of information in such areas prevents the employer from making appropriate employment choices and may put the employer at legal risk. Falsification of time, attendance, and production records amounts to theft from the employer, because the employee is claiming wages to which the employee is not entitled.<sup>245</sup> Such behavior constitutes misconduct.<sup>246</sup> Stealing from the employer or any actions that reflect a willful disregard of the employer's policy or financial interest is also misconduct.<sup>247</sup>

## ***Disruptive Behavior***

Disruptive conduct by employees in the work place which tends to disturb the efficiency, harmony, and discipline of the work place, especially when repeated and in the face of warnings, constitutes misconduct.<sup>248</sup> An employer has a strong business interest in a harmonious and efficient working environment. Common situations involving disruptive conduct by employees include fighting, abusive behavior and language, rudeness and abuse of customers, and disloyalty to the employer.

A physical altercation among employees on company premises during working hours is misconduct. Both parties participating in fighting are guilty of misconduct, regardless of who instigated the fight. Although employers often have published rules and policies prohibiting

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<sup>243</sup> See [Woodard v. N.M. Dep't of Workforce Sols.](#), D-1314-CV-2013-1353 (N.M. 13th Jud. Dist. Ct. April 10, 2014) (finding misconduct and denying unemployment benefits where employee engaged in procurement fraud); [Glenn v. N.M. Dep't of Workforce Sols.](#), D-1320-CV-2011-00141 (N.M. 13th Jud. Dist. Ct. July 18, 2013) (affirming the decision of the Department where theft of voided ski ticket is misconduct).

<sup>244</sup> See [Rivero v. N.M. Dep't of Workforce Sols.](#), D-307-CV-2012-01686 (N.M. 3d Jud. Dist. Ct. August 31, 2012); [Paiz v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-07776 (N.M. 2d Jud. Dist. Ct. December 11, 2013).

<sup>245</sup> See [Brazen v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-04984 (N.M. 2d Jud. Dist. Ct. August 14, 2013) (affirming the Department's determination that the claimant was disqualified from unemployment insurance benefits where claimant was outside her assigned area on numerous occasions, that her timesheets did not accurately reflect her activities, and that she had been warned and even suspended for this conduct prior to being discharged); [Limon v. N.M. Dep't of Workforce Sols.](#), D-307-CV-2012-1626 (N.M. 3d Jud. Dist. Ct. October 5, 2012) (misconduct found where claimant's time cards reflected more hours than worked and claimant accepted payment for more hours than actually worked).

<sup>246</sup> [Colclough v. N.M. Dep't of Workforce Sols.](#), D-1314-CV-2013-00494 (N.M. 13th Jud. Dist. Ct. June 11, 2013) (District Court affirmed the Department's conclusion that claimant was discharged for misconduct for falsifying her time sheets); [Brazen v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-04984 (N.M. 2d Jud. Dist. Ct. August 14, 2013); [Ulibarri v. N.M. Dep't of Workforce Sols.](#), D-412-CV-2012-00063 (N.M. 4th Jud. Dist. Ct. May 10, 2012)

<sup>247</sup> [Pineda v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-09619 (N.M. 2d Jud. Dist. Ct. January 11, 2012).

<sup>248</sup> See [Rodman v. N.M. Emp't Sec. Dep't](#), 1988-NMSC-089, ¶ 5, 107 N.M. 758, 760, 764 P.2d 1316, 1318 (detailing disruption employee's personal matters disrupted work for others); [Jaramillo v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2011-09814 (N.M. 2d Jud. Dist. Ct. September 21, 2012) (misconduct and substantial disregard of employer's interest found when claimant involved in an off-the-clock altercation while in uniform and involving employer-issued equipment).

fighting and assault in the workplace, notice or warning is not required in order to find misconduct. Claimants may have an affirmative defense against a finding of misconduct if they can show that they were acting purely in self-defense. Self-defense requires claimants to prove that they did not incite the fight and they attempted to remove themselves from the situation before the fight began.

The use of abusive, vulgar or demeaning language in the work place, especially if it is persistent and in the face of warnings, violates the standards of behavior an employer has a right to expect of its employees. Abusive, vulgar or demeaning language that exceeds the customary standards in the particular work place is misconduct. Discriminating and demeaning language directed at race, national origin, sex, and other legally protected classes is never tolerable and is misconduct.

Rude, abusive or inattentive behavior with customers is misconduct connected with the work and will disqualify claimants from benefits. Good will with customers is one of the most important assets for an employer. Employees must treat customers promptly and courteously even when the customers are impatient. Rude or inattentive treatment of customers is contrary to the employer's interest. If an employer discharges a claimant because of customer complaints, it is the employer's obligation to establish the truth of the complaints by more than just hearsay allegations.<sup>249</sup>

Publicly disparaging the employer or the employer's products or business, publicly criticizing the working conditions, or providing services to the employer's customers in competition with the employer may constitute misconduct connected with the work. Employers are entitled to loyalty from their employees. Disparaging public criticism, made vindictively or which serves no legitimate public interest, is inimical to the employer's business interest and violates the employees' duty toward the employer. Such criticism could include disparaging comments about an employer that a claimant may post on social media. Nevertheless, some types speech or commentary by employees—even if unflattering to an employer—may be considered to be “protected speech” under federal and state whistleblower protection laws, which, depending on the circumstances, could impact the analysis of whether that type of public criticism of an employer satisfies the definition of “misconduct.”<sup>250</sup> Similarly, federal and state labor laws may protect certain concerted activity by employees. Again, each case must be evaluated separately based on the totality of circumstances present.

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<sup>249</sup> See *It's Burger Time, Inc. v. N.M. Dep't of Labor Emp't Sec. Dep't (In re Apodaca)*, 1989-NMSC-008, ¶¶ 10–11, 108 N.M. 175, 177–78, 769 P.2d 88, 90–91 (employer required to prove that employee's conduct negatively affected the employer's business when employee was terminated for misconduct); *Trujillo v. Emp't Sec. Comm'n*, 1980-NMSC-054, ¶ 8, 94 N.M. 343, 344, 610 P.2d 747, 748 (holding that controverted hearsay alone does not qualify as substantial evidence).

<sup>250</sup> For example, N.M.'s Whistleblower Protection Act, NMSA 1978, Sections 10-16C-2 to -6, provides protection for public employees, including protection from retaliation, who communicate to third parties about an action or a failure to act that the public employee believes in good faith to constitute an unlawful or improper act. NMSA 1978, §§ 10-16C-2 to -6 (2010).

An employer generally has the right to prohibit employees from providing services to the employer's customers in direct competition with the employer. This is especially true where the employee is using the employer's equipment or time, or is gaining access to these customers directly in the performance of the employer's business. If certain activities, such as union-activities, are protected by law, they will not be treated as misconduct.

### ***Drugs and Alcohol***

The use of alcohol during working hours and on company property without express permission constitutes misconduct connected with the work. The use of alcohol off of company property or during nonworking time, if it impairs the claimant's ability to perform assigned job duties or infringes the employer's business interests is also misconduct connected with the work.<sup>251</sup> The employer generally does not need to show an explicit, published policy prohibiting such use. It is common knowledge and practice that drinking on the job is prohibited conduct. Absent a policy prohibiting use of alcohol, the employer must show by reasonable, probative evidence that the claimant was under the influence of alcohol during working hours, or that the claimant's ability to work was impaired as a consequence of alcohol use.<sup>252</sup>

Misconduct connected with the work may occur if a claimant's off-duty use of alcohol indirectly affects the claimant's ability to work, such as a suspended driver's license or loss of insurance because of alcohol-related circumstances, being unable to work due to being hung-over, or is adverse to the employer's business interests.<sup>253</sup>

The use of illegal drugs and the illegal use of controlled substances during working hours or on company premises constitute misconduct connected with the work.<sup>254</sup> A violation of the employer's policies against the use of drugs can be established without necessarily establishing impairment on the job. If a claimant tests positive for use of illegal drugs, determined by reliable testing procedures, the claimant may be subject to discharge and disqualification from unemployment benefits for misconduct connected with the work even though there is no observable impairment.

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<sup>251</sup> See [Benallie v. N.M. Dep't of Workforce Sols.](#), D-1113-CV-2012-297-7 (N.M. 11th Jud. Dist. Ct. December 20, 2012) (finding misconduct due to claimant's DWI conviction requiring claimant to drive with an interlock device, which impacted his ability to drive a company car and perform his job).

<sup>252</sup> See *Miss. Potash, Inc. v. Lemon*, 2003-NMCA-014, 133 N.M. 128, 61 P.3d 837 (holding where employer, who had a drug and alcohol policy, presented no evidence regarding the testing and collection procedures for a urine test and offered no corroborating evidence of intoxication, such as odor or physical symptoms, employee was not dismissed for good cause and was eligible to receive benefits).

<sup>253</sup> *But see Otero v. N.M. Emp't Sec. Div.*, 1990-NMSC-007, 109 N.M. 412, 785 P.2d 1031 (holding that claimant was not disqualified from receiving benefits where the sole reason for his termination as a truck driver was the refusal of the employer's insurance carrier to provide insurance, and not the claimant's misrepresentations of his driving record on his application for employment).

<sup>254</sup> [Garza v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-5097 (N.M. 2d Jud. Dist. Ct. July 20, 2012) (finding misconduct where claimant used illegal drugs on the job in clear disregard of employer's interests).

Claimants may be disqualified from benefits if they voluntarily quit their employment in order to avoid having to comply with an employer's reasonable drug testing policy. Similarly, claimants can be discharged for misconduct if they refuse to take a drug test or deliberately try to thwart the testing process.<sup>255</sup> If a claimant is discharged for testing positive for use of a controlled substance, the evidentiary burden is on the employer to make a *prima facie* showing that the testing procedures were technically valid and reliable, and met minimal due process requirements. If challenged, these facts must be established by reasonable, admissible evidence, such as testimony or evidence from the test administrators.

If drug test results are the basis for a decision to deny unemployment benefits on the grounds of misconduct, the party trying to prove a failed drug test must do so with admissible evidence.<sup>256</sup> Documentation of drug test results are hearsay, but are generally admissible under the business records exception to the hearsay rule, provided<sup>257</sup> a qualified witness can lay the appropriate foundation for admission under the business-records exception to the hearsay rule. The qualified witness must be able to identify the documents in question, testify that the documents proffered were kept in the regular course of business based on personal knowledge, and that it was the regular practice of the sponsoring party or witness to make the memorandum, report, record, or data compilation. If a failed drug test is to provide the sole basis for a denial of unemployment benefits, then documentary evidence will not, on its own be sufficient. Rather, such evidence must be proffered through a qualified foundation witness.

The documentation necessary to prove misconduct in a drug or alcohol case should consist of—at a minimum—the employer's drug testing policy under which the test was performed, the test collection and chain of custody forms filled out completely and accurately, the test results showing the substance(s) and quantities for which the claimant tested positive, as well as any notes by the testing lab's medical review officer (MRO). Depending on the particular facts of each case, however, additional documentation may be required. All required certifications on the lab forms must be signed. Failure of an employer to present facially sufficient testing documentation could undermine the employer's case.

### ***Safety Violations***

Willful or negligent inattention to duty, particularly if repeated or when it constitutes a risk to the safety of persons or property will be considered misconduct connected with the work.

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<sup>255</sup> For example, claimants have been known to try to pass off another individual's "clean" urine as their own, or sometimes they claim an inability to produce any urine for hours on end.

<sup>256</sup> See [\*Barreras v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2013-4798 (N.M. 2d Jud. Dist. Ct. October 22, 2013) (claimant's positive drug test result was a willful violation of a reasonable policy that significantly affected the City's interests and therefore constituted misconduct).

<sup>257</sup> See Rule 11-803(6) NMRA.

Failure to abide by safety rules demonstrates a willful disregard for employers' interests.<sup>258</sup> Usually, repeated violations of safety rules are necessary to establish willfulness. But misconduct may sufficiently be found in cases of flagrant endangerment where claimants knew or should have known that their actions could endanger other's safety or property.

### ***Accidents***

Accidents that demonstrate a willful or careless disregard of safety and reasonable standards of behavior, and violate the duty an employee owes to the employer, are considered misconduct connected with the work. Although the term "accident" implies circumstances beyond what claimants would ordinarily be expected to foresee or control, sometimes accidents are the result of carelessness or negligence on the part of the employee. While mere negligence typically will not support a finding of misconduct, carelessness of such a degree or culpability that it evinces a wrongful intent or willful disregard of the employer's interests constitutes misconduct.

### ***Damage to Equipment and Property***

Damage to the employer's equipment or property resulting from intentional acts or gross negligence constitutes misconduct connected with the work. Damage resulting from ordinary use, inadvertence, or ordinary negligence, however, is generally not considered misconduct. Misconduct is established when claimants, acting out of frustration, throw or strike equipment in such a way that the equipment is damaged. Misconduct is also established when claimants who have been instructed in the proper use of equipment and have used the equipment in the proper manner before, engage in improper use resulting in significant damage to the equipment.<sup>259</sup>

### ***Unsafe Working Conditions***

If the degree of risk to an employee's health, safety, and morals in the employee's working conditions is significant, that employee may refuse to work under such conditions without the refusal being regarded as misconduct. The degree of risk is the deciding factor in determining if the refusal is misconduct. The evidence of such a risk must be reasonable and have some objective support. Where working conditions meet the requirements of governmental safety regulations, claimants will not prevail on claims of unsafe working conditions unless it is established by clear and convincing proof that the conditions are nonetheless unsafe or that the government imposed safety procedures were not followed properly.

### ***Arrest and Incarceration***

If claimants' arrest and incarceration substantially interfere with their ability to perform their jobs or jeopardize their employers' reputation or business interests, it will be considered

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<sup>258</sup> See *Carlo v. N.M. Dep't of Workforce Sols.*, D-202-CV-2013-02547 (N.M. 2d Jud. Dist. Ct. May 30, 2013) (finding misconduct where Claimant acknowledged he was operating company equipment when it was damaged and caused Employer considerable expense).

<sup>259</sup> See *Gutierrez v. N.M. Dep't of Workforce Sols.*, D-202-CV-2012-10169 (N.M. 2d Jud. Dist. Ct. January 11, 2013) (finding misconduct where claimant engaged in improper use of the employer's equipment, did not perform his duties in the proper manner, and caused an accident by recklessly handling the employer equipment.).

misconduct connected with the work. If arrest and detention result in claimants' inability to appear at work, they are responsible for promptly notifying their employers.

Arrest and incarceration do not generally constitute good cause for being absent. If the absence is properly noticed and is of short duration, within the limits normally tolerated by the employer for other causes, an absence due to a brief incarceration or detention will not, on its own, disqualify claimants from receiving benefits.

If claimants are arrested because they engaged in a notorious or scandalous act or criminal conduct, and the resulting publicity threatens their employers' reputation or public confidence, the act and subsequent arrest alone may not be considered misconduct connected with the work.

<sup>260</sup> The Department's determination of whether the claimant's arrest can be characterized as misconduct is based on a fact-intensive investigation, which means the determination is made on a case-by-case basis. It is important to note that the arrest itself is at issue, not the consequences that may flow from the arrest. The arrest must be of such a nature that *the arrest itself* jeopardizes the employer's business or government interest, by bringing infamy or loss of reputation or the trust of the community to the extent that the employer's operational interest may be harmed. An arrest itself, however, with no surrounding scandal or notoriety, is not misconduct.

### ***Harassment***

Unlawful harassment of a co-worker by an employee or of subordinate employees by a supervisor constitutes misconduct connected with the work.<sup>261</sup> Harassment occurs when an employee or group of employees must endure a work environment that is hostile, offensive or intimidating to them because they have a protected characteristic. Harassing conduct may include:

- (1) Use of terms that are derogatory to and directed at a certain group (race, sex, etc.).
- (2) Making fun of a protected characteristic such as age or disability.
- (3) Demeaning jokes and cartoons.
- (4) Implied and explicit threats of violence.<sup>262</sup>

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<sup>260</sup> See [Regino v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2012-00009 (N.M. 2d Jud. Dist. Ct. May 17 2013) [Vargas v. N.M. Dep't of Workforce Sols.](#), D-307-CV-2013-00897 (N.M. 3d Jud. Dist. Ct. September 16, 2015).

<sup>261</sup> See, e.g., [Tafoya v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2014-01091 (N.M. 2d Jud. Dist. Ct. May 6, 2014) (denying unemployment benefits because claimant was discharged for misconduct stemming from sexual harassment); [Sandoval v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2013-03478 (N.M. 2d Jud. Dist. Ct. July 18, 2013) (affirming the Department's determination that the claimant was disqualified from unemployment insurance benefits because of misconduct stemming from repeated instances of sexual harassment).

<sup>262</sup> See [Lawson v. N.M. Dep't of Workforce Sols.](#), D-202-CV-2015-01666 (N.M. 2d Jud. Dist. Ct. April 6, 2015) (physical threats against other employees constitutes an affirmative act of misconduct that is sufficient to deny benefits).

Sexual harassment of a co-worker by an employee or of subordinate employees by a supervisor is also misconduct connected with the work. Sexual harassment is a form of sex discrimination in which one person takes unfavorable action toward another person because of the other person's gender. There are two types of sexual harassment:

- (1) *Quid Pro Quo* (this for that) sexual harassment occurs when a manager or other authority figure offers or merely hints that he or she will give the employee something (a raise or a promotion) in return for that employee's satisfaction of a sexual demand. It also occurs when a manager or other authority figure says he or she will not fire or reprimand an employee in exchange for some type of sexual favor.
- (2) *Hostile Work Environment* sexual harassment refers to situations where employees are subject to a pervasive pattern of exposure to unwanted, offensive sexual behavior from others in the workplace. Examples include people telling dirty jokes, displaying pornographic or sexually offensive pictures, signs or web content, unwanted physical contact, repeated requests for dates or unsolicited notes, email or unwanted gifts to name a few.

As in all cases involving allegations of misconduct, employers bear the burden of proof. Employers must establish that claimants have committed harassment by more than just controverted hearsay evidence because the "legal residuum" rule applies to administrative decisions in unemployment benefits cases.<sup>263</sup>

### ***Personal Appearance and Grooming***

Failure to abide by reasonable rules or instructions related to personal appearance and grooming constitutes misconduct connected with the work if the rules reasonably further the employer's legitimate business interests, are clearly made known to employees and do not disproportionately discriminate against particular classes of people. Reasonable rules would include those relating to cleanliness and personal hygiene; appropriate dress in accordance with the custom and acceptance of the business or trade; and compliance with uniform requirements.

If the claimant's appearance is substantially inconsistent with the custom and practice prevailing in the employer's type of business and tends to adversely impact the employer's public image or the discipline of the work place, the employer can impose reasonable corrective instructions or rules. The employer's requirements concerning personal appearance may not be considered reasonable if they are based merely on the employer's arbitrary personal preferences.<sup>264</sup> Uniform

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<sup>263</sup> *Trujillo v. Emp't Sec. Comm'n.*, 1980-NMSC-054, ¶¶ 7-8, 94 N.M. 343, 344, 610 P.2d 747, 748.

<sup>264</sup> *See It's Burger Time, Inc. v. N.M. Dep't of Labor Emp't Sec. Dep't (In re Apodaca)*, 1989-NMSC-008, 108 N.M. 175, 769 P.2d 88 (the employer had failed to show how the color of the claimant's hair affected its business; therefore, the claimant's refusal to return her purple hair to its original color did not constitute rise to the level of misconduct required for denial of unemployment compensation where employer received no customer complaints regarding color of hair, and no evidence indicated that color of her hair significantly affected employer's business).

or dress requirements will not be considered “reasonable” if they constitute an unreasonable and recognized embarrassment to the employee, such as scanty clothing or unusual body exposure.

### ***Polygraph***

Generally, claimants shall not be disqualified for misconduct connected with the work solely on the basis of polygraph test results or refusal to take a polygraph test. The issue of polygraph tests in employment is now controlled by the standards set out in the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2014). This legislation prohibits the use of polygraph or lie detector tests by private employers except under specified, limited circumstances. Government employers are exempt from the Employee Polygraph Protection Act.<sup>265</sup>

### ***Failure to Maintain a License***

Claimants’ willful or negligent failure to maintain a license, certification or other legal or regulatory requirement that is required for the performance of their duties to the employer may be considered misconduct. An off-duty arrest for DWI or a related offense, which results in the suspension of a claimant’s driver’s license, is considered disqualifying misconduct where having a valid driver’s license is a pre-requisite for hire and continued employment.<sup>266</sup>

### ***Pregnancy***

Claimants who are discharged from their jobs solely because of pregnancy or medical complications resulting from pregnancy are not subject to disqualification from unemployment benefits.<sup>267</sup> If pregnant claimants are discharged or otherwise involuntarily separated from their employment by employers for any reason other than pregnancy, then their separation must be treated under the regular discharge rules.<sup>268</sup>

### ***Discharge for Religious Beliefs and Practices***

Claimants who are discharged from their employment because of conflicts between religious convictions and practices are not disqualified from unemployment benefits. This rule is a constitutional standard based upon the Free Exercise Clause of the First Amendment to the United States Constitution and upon Article 2, Section 11 of the New Mexico Constitution. The U.S. Supreme Court has ruled that although an employer may have the right to discharge an employee with an irreconcilable conflict between the employee’s religious convictions and

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<sup>265</sup> 29 U.S.C. § 2006

<sup>266</sup> See *Benallie v. N.M. Dep’t of Workforce Sols.*, D-1113-CV-2012-297-7 (N.M. 11th Jud. Dist. Ct. December 20, 2012). But see *Valenzuela v. N.M. Dep’t of Labor*, CV-2011-06703 (N.M. 2d Jud. Dist. Ct. October 13, 2011).

<sup>267</sup> NMSA 1978, § 51-1-7(A)

<sup>268</sup> *Wimberly v. Labor & Indus. Relations Comm’n of Missouri*, 479 U.S. 511, 516-17 (1987) (“[T]he plain import of the language of § 3304(a)(12) is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment. The text of the statute provides that compensation shall not be denied under state law ‘solely on the basis of pregnancy[ . . . ]’ [I]f a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made ‘solely on the basis of pregnancy.’”).

practices and employment, the state has no right to burden the employee's free exercise rights by withholding unemployment benefits.<sup>269</sup>

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<sup>269</sup> See *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981)

## **IX. SUITABLE WORK**

An individual will be disqualified from receiving unemployment benefits “if it is determined . . . that the individual has failed without good cause either to apply for available, suitable work when so directed or referred by the division or to accept suitable work when offered.”<sup>270</sup> Suitable work is defined as work for which the claimant is qualified by experience and training, pays a wage commensurate with the claimant’s experience, skill, and prior earnings, is within reasonable distance from the claimant’s residence, and the working conditions do not constitute an undue risk to the claimant’s health, safety, or morals. A principal objective of the Unemployment Compensation Law is to allow claimants a reasonable opportunity to locate work in their established trade or occupation, or at their highest level of skill and experience. This objective, however, must be considered within the context of the claimant’s length of unemployment and the prospects of obtaining new work in the claimant’s usual occupation or skill within the local area.

Work for which a claimant is experienced and trained includes not only work in a claimant’s usual or customary occupation; it also includes other work the claimant can reasonably perform with their experience and training. If work in the same occupation is limited, other work for which the claimant is fitted will be suitable. Work may be unsuitable if the claimant is overqualified or underqualified. The claimant, however, may not have good cause for refusing an offer of work for which the claimant is not presently qualified if the employer offers training or retraining within the claimant’s capabilities. Claimants are responsible for establishing that an offer of work is unsuitable for them because they are overqualified or underqualified for such work if the work falls within their general qualifications or capabilities.

Claimants may not refuse a referral to or offer of suitable work for which they are suited by prior training, experience, or occupation because of personal choice to train for a new occupation or skill, unless they are in approved training as provided in the Unemployment Compensation Law. If claimants have completed training in a new skill and occupation for which there are reasonable work prospects, and they are making active searches for such work, they should be allowed a reasonable time to continue their search for work in their new skill.

Generally, an offer of work will be suitable if the wages offered are reasonably commensurate with the claimant’s skill and prior earnings or are prevailing wages for similar work in the claimant’s locality. The claimant’s former wage level is generally evidence of prevailing wages for work of the claimant’s skill and experience. A “prevailing” wage in actual practice is a range of wage rates depending upon such market factors as seniority, in-house experience, and fringe benefits. A claimant must, therefore, be willing to accept a lower starting wage at a new job so long as the wage is within the prevailing range.

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<sup>270</sup> NMSA 1978, § 51-1-7(A)(3).

The former wage rate may not be a relevant consideration in determining a suitable wage for claimants who are seeking work in a different locality from their former employment. A suitable wage will be wholly dependent upon the wage range prevailing for similar work in the new locality.

An important factor in determining whether a wage is suitable is whether the wage offered is the rate that was agreed upon at the time of hire. Different jobs may pay different wage rates depending on applicable wage regulations, locality, or type of job. Unless the agreed-upon base salary violates regulations or law or is substantially below the prevailing wage, the agreed-upon base salary is the benchmark for determining the suitability of the wage offered. Work which pays a wage below the legal minimum wage is always unsuitable work.

The method of payment of wages does not, in itself, make an offer of work unsuitable. If the method of payment, e.g., commissions, piece rate, etc., is common in the occupation or trade, it is the claimant's responsibility to demonstrate that the work and earnings would be substantially less favorable than that which prevails for similar work in the locality.

An offer of work will be suitable if the job offered is within the claimant's usual job market area.<sup>271</sup> Claimants living in sparsely populated areas must be able and willing to travel to the location or area where the work that they are seeking is generally located. What constitutes a reasonable distance also depends upon the customary practice in the claimant's occupation or industry. If it is customary in the trade or occupation for employees to travel substantial distances to work sites away from their residences, the work involving such distances will be suitable for the claimant. Lack of transportation is not considered good cause for refusing an offer of suitable work if the distance to work is within the claimant's usual job market area or is a customary and normal travel distance for work in the claimant's occupation or trade.<sup>272</sup>

The suitability of a referral to or offer of work with a claimant's former employer will depend upon the terms and conditions of the work offered and the reasons for the claimant's previous separation. Offers of work with a claimant's former employer are not unsuitable simply because of the former employment. In determining the suitability of such work, the reasons for the claimant's previous separation from that employer must be considered in addition to the usual factors for determining the suitability of work. If the reasons for the previous separation indicate that the same work would still be unsuitable or that different work with the same employer would likely be unsuccessful, the work is unsuitable.<sup>273</sup> If the work on its face appears to be suitable, the claimant must demonstrate why it is not suitable, based upon something more than personal preference, or why the claimant has good cause for refusing it.

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<sup>271</sup> See *Parsons v. Emp't Sec. Comm'n*, 1963-NMSC-007, 71 N.M. 405, 379 P.2d 57

<sup>272</sup> See *Moya v. Emp't Sec. Comm'n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925.

<sup>273</sup> See *Stamp Smith, Inc. v. N.M. Dep't of Workforce Sols.*, D-202-CV-2012-06872 (N.M. 2d Jud. Dist. Ct. Oct. 10, 2012) (claimant had good cause to refuse offer of work with former employer after the former employer yelled at and called the claimant stupid in front of co-workers before terminating claimant).

### ***Length of Unemployment***

As a claimant's period of unemployment lengthens without reasonable prospects of reemployment, the claimant may be required to become available for and to accept work below the claimant's skill, experience, and wage expectations. The Unemployment Compensation Law encourages the development and preservation of workers' skills and the utilization of their experience and training. A claimant is entitled, therefore, to a reasonable period of time within which to obtain employment at the claimant's highest skill and wage levels. However, as the claimant's period of unemployment continues without reasonable prospects of reemployment in the former occupation or work for which the claimant is fitted by experience or training, the claimant may be required to seek and accept work in different occupations, work requiring less skill, or employment at lower wages.

### ***Prospects for Obtaining Work***

Claimants will be required to accept work which they are capable of performing outside their primary or highest skill or occupation if there are no reasonable prospects of obtaining work in their former occupation or highest skill and training. If a period of unemployment is lengthy, requiring claimants to broaden their search for work, it is often because prospects for work in claimants' skill or occupation are poor. Other factors also affect prospects for work in claimants' skill or occupation. One frequent factor is relocation to a new location where there is no job market for claimants' skill or occupation. If this occurs, claimants must immediately broaden their search for work to include occupations that are available even if this requires a downgrade in skill utilization and wage demands. What constitutes a reasonable time to search for work at claimants' highest skill and training level will be affected by the prospects for work in that skill and occupation in the locality.

### ***Health, Safety and Morals***

No work will be suitable for a claimant if the claimant proves the work poses an undue risk to the claimant's health, safety and morals. The key element in adjudicating claims involving a refusal of suitable work on the basis of a risk to the claimant's health, safety, and morals is reasonable, objective evidence. It is the claimant's responsibility to establish by reasonable, competent evidence that the work is not suitable for the claimant because of the claimant's physical or mental limitations. The claimant must provide objective corroboration, preferably medical verification, to support a claim of good cause for refusing the work. In addition to reviewing the state of the claimant's physical or mental limitations, the Department will also consider the safety conditions of the offered work. In determining the degree of risk to a claimant's morals, the Department will consider any activity which violates a claimant's sincerely held moral or ethical beliefs.

### ***Working Conditions, Hours and Schedule of Work***

Claimants shall not be denied benefits if the conditions of the work or the hours of work that are offered are substantially less favorable to the claimant than those prevailing for similar work in

the locality. A claimant's mere preference for certain conditions similar to the claimant's former employment will not be good cause for refusing a referral or offer. If a claimant alleges less favorable working conditions, the claimant must be prepared to prove with objective evidence that the disadvantages are real and substantial.

Generally, the hours and days that work is scheduled do not make work unsuitable. If work in the claimant's usual skill or occupation customarily includes shift work, work on all shifts will be suitable unless the conflict with the claimant's personal obligations or health is compelling and irreconcilable.

If overtime work is customary in the trade or occupation, the need for some overtime work will not make the offer of work unsuitable. Overtime work would be unsuitable only if it continuously exceeds 48 hours per week or substantially interferes with the claimant's domestic responsibilities and enjoyment.

### ***Part-Time and Temporary Work***

Part-time, temporary, or intermittent work will not be considered unsuitable for a claimant unless it materially interferes with the claimant's efforts to find full-time work. Claimants who normally work in full-time occupations should be allowed reasonable time to canvass the full-time job opportunities in their locality before being required to take part-time work. This rule will not apply if the part-time work is offered by the claimant's present employer as an alternative to total unemployment.

Seasonal employment is suitable work if claimants have had a reasonable opportunity to search for permanent, full-time work and accepting the seasonal work would not unduly hamper their prospects for finding permanent full-time work or part-time work of at least 20 hours per week. In some localities, seasonal work may be the only significant work available.

### ***Union Relations***

Unemployment benefits cannot be denied to an otherwise eligible claimant for refusing to accept new work if, as a condition of being employed, the claimant would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. The law does not provide that nonunion work is unsuitable for union members, or that a union member has a good cause for refusing an otherwise suitable work offer where conditions of work and wages are prevailing. If after a lengthy period of unemployment and prospects for reemployment in a union job are poor, the claimant may be required to accept a suitable nonunion job or be subject to disqualification from benefits.

Claimants cannot be disqualified if, as a condition of being employed, they would be required to resign from the union. If the union has a rule that the claimant must resign from the union if the claimant accepts a nonunion job, such a condition does not generally render the work unsuitable.

### ***Vacant Due Directly to a Labor Dispute***

Benefits cannot be denied to a claimant for refusing to accept work if the position offered is vacant due directly to a strike, lockout, or other labor dispute.<sup>274</sup> The issue is whether the vacancy is due “directly” to the labor dispute or for other reasons. If the employer demonstrates that the vacancy exists for reasons unrelated to the labor dispute, i.e., the former incumbent quit, or the vacancy predates the labor dispute, the offer of work is suitable. Claimants would have good cause for refusing a referral to work, however, if they had to cross a hostile picket line to have an interview or had to otherwise offend a union with which they would have to work in the future.<sup>275</sup>

### ***Personal Good Cause for Refusing Suitable Work***

Personal good cause is confined to compelling personal reasons which pose an irreconcilable conflict between the work and a claimant’s personal obligations or health. If the personal reason or obligation prohibits all work, the restriction obviously indicates temporary or permanent unavailability and the claimant will be disqualified from receiving benefits.<sup>276</sup> As a practical matter, the analytic distinction between “good personal cause” and “unsuitable work” is not well defined and is largely irrelevant. Whether or not a claimant claims to have “good cause” to refuse work or to have refused an offer of “unsuitable work” for personal reasons, what matters is whether the personal reasons leading to the refusal pose an irreconcilable conflict between the work and the claimant’s personal obligations or health. Claimants who establish personal good cause for refusing an offer of suitable work will not be subject to disqualification. Similarly, claimants will not be subject to disqualification for refusing an offer of otherwise suitable work that poses an irreconcilable conflict with sincerely held religious beliefs and practices.<sup>277</sup>

Pregnancy will not excuse a claimant from disqualification from unemployment benefits for refusing to accept a referral to or offer of suitable work unless the pregnancy is disabling for the particular work offered. Of course, an individual who is completely disabled from performing any work, by pregnancy or otherwise, is ineligible for unemployment benefits. For purposes of adjudicating a refusal of suitable work, pregnancy is subject to the same rules that affect any

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<sup>274</sup> *Albuquerque-Phoenix Express, Inc. v. Emp’t Sec. Comm’n*, 1975-NMSC-069, ¶¶ 13–16, 18–2, 88 N.M. 596, 544 P.2d 1161 (holding that the term “stoppage of work,” as it is used in the context of the Unemployment Compensation Act, refers to the employer’s business rather than the employee’s work and means a cessation or substantial curtailment of the employer’s business) *See also Wilson v. Emp’t Sec. Comm’n*, 1963-NMSC-085, ¶¶ 9, 74 N.M. 3, 9, 389 P.2d 855, 859 (stating that claimants bear the burden of proving they are not disqualified from benefits when unemployment is caused by a work stoppage).

<sup>275</sup> *Wilson v. Emp’t Sec. Comm’n*, 1963-NMSC-085, ¶ 18, 74 N.M. 3, 11–12, 389 P.2d 855, 861 (stating that claimant has no duty to cross picket line to ascertain whether work is available to him or her, nor does a failure to so cross a picket line under such circumstances disqualify a claimant for unemployment benefits).

<sup>276</sup> *See Moya v. Employment Security Comm’n of N.M.*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925 (claimant who had restricted availability for work to weekdays from 8:00 AM to 5:00 PM was not “available for work” under Unemployment Compensation Law).

<sup>277</sup> *But see Randolph v. N.M. Emp’t Sec. Dep’t*, 1989-NMSC-031, 108 N.M. 441, 445, 774 P.2d 435, 439 (holding that where employee knew of employer owner’s religious beliefs and how those religious beliefs affected the work environment, the employee was ineligible for benefits after voluntarily quitting).

claimant alleging an illness or disability. In some cases, pregnancy may require a modification of the nature of the work the claimant can perform, but assuming that the work offered is suitable in terms of the claimant's present physical fitness, the claimant may not refuse the offer without demonstrating good cause other than the pregnancy.

Lack of transportation is not a good cause for refusing an offer of work in New Mexico unless the work is not within the claimant's usual job market or the distance from the claimant's residence is not reasonable and customary in the occupation or trade.<sup>278</sup>

Claimants will be subject to disqualification from benefits for refusing a referral to or offer of suitable work because they are enrolled in and are attending school or a training program.<sup>279</sup> Attendance at school or training is not good cause for refusing work unless the school or training is approved training in The Unemployment Compensation Law and the Secretary's regulations.

### ***Evidence***

The Department or the employer has the initial burden of establishing by reasonable evidence that a valid referral to or offer of suitable work has occurred. It is the claimant's burden to show by reasonable evidence that the work was not, in fact, suitable or that the claimant had good cause for refusing the referral or offer.

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<sup>278</sup> See *Moya v. Emp't Sec. Comm'n*, 1969-NMSC-022, 80 N.M. 39, 450 P.2d 925.

<sup>279</sup> *Phelps Dodge Corp. v. N.M. Emp't Sec. Dep't*, 1983-NMSC-068, ¶ 11, 100 N.M. 246, 248, 669 P.2d 255, 257 (stating that leaving one's employment to attend school is generally regarded to be a voluntary quit without good cause related to the employment (citation omitted)).

## **X. OVERPAYMENTS, FRAUD, AND BANKRUPTCY**

### ***Overpayments***

Application of the Unemployment Compensation Law at times creates overpayments. An overpayment occurs when a claimant is awarded benefits, and is subsequently found to be ineligible for the benefits the claimant received. Some overpayments are the result of the administrative process or department error, while others are the result of fraud. The Unemployment Compensation Law states that any person who has erroneously received unemployment benefits, whether because of administrative error or any other reason, is liable to repay such benefits to the department.<sup>280</sup>

Overpayments of unemployment benefits can also result from many factors including: appeal decisions, incorrect listing of employers and wages on the initial determination of monetary eligibility, a failure by a claimant to continue meeting eligibility requirements, back pay awards, pension offsets, or claimants' failure to report earnings.

### ***Overpayments Resulting from Appeals***

The Unemployment Compensation Law provides that claimants will be paid promptly upon an initial determination that they are eligible for benefits and payments cannot be stopped without prior notice and an opportunity to be heard notwithstanding any pending appeals challenging the initial determination.<sup>281</sup>

This procedure necessarily results in some payments being made upon an initial determination of eligibility that are subsequently overturned by appeals to the Department or the Courts. The overpayments resulting from the reversal of the initial determination of eligibility are incidental to the determination that give rise to overpayments. The determination that give rise to overpayments can be appealed rather than the overpayment. The Unemployment Compensation Law requires that an overpayment resulting from the reversal of a previous decision of eligibility must be repaid to the Department in accordance with the Department's rules.<sup>282</sup>

### ***Overpayments Resulting from Monetary Determinations***

Employers are required to submit a quarterly wage report listing wages paid to all workers and pay a tax at the rate applicable to that particular employer account. Employer wage reports, however, can contain errors with respect to social security numbers, the amount of wages reported, the times of payment and other errors, which occasionally make the Department's initial monetary determinations inaccurate. Sometimes employers through error overstate the

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<sup>280</sup> See NMSA 1978, § 51-1-38(H).

<sup>281</sup> 11.3.300.308(E) NMAC

<sup>282</sup> NMSA 1978, § 51-1-38(H)

wages paid to a claimant an overpayment of benefits is established against the claimant, which the claimant must repay to the Department.<sup>283</sup>

The Department, on its own initiative, may reconsider a monetary determination whenever it is determined that an error in computation or identity has occurred or that new wages pertinent to the determination have been discovered; or that benefits have been allowed or denied on the basis of misrepresentation of fact.<sup>284</sup>

### ***Failure to Meet Continued Eligibility Requirements***

Overpayments of unemployment benefits can also result from a failure by a claimant to continue meeting eligibility requirements. For example, a claimant may become physically incapable of working due to illness at some point during the claim, making the claimant ineligible for benefits for any weeks when the claimant is unable to work. Claimants must continue to meet all eligibility requirements for each week of unemployment benefits they claim. Claimants will be determined to be overpaid and subject to repayment of benefits for any week it is determined they failed to meet eligibility conditions.

### ***Back-pay Awards***

Claimants may not receive both wages, (even as back-pay), and unemployment compensation benefits for the same period.<sup>285</sup> Unemployment benefits are paid to claimants if they are not performing services and are not receiving pay at the time they file claims for benefits. If claimants later receive back-pay allocable to the same period that they were paid unemployment benefits, an overpayment of unemployment benefits is created which they must repay.<sup>286</sup>

Whenever an employer is obligated to make a back-pay award resulting from a court order, arbitration or any settlement agreement, the following steps should be taken by the parties in order for the unemployment insurance claim to be completed. The employer should provide the Department with a copy of the proposed settlement with a former employee who has filed a claim and collected unemployment benefits. The Department will issue a determination advising both the claimant and the employer that if the claimant will receive a back-pay settlement the entire amount of any unemployment insurance benefits paid to the claimant for the time period covered by the settlement agreement will be determined overpaid and no further benefits will be paid to the claimant.

The Department will provide the employer with the amount of unemployment benefits paid to the claimant for the time period covered by the settlement agreement. The employer should deduct the entire amount of the unemployment benefits paid to the claimant from the settlement

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<sup>283</sup> See *Johnson v. N.M. Dep't of Workforce Sols.*, D-1113-CV-2011-536-7 (N.M. 11th Jud. Dist. Ct. Nov. 1, 2013 (affirming the Department's determination that the claimant must repay overpayments resulting from employer mistakenly reporting wages that are not reportable under the Unemployment Compensation Law).

<sup>284</sup> NMSA 1978, § 51-1-4.

<sup>285</sup> NMSA 1978, § 51-1-4(B)(2).

<sup>286</sup> NMSA 1978, § 51-1-38(J).

amount and issue a check to the Department for the amount of the unemployment benefits paid to the claimant. The Department will apply the check to the amount of the claimant's overpayment and the employer will receive a benefit charge credit for the full amount. If the claimant receives a back-pay settlement check and the employer has not deducted the amount of the unemployment benefits, the claimant must issue a check to the Department for the amount of the unemployment benefits paid to the claimant to be applied to the claimant's overpayment.

### ***Overpayments Resulting from Pension Offset***

The Unemployment Compensation Law requires that a claimant's weekly benefit amount must be reduced under certain circumstances if the claimant is receiving pension or retirement payments pursuant to a plan financed in whole or in part by a base-period employer of the claimant.<sup>287</sup> The amount of the offset is based on the prorated amount of the pension that exceeds the percentage contributed to the plan by the claimant.<sup>288</sup> Under the Unemployment Compensation Law, both periodic retirement payments and lump-sum withdrawals from retirement plans will be deducted from any benefits paid.<sup>289</sup> If for any reason these reductions are not made and the claimant receives the full benefit amount, the claimant will be determined to have been overpaid benefits which the claimant will be required to repay to the Department.<sup>290</sup>

The Department's failure to impose the pension reduction can be the result of non-disclosure of pertinent information by claimants and employers. Nevertheless, the reduction requirement applies at any point at which the Department discovers information warranting a reduction of benefits under the pension reduction provisions of the Unemployment Compensation Law. It is in a claimant's best interests to declare any and all information regarding such payments upon the initial filing of the claim so as to avoid a possible future overpayment. All claimants are requested to provide information on their initial claims about their eligibility or for or receipt of pension and retirement payments. Claimants must not withhold information pertaining to the receipt of such payments, including any information the claimant becomes aware of after filing the claim.

### ***Failure to Report Earnings***

Claimants must report to the Department all remuneration they receive for services, whether performed for employers or others, or performed in self-employment. Claimants' weekly unemployment compensation benefits will be reduced based upon wages received in the same week. A failure to report the income from wages during the weeks an individual is receiving benefits will create an overpayment and may subject the claimant to a charge of fraud.

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<sup>287</sup> NMSA 1978, § 51-1-4(B)(3).

<sup>288</sup> NMSA 1978, § 51-1-4(B)(3).

<sup>289</sup> NMSA 1978, § 51-1-4 (B)(4) See also [\*Krogh-Pelke v. N.M. Dep't of Workforce Sols.\*](#), D-202-CV-2011-08113 (April 25, 2012) (upholding the reduction of a claimant's benefits after the claimant withdrew \$50,000 from her 401(k) while she was receiving unemployment benefits).

<sup>290</sup> Id.

### ***Recoupment of Overpayments***

The recoupment language of the Unemployment Compensation Law is mandatory and provides no exceptions. The Department, like claimants, is bound by these recoupment provisions and has no power to waive or forgive overpayments unemployment compensation benefits based on New Mexico law. The non-discretionary nature of the agency's obligation to recover overpaid benefits has been reaffirmed by the New Mexico Court of Appeals.<sup>291</sup> Because recoupment is mandatory, the doctrine of equitable estoppel is inapplicable to Department recoupment efforts.<sup>292</sup> Further, the Department's obligation to recoup overpayments is not barred by any statute of limitation.<sup>293</sup>

There are several collection options within the authority of the Secretary specified in the Unemployment Compensation Law. The Secretary can request repayment of any benefits overpaid to a claimant in cash (or equivalent) tender. In the case of non-fraud overpayments, claimants may be allowed to set up installment repayment agreements that accommodate their means. No interest is charged on such delayed repayments. In the event that a claimant legally qualifies for a new or reopened claim, the Department will offset the overpayment due from the claimant against the benefits payable on the new claim. The Secretary may offset an amount not less than fifty-percent of the weekly benefit amount payable to the person.<sup>294</sup> The Secretary is also empowered to file suit on behalf of the State to enforce collection of overpayments.<sup>295</sup> Notably, the Unemployment Compensation Law allows the Department the remedy of garnishment without the requirement that it first obtain a separate judgment in a court of law.<sup>296</sup>

### ***Waiver of Certain Overpayments***

Although the Department has no discretion to waive overpayments incurred pursuant to the state's Unemployment Compensation Law,<sup>297</sup> Department regulations provide for a waiver of overpayments paid under the federally-created and funded Trade Acts, the Trade Adjustment Assistance (TAA), Trade Readjustment Assistance (TRA), or the Temporary Extended Unemployment Compensation (TEUC) Acts.<sup>298</sup> In these instances only, the Department may waive collection of the overpayment of these federal funds if the repayment would be contrary to

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<sup>291</sup> *Millar v. N.M. Dep't. of Workforce Sols.*, 2013-NMCA-055, ¶ 15, 304 P.3d 427, 431 “[The Unemployment Compensation Law] unequivocally imposes a statutory duty upon DWS to recover funds issued to claimants who are later found to be ineligible or disqualified from receiving benefits.”)

<sup>292</sup> *Millar v. N.M. Dep't of Workforce Sols.*, 2013-NMCA-055, ¶¶ 18-24, 304 P.3d 427, 432-34.

<sup>293</sup> See *In re Valdez*, 136 Bankr. 874 (Bankr. D.N.M. 1992) (holding that no state statute of limitation ran against the claim by the Department alleging that a debtor wrongfully collected unemployment benefits while employed by failing to disclose her employment).

<sup>294</sup> NMSA 1978, § 51-1-38(H).

<sup>295</sup> See NMSA 1978, § 51-1-38(I); NMSA 1978, § 51-1-36(B)

<sup>296</sup> NMSA 1978, § 51-1-36(B); See *N.M. Dep't of Labor v. Percy*, (No. 14,327, NMCA Dec. 17, 1992 unpublished op.)

<sup>297</sup> NMSA 1978, § 51-1-38(H).

<sup>298</sup> 11.3.300.325 NMAC. TEUC was a federal program that allowed claimants to collect additional, federally-funded unemployment benefits after exhausting regular state benefits. TEUC benefits ceased being available in April 2004. The regulatory provisions allowing for the waiver of TEUC benefits remain in effect however, because overpayments of unemployment benefits do not expire in New Mexico and some overpayments of benefits received pursuant to TEUC may still exist.

equity and good conscience. Claimants must timely apply for this waiver in writing within fourteen days of the issuance of the overpayment. The Department will have discretion to waive the overpayment of federal funds for the above-mentioned specialized programs if the claimant committed no fraud in collecting benefits.

### ***Fraud***

Knowingly making a false statement or knowingly failing to disclose a material fact on any claim to obtain or increase the payment of benefits constitutes fraud and will subject the individual to the penalties for filing fraudulent claims. Similarly, an employer that makes a false statement or representation knowing it to be false or that knowingly fails to disclose a material fact to prevent or reduce the payment of benefits will be subject to fines and penalties. Individuals who commit unemployment insurance fraud may be subject to criminal prosecution and administrative penalties.

Claimants found to have committed fraud are subject to forfeiture of all rights to benefits for up to a year, a fine not to exceed \$100, total cancellation of the fraudulent claim, liability to repay all benefits arising from the claimant's fraud, and a civil penalty of twenty-five (25) percent of the amount of overpaid benefits.<sup>299</sup> Claimants who knowingly fail to report earnings either from employment with an employer or from self-employment while receiving unemployment benefits will be deemed to have committed a fraud and are subject to the penalties for filing fraudulent claims.

If it is determined that claimants were not eligible for benefits because of fraud, any payments received by such claimants are considered overpayments, which the Department must recover. The Department will actively pursue unemployment insurance fraud cases to recover money for the Unemployment Trust Fund and to deter individuals from seeking and obtaining unemployment benefits by fraudulent misrepresentations.

Employers who commit fraud with respect to a claim for unemployment benefits face criminal sanctions of up to thirty days imprisonment and a \$100 fine for each offense.<sup>300</sup> Employers committing fraud may also be assessed a civil penalty up to \$10,000.<sup>301</sup>

Employers, like claimants, are required to be truthful when responding to benefit claims. Knowingly making a false statement or representation or failing to disclose material facts, whether to prevent or reduce benefit payments or to fraudulently assist a claimant in obtaining benefits, subjects an employer to the fraud penalties of the law.

The failure-to-disclose-a-material-fact provision does not require employers to respond to claims if they do not wish to do so. The requirement of disclosure applies only if an omission is

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<sup>299</sup> NMSA 1978, § 51-1-38(B).

<sup>300</sup> NMSA 1978, § 51-1-38(C).

<sup>301</sup> NMSA 1978, § 51-1-38(D); 11.3.300.314(I) NMAC.

intended to prevent or reduce a claimant's benefits. When an employer does not choose to contest a claim, the employer does not prevent or otherwise interfere with the payment of benefits.

The Department bears the burden of establishing that a claimant or employer has knowingly made a false statement or representation or has knowingly failed to disclose a material fact to obtain or increase benefits or to prevent or reduce benefit payments or to fraudulently assist a claimant in obtaining benefits. New Mexico courts have consistently applied the same standard of proof applicable to civil fraud actions to administrative fraud determinations, that is, the clear and convincing evidence standard.<sup>302</sup> This is a higher standard than a mere preponderance of the evidence. "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with the abiding conviction that the evidence is true."<sup>303</sup>

Several options are available to recover benefits fraudulently obtained and other penalties owed to the Department, including having liens placed on property, garnishing wages, and intercepting future federal and state income tax refunds.

### ***Statute of Limitations on Unemployment Insurance Fraud***

There is no statute of limitations applicable to taking administrative action against an individual or an employer based on Unemployment Insurance fraud. New Mexico follows the common law principle that statutes of limitations ordinarily do not run against the state, unless a statute expressly or by clearest implication permits a statute of limitation defense to run against the state.<sup>304</sup> In the case of debts stemming from Unemployment Insurance fraud, there is no express or implied statute of limitation applicable to the Department.<sup>305</sup> This means that the ability of the Department to seek recoupment through the various collection means afforded by statute cannot be extinguished by the passage of time.

### ***Bankruptcy***

The Office of General Counsel represents the Department in matters pending before the New Mexico Bankruptcy Court, where more than 8,000 New Mexico taxpayers seek relief in a typical

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<sup>302</sup> See *In Matter of Convisser*, 2010-NMSC-037, 148 N.M. 732, 242 P.3d 299 (recognizing applicability of clear and convincing evidence standard in attorney disciplinary proceedings involving allegations of intentional misrepresentation with fraudulent intent); *Varbel v. Sandia Auto Electric and CNA Insurance Company*, 1999-NMCA-112, 128 N.M. 7, 988 P.2d 317, (applying clear and convincing evidence standard to fraud finding by Workers' Compensation Administration); and *Matter of D'Angelo*, 1986-NMSC-052, 105 N.M. 391, 733 P.2d 360, (applying standard to attorney disciplinary proceedings involving fraud allegations).

<sup>303</sup> *Varbel v. Sandia Auto Electric and CNA Insurance Company*, 1999-NMCA-112, ¶ 18, 128 N.M. 7, 11, 988 P.2d 317, 321 (citations and internal quotation marks omitted).

<sup>304</sup> *In re Valdez*, 136 B.R. 874 (Department brought adversary proceeding in Bankruptcy Court to determine the dischargeability of debt allegedly owed by debtor for unemployment compensation benefits wrongfully obtained, the Bankruptcy Court held that under New Mexico law no statute of limitations ran against the state's claim to recoup said benefits).

<sup>305</sup> *Id.*

year. In bankruptcy actions, including Chapter 7 asset cases, Chapter 11, and Chapter 13 cases, the Department will file proofs of claim on employer tax claims and claimant benefit overpayments for amounts owed to the Department for pre-petition debts and post-petition debts. Additionally, the Department will file proofs of claims on behalf of wage claimants who have not been paid wages by their employer if the wage claimant files an assignment of wage claim with the Department.

Tax claims are given priority status under the United States Bankruptcy Code. The Department routinely files proofs of claims on state unemployment insurance tax secured claims, priority tax claims, administrative claims for post-petition taxes, and unsecured claims. The Department requests that employers provide wage reports during bankruptcy proceedings.

In a Chapter 7 individual bankruptcy proceeding where the benefit overpayment was obtained by fraudulent misrepresentations, the Department will attempt to negotiate a reaffirmation agreement for the debt owed or, if necessary, bring an adversary complaint seeking a judgment or order determining that the debt is a non-dischargeable debt. Fraudulent overpayments may not be discharged in bankruptcy and claimants will be required to repay the full amount of fraudulent overpayments.<sup>306</sup>

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<sup>306</sup> In re Bell, No. 13-14023, 2014 WL 6819714 (Bankr. D. N.M. Dec. 2, 2014) (finding that defendant's debt for fraudulent overpayments were non-dischargeable under § 523(a)(2)(A) § 523(a)(2)(A) of the Bankruptcy Code); \*In re Gallegos, 13-13689, 2015 WL 2097834 (Bankr. D. N.M. May 4, 2015) (finding that defendant's debt to the Department, which consists of the entire amount of unemployment benefits she received, is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code).

## **XI. AGENCY APPEALS**

### ***Introduction***

The Unemployment Compensation Law provides two levels of appellate review within the New Mexico Department of Workforce Solutions (DWS). Claimants or employers adversely impacted by an initial determination by a claims examiner can, as a matter of right, file a first-level appeal and receive an evidentiary hearing. If still aggrieved after this first-level appeal, parties may file a second-level appeal. The second level appeal is not evidentiary but instead involves a careful review of the whole administrative record. Before an aggrieved party may seek judicial review of a Department appeal decision in state district court, that party must exhaust administrative remedies provided under the Unemployment Compensation Law. The statutory provisions creating the administrative appeal process are found in NMSA 1978, Section 51-1-8 (2013). The regulations implementing Section 51-1-8 are found in 11.3.500.1 NMAC through 11.3.500.15 NMAC.

### ***Appeal Tribunal***

The Appeal Tribunal is first level of appellate review within NMDWS. This is a *de novo* review, meaning the Appeal Tribunal administrative law judge (ALJ) is not bound by the claims examiner's findings or rationale. The ALJ conducts an evidentiary hearing, known as an "adjudicatory hearing," in which all interested parties are afforded a reasonable opportunity to be heard and present evidence. After the hearing, the ALJ issues a written decision containing findings of fact and conclusions of law based on the evidentiary record. The decision must be supported by substantial evidence.<sup>307</sup> Substantial evidence to support a decision means there is enough evidence in the record to reasonably support a conclusion on the issue at hand.<sup>308</sup> A decision of the Appeal Tribunal is legally binding upon the parties unless reversed or modified on further appeal.

The procedures applicable to adjudicatory hearings are set by regulation. Failure to follow these procedures can adversely impact a party's interests. For example, failure of a party to disclose an exhibit to the opposing party in accordance with the regulations may result in the exhibit not being admitted into evidence. For this reason, it is advisable for individuals—both lawyers and non-lawyers—to familiarize themselves fully with these regulations before participating in Appeal Tribunal hearings. Any unanswered questions about the process should be referred to the Appeal Tribunal by telephone or Department website. Although it may not be possible to speak directly with the assigned ALJ due to concerns about *ex parte* communications, there are always knowledgeable staff available at the Appeal Tribunal to answer procedural questions.

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<sup>307</sup> 11.3.500.10(L)(3) NMAC.

<sup>308</sup> *Fitzhugh v. New Mexico Dept. of Labor, Employment Sec. Div.*, 1996-NMSC-044, ¶ 24, 122 N.M. 173, 180, 922 P.2d 555, 562 ("Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion) (internal citations and quotation marks omitted).

The following is a synopsis of the major procedures provisions for adjudicatory hearings before the Appeal Tribunal:

### ***Initiation of an Appeal***

An appeal to the Appeal Tribunal is initiated when the appellant files a written appeal with the Department. Any written communication clearly demonstrating a desire to appeal an adverse determination will be regarded as an appeal.<sup>309</sup> Appeals to the Tribunal can be filed by mail, fax, or online.<sup>310</sup> An appeal will be considered timely if the post-mark or the transmittal received date on the Department's fax machine or the Department's online system is equal to or less than the appeal deadline date. If the appeal letter does not have a post-mark or fax transmittal date, the date the Department receives the appeal will be regarded as the date of filing.

Any party that is adversely affected by a claims examiner's determination may file an appeal no later than fifteen (15) days after the date of mailing of the claims examiner's decision. An employer adversely affected by a tax representative's decision may file an appeal no later than [...] days of the mailing of the tax representative's decision. The Department may extend the time for filing an appeal only upon a showing of good cause for the failure to appeal timely.<sup>311</sup> "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason.<sup>312</sup> A non-exhaustive list of factors that may be used to determine the existence of good cause include: whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action.<sup>313</sup> Subjective misunderstandings or personal reasons for not filing on time are not good cause for failing to timely appeal.<sup>314</sup>

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<sup>309</sup> 11.3.500.8(A) NMAC.

<sup>310</sup> Both claimants and employers may file most types of appeals to the Appeal Tribunal online. For example, employers may request reviews of their tax rates online, but other types of appeals, such as questions regarding covered employment may not be filed online. The link for online filing is <https://www.dws.state.nm.us/>.

<sup>311</sup> 11.3.500.8(D) NMAC.

<sup>312</sup> 11.3.500.7(D) NMAC.

<sup>313</sup> 11.3.300.7(L) NMAC.

<sup>314</sup> See, e.g., *Flores v. N.M. Dep't of Workforce Sols.*, CV-2014-07407 (N.M. 2d Jud. Dist. Ct. Feb. 9, 2015) (failure to timely appeal was not for good cause when Spanish instructions said to call Department immediately if English instructions were not understood); *Musleh v. N.M. Dep't of Workforce Sols.*, No. D-202-CV-2014-05085 (N.M. 2d Jud. Dist. Ct. Sept. 17, 2014) (finding personal reasons, including family problems and relationship problems, did not demonstrate good cause for untimely appeal from initial claims determination); *Ludi v. N.M. Dep't of Workforce Sols.*, D-202-CV-2013-06609 (N.M. 2d Jud. Dist. Ct. Sept. 23, 2013) (claimant's misunderstanding of time and date of hearing did not establish good cause for failure to timely appeal).

### *Docketing and Scheduling of Appeals*

When the Appeal Tribunal receives an appeal, the appeal is docketed, assigned to an ALJ, and scheduled for a hearing. Procedural due process requires that the hearing notice be “reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present their case.”<sup>315</sup> The Appeal Tribunal must issue a written hearing notice to all interested parties a minimum of ten calendar days prior to the hearing date. The hearing notice must contain all of the following elements: a statement of the time, place and nature of the hearing; a statement of the legal authority under which the hearing is to be held; and a short, plain statement of the issue(s) that are to be covered in the hearing.<sup>316</sup> All hearing notices contain statements in Spanish advising Spanish-speaking individuals that language assistance is available through the Department’s call center. Additionally, when the Appeal Tribunal conducts the hearing, language assistance is provided free of charge to any party who requests it or has identified any language other than English as that party’s primary language at time of filing the claim or appeal.

An appeal to the Appeal Tribunal is initiated when the adversely affected party (appellant) files a written appeal with the Department. Any written communication clearly demonstrating a desire to appeal an adverse determination will be regarded as an appeal.<sup>317</sup> Appeals to the Tribunal can be filed by mail, fax, or online. An appeal will be considered timely if the post-mark or the transmittal received date on the Department’s fax machine or the Department’s online system is equal to or less than the appeal deadline date.<sup>318</sup> If the appeal letter does not have a post-mark or fax transmittal date, the date the Department receives the appeal will be regarded as the date of filing.

When the Appeal Tribunal receives an appeal, the appeal is docketed, assigned to an ALJ, and scheduled for a hearing. Procedural due process requires that the hearing notice be “reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present their case.”<sup>319</sup> The Appeal Tribunal must issue a written hearing notice to all interested parties a minimum of ten calendar days prior to the hearing date. The hearing notice must contain all of the following elements: a statement of the time, place, and mode (i.e., telephonic or in person) of the hearing; a statement of the legal authority under which the hearing is to be held; and a short, plain statement of the issue(s) that are to be covered in the hearing.<sup>320</sup> All hearing notices contain statements in Spanish advising Spanish-speaking individuals that language assistance is available through the Department’s call center. The Appeal Tribunal also provides

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<sup>315</sup> *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm’n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32, 229 P.3d 494, 505

<sup>316</sup> 11.3.500.9(D) NMAC.

<sup>317</sup> 11.3.500.8(A) NMAC.

<sup>318</sup> *Id.*

<sup>319</sup> *Albuquerque Bernalillo Cty Water Util. Auth. v. N.M. Pub. Regulation Comm’n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32, 229 P.3d 494, 505

<sup>320</sup> 11.3.500.9(D) NMAC.

free interpretation service in any hearing in which a party or witness with limited English proficiency (LEP) is involved.

Any party may be represented at all stages of the appeal process<sup>321</sup> at the party's own expense. A representative need not be an attorney.<sup>322</sup> Many employers hire non-attorney representatives—also known as “third party agents” (TPAs) or “third-party-representatives” (TPRs)—to represent them in appeal hearings. However, the majority of parties appearing before the Appeal Tribunal do so *pro se*, that is, without the assistance of an attorney or other representative. This is possible because the hearing process is designed to enable laypersons to represent themselves effectively without an attorney. The ALJ explains the hearing process in detail at the beginning of the hearing, assists parties with forming cross-examination questions if they are unable to do so, and questions both sides to develop the factual record. Any party may elect to have representation in the hearing, provided the representative files a written entry of appearance and is capable of providing competent representation.

### ***Subpoenas***

The parties may request subpoenas for witnesses who are unwilling to testify or documents that are in the possession of someone else. The requirements for requesting subpoenas are found in 11.3.500.9 NMAC. The party seeking the subpoena must reasonably identify and specify the evidence or documents sought and show the relevance of such evidence or documents to the issue under consideration. The proposed subpoena must show upon its face the name and address of the party at whose request the subpoena was issued. The assigned ALJ has discretion to decide whether to grant or deny the subpoena request. If the ALJ denies the request and the requesting party does not prevail in the appeal decision, the requesting party may raise the subpoena issue on further appeal.

### ***Hearing Notice and Call-in Procedures***

After an appeal has been docketed the parties will receive a “Notice of Hearing” a minimum of ten days before the scheduled hearing. The notice provides the parties with the date and time for the hearing and the issues to be resolved. The parties that have filed the appeals, known as “appellants,” are advised that they must call the Appeal Tribunal to confirm their participation in the hearing any time after receipt of the Notice of Hearing but no later than 4:00 p.m. on the day prior to the hearing, or the hearing will be canceled. If appellants fail to call the Appeal Tribunal to confirm their participation in the hearing their appeal will be dismissed. Appellants’ whose cases are dismissed are advised that they may file a request to reopen the case. Their request to reopen the case must state their good cause explanation for not confirming their participation in the hearing. A first request to reopen is leniently granted to appellants that failed to confirm participation in the hearing.

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<sup>321</sup> See generally 11.3.500.9(A)(1), (B) NMAC.

<sup>322</sup> 11.3.500.9(A) NMAC; *cf.* 11.3.500.9(B) NMAC (non-attorney representative may represent a party only to the extent that such participation does not constitute unauthorized practice of law).

It is important for any party filing an appeal to the Appeal Tribunal to be fully prepared to present all the evidence the party can present, including all relevant witnesses and documents. All testimony at any hearing is taken under oath and is recorded. Appeal Tribunal proceedings are not transcribed unless the disputed claim is appealed to the district court.<sup>323</sup>

### ***The Residuum Rule***

Administrative decisions in unemployment insurance cases must be supported by substantial evidence. Substantial evidence contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion.<sup>324</sup> Moreover, administrative decisions in unemployment insurance cases are subject to the “legal residuum rule.”<sup>325</sup> The legal residuum rule states that an administrative ruling must be based upon such substantial evidence as would support a verdict in a court of law.<sup>326</sup> As a practical matter, this rule means that a decision cannot be based upon controverted hearsay alone. This does not mean that hearsay evidence is inadmissible. Hearsay evidence may be helpful or probative of a particular issue. Nevertheless, an administrative decision in an unemployment insurance case may not rest solely on controverted hearsay.

Hearsay evidence constitutes statements or evidence which the person testifying knows only indirectly from another person or source, as opposed to the person’s personal knowledge or observation. In light of the residuum rule, evidence that is considered hearsay in New Mexico state courts is also hearsay in hearings before the Appeal Tribunal. Consequently, the definition of hearsay and the exceptions and exclusions to the hearsay rule found in the New Mexico Rules Annotated are applicable in the Appeal Tribunal.<sup>327</sup> Hearsay evidence may be admitted in administrative hearings or interviews if it has any relevance to the issues being adjudicated. Such evidence will then be given whatever probative weight it merits within the context of its apparent reliability and the overall evidence in the whole record.

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<sup>323</sup> See Rule 1-077 NMRA (“The record on appeal shall include a copy of all reports, papers, pleadings, and documents filed in the proceedings before the board of review or the secretary and a certified transcript of proceedings before the secretary or board of review. If the transcript of the proceedings is an audio recording, the Department of Workforce Solutions shall prepare and file with the district court a duplicate of the recording.”)

<sup>324</sup> *Wilson v. Emp’t Sec. Comm’n*, 1963-NMSC-085, ¶ 7, 74 N.M. 3, 8, 389 P.2d 855, 858 (“[Substantial evidence] means more than merely any evidence and more than scintilla of evidence and contemplates such relevant legal evidence and more than a scintilla of evidence and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion.”).

<sup>325</sup> *Trujillo v. Emp’t Sec. Comm’n*, 1980-NMSC-054, ¶¶ 7–8, 94 N.M. 343, 344, 610 P.2d 747, 748.

<sup>326</sup> *Trujillo v. Emp’t Sec. Comm’n*, 1980-NMSC-054, ¶ 5, 94 N.M. 343, 344, 610 P.2d 717, 748. See [All Faiths Receiving Home v. N.M. Dep’t of Workforce Sols.](#), D-202-CV-2014-00203 (N.M. 2d Jud. Dist. Ct. Mar. 12, 2014) (affirming Department’s decision approving benefits where employer relied on allegations based upon controverted hearsay; the record failed to contain substantial evidence to support the allegation of misconduct because it did not meet the legal residuum rule’s requirements).

<sup>327</sup> See Rule 11-801 through 11-807 NMRA (setting forth definitions and exclusions, the rule against hearsay, and the exceptions).

### ***Adherence to Procedural Requirements***

The informality of the appeal process does not mean that the parties do not have to comply with the procedures in the administrative regulations. Any party who fails to appear for an Appeal Tribunal hearing must demonstrate good cause for that failure.<sup>328</sup> “Good cause” means a substantial reason that affords a legal excuse or a legally sufficient ground or reason.<sup>329</sup> In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the Department may consider any relevant factors set forth in the rule.<sup>330</sup> However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act as required that was caused by the party’s failure to keep the Department directly and promptly informed by written, signed statement of the claimant’s, employer’s or employing unit’s correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.<sup>331</sup>

Few personal reasons constitute good cause for failure to appear or act. Confusion regarding the appeal process will not excuse the failure to appear.<sup>332</sup> An allegation that the claimant spoke only Spanish and did not understand English does not excuse the claimant’s failure to appear when the Notice contains instructions in Spanish directing claimants to contact the Department if the instructions in English are not understood.<sup>333</sup> Being busy and forgetting the time of the hearing,<sup>334</sup> looking for work,<sup>335</sup> or a conflict in schedules<sup>336</sup> do not provide good cause for failing to appear at a hearing. Failing to appear three times<sup>337</sup> or calling five hours late for the hearing<sup>338</sup> do not demonstrate good cause. Parties have a duty to keep the Department informed of their current mailing address thus failing to appear because of a late delivery of the “Notice of

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<sup>328</sup> [\*Padilla v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2013-06348 (N.M. 2d Jud. Dist. Ct. Sept. 18, 2013) .

<sup>329</sup> 11.3.500.7(D) NMAC.

<sup>330</sup> 11.3.500.7(D) NMAC.

<sup>331</sup> 11.3.500.7(D) NMAC.

<sup>332</sup> See [\*Lukens v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2013-06282 (N.M. 2d Jud. Dist. Ct. Apr. 1, 2014) (claimant confusion over call-in process was not good cause for failure to appear); [\*Sanchez v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2013-10055 (N.M. 2d Jud. Dist. Ct. Mar. 11, 2014) (claimant’s asserted confusion when she admitted receiving the Notice of Hearing, which describes hearing procedure, did not constitute good cause).

<sup>333</sup> [\*Chavez v. N.M. Dep’t of Workforce Sols.\*](#), D-307-CV-2013-01960 (N.M. 3d Jud. Dist. Ct. Jan. 21, 2014)

<sup>334</sup> [\*Hopkins v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2012-11222 (N.M. 2d Jud. Dist. Ct. Mar. 11, 2013)

<sup>335</sup> [\*Enriquez-Venegas v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2012-09007 (N.M. 2d Jud. Dist. Ct. Nov. 28, 2012)

<sup>336</sup> [\*Diaz v. N.M. Dep’t of Workforce Sols.\*](#), D-307-CV-2013-01225 (N.M. 3d Jud. Dist. Ct. Nov. 5, 2013) (Claimant chose her clinical nursing duties over attendance at the hearing and did not request a postponement in advance of the hearing).

<sup>337</sup> [\*Montoya v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2012-09053 (N.M. 2d Jud. Dist. Ct. Nov. 26, 2012)

<sup>338</sup> [\*Aragon v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2014-00621 (N.M. 2d Jud. Dist. Ct. May 12, 2014)

Hearing” is not good cause.<sup>339</sup> Nevertheless, some drastic extenuating circumstances will excuse a failure to appear, such as the death of an immediate family member days before the hearing.<sup>340</sup>

### ***Disqualification of the Secretary, Board of Review Member, or Administrative Law Judge***

The Secretary, a Board of Review member, or an Administrative Law Judge should withdraw from any proceeding in which they cannot accord fair and impartial hearing or consideration and from any proceeding in which they may have an interest.<sup>341</sup> Any party may request the disqualification of the Secretary, Board of Review member, or Administrative Law Judge on the grounds of their inability to be fair and impartial by filing an affidavit or written statement or making a statement on the record with the Appeal Tribunal or Board of Review promptly upon discovering the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. If a Board of Review member is disqualified or withdraws from any proceeding, the remaining Board of Review members may appoint an Administrative Law Judge to sit on the Board of Review for the proceeding involved.<sup>342</sup> The grant or denial of a requested disqualification can be considered in an appeal on the merits.

### ***Ex Parte Communication***

No party, representative of a party, or any other person shall communicate off the record about the merits of a case with the Cabinet Secretary or any Administrative Law Judge or Board of Review member who participates in making the decision for any adjudicatory hearing unless the communication is written and a copy of the communication is transmitted to all interested parties to the proceeding. The Cabinet Secretary, Administrative Law Judges, and Board of Review members or their representatives will not communicate off the record about the merits of an adjudicatory hearing with any party or representative of a party or any other person unless a copy of the communication is sent to all interested parties in the proceeding.

### ***Copies of Claim Files and Other Records***

Any party to a pending appeal proceeding before the Department may receive one copy of the Department’s claim file and records pertaining to that proceeding.<sup>343</sup> The first copy of such records that is requested will be provided free of charge.<sup>344</sup> Thereafter, copies are charged at the Department’s standard rate for copying.<sup>345</sup> The records that may be released to a party to a pending appeal proceeding include, but are not limited to, investigation reports, statements, memoranda, correspondence, tape recordings or transcripts of hearings, or other data pertaining

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<sup>339</sup> [\*Torrez v. N.M. Dep’t of Workforce Sols.\*](#), D-202-CV-2013-04616 (N.M. 2d Jud. Dist. Ct. Aug. 29, 2013)

<sup>340</sup> [\*Salas v. N.M. Dep’t of Workforce Sols.\*](#), D-1010-CV-2012-00097 (N.M. 10th Jud. Dist. Ct. Nov. 7, 2012)

<sup>341</sup> NMSA 1978, § 51-1-8(E).

<sup>342</sup> Id.

<sup>343</sup> 11.3.500.9(C) NMAC.

<sup>344</sup> Id.

<sup>345</sup> Id. See 11.3.100.106 NMAC (setting forth standard rates for copying).

to matters under consideration or scheduled for hearing before the Department.<sup>346</sup> If the records are sought for any purpose other than a proceeding before the Department, however, even employers, claimants and their authorized representatives may receive copies of records only upon a written consent to release the records signed by all interested parties.<sup>347</sup>

Because information obtained from employers and claimants is confidential, the Department will not release these records to any person other than employers or claimants to whom the records pertain, or the employers' or claimants' authorized representative.<sup>348</sup>

### ***Other Proceedings as Evidence in Unemployment Compensation Hearings***

Findings of fact or decisions made by courts or other agencies in actions involving laws other than the Unemployment Compensation Law may be admitted as evidence in unemployment compensation determinations and appeals if they have probative value, but such findings and decisions are not controlling with regard to the determination of unemployment compensation claims.

Convictions or acquittals on criminal charges do not necessarily determine an issue of misconduct in an unemployment compensation disqualification proceeding, even if the criminal charges and the unemployment compensation misconduct issue arise out of the same factual situation.<sup>349</sup> Further, evidence of misconduct does not have to be obtained in accordance with the rules of evidence for criminal proceedings.<sup>350</sup> The New Mexico Supreme Court has stated that the Department should not be precluded from adjudicating unemployment claims in situations where a criminal conviction was not obtained.<sup>351</sup>

### ***Appeal Tribunal Hearing Procedures***

A party aggrieved by an initial determination made by the Claims Adjudication or Tax Units, whether employer or claimant, has the opportunity to challenge the Department's initial determination before the Appeal Tribunal. These hearings, normally held over the phone, are governed by 11.3.500.10 NMAC. Appeal Tribunal hearings allow the parties to support their position by presenting exhibits, testimony, and objections, and an opportunity to cross-examine witnesses before an Administrative Law Judge. The Appeal Tribunal exercises full authority over the conduct and behavior of parties and witnesses appearing before it to ensure a fair, orderly adjudicatory hearing and an expeditious conclusion to the proceedings. The Appeal

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<sup>346</sup> 11.3.500.9(C) NMAC.

<sup>347</sup> 11.3.100.106(C) NMAC.

<sup>348</sup> NMSA, 1978 § 51-1-32; 11.3.100.106 NMAC.

<sup>349</sup> *Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, 104 N.M. 518, 519, 724 P.2d 228, 231.

<sup>350</sup> *See Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, ¶ 18, 104 N.M. 518, 521, 724 P.2d 227, 230.

<sup>351</sup> *See Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, ¶ 19, 104 N.M. 518, 521, 724 P.2d 227, 230 (“To hold otherwise would mean that the Department would be precluded from adjudicating unemployment benefit claims in cases where an employee's conduct might also arguably come within the Criminal Code merely because, for whatever reason, a criminal conviction had not or could not be obtained. Such a result, we believe, is not warranted.”).

Tribunal affords all parties an opportunity for a full and fair hearing, including an opportunity to respond and present evidence and argument on all issues involved.

Appeal Tribunal hearings are conducted under relaxed rules of evidence and procedure, but the decision of the Appeal Tribunal must be supported by substantial evidence. In New Mexico, “substantial evidence” means evidence that a reasonable person would accept as sufficient to support a decision.<sup>352</sup> Administrative Law Judges may consider hearsay evidence in making decisions. The Appeal Tribunal’s decision, however, may not be based upon controverted hearsay evidence alone; there must be some evidence supporting the decision which would be admissible in a court.<sup>353</sup>

The record in an adjudicatory hearing includes:

- (1) All documents in the Department’s files, pleadings, motions and previous rulings;
- (2) Documentary evidence received or considered;
- (3) A statement of matters officially noticed;
- (4) Questions, tenders of evidence, offers of proof, objections and rulings thereon in the form of a tape recording or transcript;
- (5) Findings and conclusions; and
- (6) Any decision, opinion, or report by the Cabinet Secretary, Board of Review members, or the Appeal Tribunal Administrative Law Judge conducting the hearing.

All evidence, including any records, investigation reports, and documents in the possession of the adjudicatory body which the Department desires to avail itself as evidence in making a decision, shall be made a part of the record in the proceedings. The tape or digital recording of a proceeding made on the Department’s system is the official recording of the record of the hearing.<sup>354</sup> While any proceeding before the department is ongoing a party to such proceeding may request and receive from the department, without charge, one set of copies of the department’s files and records.<sup>355</sup>

A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the Administrative Law Judge and the other party in a manner to insure their receipt by the Administrative Law Judge and the other party at least 48 hours prior to the date and time of the

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<sup>352</sup> *Wilson v. Emp’t Sec. Comm’n*, 1963-NMSC-085, ¶ 7, 74 N.M. 3, 8, 389 P.2d 855, 858 (“[Substantial evidence] means more than merely any evidence and more than a scintilla of evidence and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion.”).

<sup>353</sup> *Trujillo v. Emp’t Sec. Comm’n*, 1980-NMSC-054, 94 N.M. 343, 610 P.2d 747

<sup>354</sup> 11.3.500.10(G)(3) NMAC.

<sup>355</sup> 11.3.500.9(C) NMAC.

scheduled hearing.<sup>356</sup> These exhibits must be properly identified with the correct denotations. If the exhibits are the claimant's, then the claimant must mark them with the denotation C-1, C-2, C-3, etc. If the exhibits are the employer's, then the employer must mark them with them the denotation E-1, E-2, E-3, etc. A party must be present at the hearing and move the exhibits into the record during the course of the hearing in order for the Administrative Law Judge to consider them.

If a party fails to adhere to the evidentiary rules provided for in 11.3.500 NMAC and any other applicable instructions from the Department, the party's exhibits may be excluded from consideration. The exhibit may not be excluded if it is apparent that the particular exhibit was previously seen by the party whose interest is affected, that party acknowledges having seen the exhibit and has no objection to its admission. An exhibit may also be admitted if the Administrative Law Judge, in the judge's discretion, determines that fundamental fairness and the proper administration of the Unemployment Compensation Law requires the admission of the exhibit.<sup>357</sup> In any case where the Administrative Law Judge determines that documentary evidence will be admitted over the objection of a party and that party has not had an opportunity to review and consider the evidence, a reasonable continuance must be granted by the Administrative Law Judge to give the objecting party an opportunity to review the evidence.<sup>358</sup> All exhibits that are denied admission shall be individually identified and the reason for the denial will be stated in the record.

Findings of fact or decisions made by courts or other agencies in actions involving laws other than the Unemployment Compensation Law may be admitted as evidence in unemployment compensation determinations and appeals if they have probative value, but such findings and decisions are not controlling with regard to the determination of unemployment compensation claims. The Department's determinations are not conclusive or binding in any separate proceeding between the same or related parties or involving the same facts.<sup>359</sup>

Convictions or acquittals on criminal charges are not dispositive as to an issue of misconduct in an unemployment compensation disqualification proceeding, even if the criminal charges and the unemployment compensation misconduct issue arise out of the same factual situation.<sup>360</sup> Further, evidence of misconduct does not have to be obtained in accordance with the rules of evidence for criminal proceedings.<sup>361</sup> The New Mexico Supreme Court has stated that the Department should

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<sup>356</sup> 11.3.500.10(F)(a),(b) NMAC.

<sup>357</sup> 11.3.500.10(F)(1)(c)(ii) NMAC.

<sup>358</sup> 11.3.500.10(F)(1)(d) NMAC.

<sup>359</sup> NMSA 1978, § 51-1-55

<sup>360</sup> *Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, 104 N.M. 518, 519, 724 P.2d 228, 230.

<sup>361</sup> *See Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, ¶ 18, 104 N.M. 518, 521, 724 P.2d 227, 230.

not be precluded from adjudicating unemployment claims in situations where a criminal conviction was not obtained.<sup>362</sup>

An Administrative Law Judge's perception of the credibility of testimony and the demeanor of the parties and witnesses may be an important or controlling factor in the final decision. Credibility perceptions are based on a number of factors. Confronted with conflicting testimony, the Administrative Law Judge must make a determination regarding witnesses' credibility. Upon review on appeal, courts cannot reweigh witnesses' credibility and must defer to the hearing officer's findings on credibility.<sup>363</sup> A finding on the credibility of testimony and other evidence constitutes a legal, evidentiary finding in support of a decision if it is based upon reasonable facts and inferences from the record and the demeanor of the participants.<sup>364</sup>

The Administrative Law Judge has broad discretion whether to continue, reschedule, or reopen a hearing. If the Administrative Law Judge determines that a party has not had adequate time to review the opposing party's proposed exhibits, the Administrative Law Judge may continue the hearing to a later date. If, prior to the hearing's scheduled date, a party provides a sufficient, written reason to the Administrative Law Judge explaining why the party cannot appear for the hearing, the Administrative Law Judge may postpone and reschedule the hearing for a later date. If the appellant fails to appear for the scheduled hearing, the Administrative Law Judge may either reschedule the hearing for a later date or render a decision on the record and evidence then before Appeal Tribunal.

If a party fails to appear for a hearing, that party may, within fifteen (15) calendar days from the date of the mailing of the decision, request a reopening before the Appeal Tribunal. If a party fails to appeal an initial determination within 15 days the party can also request the Appeal Tribunal to allow a late appeal. The requesting party must establish good cause for failing to appear or for the late appeal. Any decision that grants a request for reopening or finds good cause for failure to timely appeal from an initial determination cannot be appealed. Any decision that

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<sup>362</sup> See *Warren v. Emp't Sec. Dep't*, 1986-NMSC-061, ¶ 19, 104 N.M. 518, 521, 724 P.2d 227, 230 ("To hold otherwise would mean that the Department would be precluded from adjudicating unemployment benefit claims in cases where an employee's conduct might also arguably come within the Criminal Code merely because, for whatever reason, a criminal conviction had not or could not be obtained. Such a result, we believe, is not warranted.").

<sup>363</sup> See *Tallman v. ABF (Arkansas Best Freight)*, 1988-NMCA-091, ¶ 7, 108 N.M. 124, 127, 767 P.2d 363, 366 holding modified on other grounds by *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148 *N.M. Dep't of Workforce Solutions v. Cold Front Distribution LLC*, No. 30,814, mem. op. (N.M. Ct. App. Feb. 23, 2011) (non-precedential). But see *Skowronski v. New Mexico Public Educ. Dept.*, 2013-NMCA-034, 298 P.3d 469 (Secretary may reject credibility determinations if done after a whole record review).

<sup>364</sup> See *Bullamore v. N.M. Dep't of Workforce Sols. and Taco John's Int'l, Inc.*, D-202-CV-2015-06547 (N.M. 2d Jud. Dist. Ct. Oct. 13, 2015) (Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact"); *Highpointe Care, Inc., v. N.M. Dep't of Workforce Sols.*, D-202-CV-2014-06189 Jan. 13, 2015); and *Sanchez v. N.M. Dep't of Workforce Sols. and Sandoval County*, D-1329-CV-2013-2162 (N.M. 13th Jud. Dist. Ct. Sept. 9, 2014) ("It would be improper for the district court to reweigh the evidence or substitute its assessment of witness credibility for that of the agency").

denies a request for reopening or a late appeal shall include the Appeal Tribunal's findings and conclusions for the denial. Either party, if aggrieved, may file an appeal on the merits of any written decision issued by the Administrative Law Judge.

Any request to reopen filed more than 15 days from the date of the decision or the denial of a request to allow a late appeal will be heard by either the Cabinet Secretary or the Board of Review. The appealing party must provide good cause to the Cabinet Secretary or the Board of Review for failing to appear or for appealing late. If good cause is found, then the matter will be reopened and remanded to the Appeal Tribunal for a hearing on the merits. Following the conclusion of an appeal hearing, the Administrative Law Judge who heard the appeal shall issue a written, signed decision that includes findings of fact and conclusions of law.

## **XII. DISTRICT COURT APPEALS – RULE 1-077 NMRA**

The Unemployment Compensation Law provides for judicial review of New Mexico Department of Workforce Solutions administrative decisions by the district court for the county in which the claimant lives. Unemployment compensation appeals are given priority over all other civil cases and are to be heard in a summary manner. The informality of the appeal process within the Department does not apply to appeals to courts; the parties must strictly comply with court rules and procedures. For example, corporations must be represented by counsel in state district court.<sup>365</sup> Appeal requests must be filed with the district court within thirty days from the date the Department's final decision is made, not the date it is received. District courts have uniformly held that if the petition for writ of certiorari is not filed within thirty (30) days of the final decision issued by the Secretary or Board of Review, the district court will not have jurisdiction to hear the appeal.<sup>366</sup>

In filing the appeal, the appellant must set out a statement of issues, including a copy of the Department's final decision and a short recitation of all relevant facts. The New Mexico Supreme Court has developed model forms for filing an unemployment insurance appeal: Petition for Writ of Certiorari (Form 4-831) and a Writ of Certiorari (Form 4-832). Appellants are required to file a Petition for Writ of Certiorari with an attached Writ of Certiorari. The Writ of Certiorari must be prepared and served simultaneously with the Petition. Both the Department and the former employer or employee must be named and joined as respondents to the appeal on the Petition for Writ of Certiorari and the Writ of Certiorari. Dismissals have been granted where claimants failed to comply with these rules.<sup>367</sup> After the district court issues the Writ of Certiorari and the Writ has been properly served on the Department, the Department files the administrative record on appeal within twenty days from the date of service of the writ. No individual claiming benefits is to be charged fees by the district court.

The district court's review of an unemployment claim is limited in scope. An appeal to the district court is not a new trial, where all issues are litigated again. Instead, the district court performs a whole record review and makes a decision based upon the evidence introduced at the hearing before the Appeal Tribunal. Although the statute provides that "the district court shall render its judgment after hearing," the statute does not contemplate introducing additional evidence at the district court.<sup>368</sup> However, if the Department's decision involves questions of

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<sup>365</sup> NM R 2 DIST LR2-116.

<sup>366</sup> See e.g., *Brockenborough v. N.M. Dep't of Workforce Sols.*, D-202-CV-2013-00439 (N.M. 2d Jud. Dist. Ct. July 30, 2013); *Theodore v. N.M. Dep't of Workforce Sols.*, D-1226-CV-2012-000083 (N.M. 12th Jud. Dist. Ct. Oct. 12, 2012); *Mora v. N.M. Dep't of Workforce Sols.*, D-01329-CV-2010-02441 (N.M. 13th Jud. Dist. Ct. Dec. 6, 2011)

<sup>367</sup> See e.g., *Fowler v. N.M. Dep't of Workforce Sols.*, D-101-CV-2014-00686 (N.M. 1st Jud. Dist. Ct. June 27, 2014); *Martinez v. N.M. Dep't of Workforce Sols.*, D-01113-CV-2012-00410 (N.M. 11th Jud. Dist. Ct. Jan. 16, 2013).

<sup>368</sup> See Rule 1-077(J) NMRA ("The district court shall determine the appeal upon the evidence introduced at the hearing before the board of review or secretary of the Department."); *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 24, 122 N.M. 173, 180, 922 P.2d 555, 562 ("The decision of the agency will be affirmed if it is supported by the applicable law and by substantial evidence in the record as a whole.").

substantial compliance with a statute, those questions depend on statutory construction and are reviewed de novo by the district court.

Under the whole record standard of review, the district court judge considers all the evidence, including evidence both favorable and unfavorable to the Department's decision.<sup>369</sup> The judge reviews the administrative record, including the transcript of the proceeding and the claim file, to determine the correctness of the Department's decision. The judge cannot reweigh the evidence and does not substitute the judge's opinion for that of the agency simply because the judge may not agree with the decision or would have decided the issues another way. Instead, the district court may reverse the Department's decision if it finds that: (1) the Board of Review or Secretary acted fraudulently, arbitrarily, or capriciously; (2) the Board of Review's or Secretary's decision is not supported by substantial evidence, based upon the whole record on appeal; or (3) the Department's action was outside the agency's scope of authority.<sup>370</sup>

The party challenging a Department decision bears the burden of demonstrating that the decision was arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, clearly erroneous, or violated due process.<sup>371</sup> Substantial evidence means "such relevant evidence as a reasonable mind might accept as sufficient to support a conclusion."<sup>372</sup> An agency's decision will be arbitrary or capricious when a ruling, viewed in light of the whole record, "is unreasonable or does not have a rational basis, and is the result of an unconsidered, willful and irrational choice of conduct and not the result of the winnowing and sifting process."<sup>373</sup>

If parties are aggrieved by the district court's decision, they may ask for further review by the Court of Appeals in accordance with the Rules of Appellate Procedure, but such permissive appeals are discretionary and infrequently granted.

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<sup>369</sup> *Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 23, 122 N.M. 173, 180, 922 P.2d 555, 562

<sup>370</sup> Rule 1-077(J) NMRA

<sup>371</sup> *Fitzhugh*, 1996-NMSC-044 ¶ 25 ; *See also Miss. Potash, Inc. v. Lemon*, 2003-NMCA-014, ¶ 8, 133 N.M. 128, 130, 61 P.3d 837, 839 (To be arbitrary and capricious, the decision must be unreasonable or without a rational basis and show a failure to consider and balance the evidence in a reasonable manner).

<sup>372</sup> *Wilson v. Emp't Sec. Comm'n*, 1963-NMSC-085, ¶ 7, 74 N.M. 3, 8, 389 P.2d 855, 858.

<sup>373</sup> *Perkins v. Dep't of Human Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P. 2d 24 (internal quotation and citation omitted).

### **XIII. DUE PROCESS**

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides that a state cannot deprive “any person of life, liberty, or property, without due process of law.” “Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty and property.”<sup>374</sup> Additionally, “due process requires that proceedings looking toward a deprivation be essentially fair.”<sup>375</sup> Courts have been reluctant to prescribe specific procedures because “[d]ue process considerations are flexible” and the circumstances of the case determine the requirements.”<sup>376</sup> The Supreme Court of the United States, in *Matthews v. Eldridge*, 424 U.S. 319 (1976), established a three-part balancing test to determine the sufficiency of particular procedural safeguards in a deprivation proceeding:

- (1) the private interest affected by the official action;
- (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>377</sup>

An individual asserting a right to due process must first show that he or she stands to be deprived of a cognizable liberty or property interest. To have a property interest in a benefit, one must have more than an abstract need or desire for it. One must have more than a unilateral expectation of it. One must, instead, have a legitimate claim of entitlement to it.<sup>378</sup> Property interests are not created by the Constitution, but rather by existing rules or understandings that stem from an independent source such as state laws and rules or other understandings that secure certain benefits and that support claims of entitlement to those benefits. New Mexico courts have accordingly recognized that New Mexico law does not recognize a valid property interest in benefits that are improperly awarded.<sup>379</sup>

The purpose of the notice requirement is to ensure the “deprived person” a meaningful opportunity to be heard.<sup>380</sup> “Notice should be more than a mere gesture; it should be reasonably calculated, depending on the practicalities and peculiarities of the case, to apprise interested

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<sup>374</sup> *Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 40, 149 N.M. 556, 568, 252 P.3d. 780 (quoting *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 25, 122 N.M. 524, 928 P.2d 250)

<sup>375</sup> *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶ 23, 118 N.M. 470, 478.

<sup>376</sup> *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶ 23, 118 N.M. 470, 478.

<sup>377</sup> *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)

<sup>378</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S. Ct 2701 (1972)

<sup>379</sup> *Millar v. Dep’t of Workforce Sols.*, 2013-NMCA-055, ¶ 26, 304 P.3d 427.

<sup>380</sup> *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)

parties of the pending action and afford them an opportunity to present their case.”<sup>381</sup> Accordingly, to assure that adequate notice is given to parties faced with a constitutional deprivation of property, the following practices have been developed.

*Timeliness.* Parties must have a reasonable time to evaluate the charges and issues, assemble their evidence and witnesses and prepare a response. The Department issues written notice of all appeal hearings to all interested parties a minimum of ten (10) calendar days prior to the date of the adjudicatory hearing.<sup>382</sup>

*Statement of issues.* To be adequate, notice must apprise the parties of what the issues are in a reasonably understandable manner. Informed awareness of the charges and issues is fundamental to a fair hearing. The notice of hearing shall include a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held; and a short and plain statement of the foreseeable issues that will be taken up in the hearing so that all parties have sufficient notice and opportunity to prepare.<sup>383</sup>

*Right to representation.* Notices should inform parties that they can be represented in proceedings before the Department by an attorney or as otherwise permitted by law.<sup>384</sup>

*Documentary submissions.* Parties must be given a reasonable opportunity to review and respond to documentary submissions which are relied upon by the Department as evidence in support of its findings.<sup>385</sup> This means that any party wishing to rely on documentary submissions in a hearing before the Appeal Tribunal must timely furnish the documents to the Appeal Tribunal and to any other interested parties, even if the party has already submitted those documents during the claims examination process.

Where a party asserts that a due process violation has occurred, whether it is based on alleged insufficient notice or some other aspect of the deprivation proceeding, that party has the burden of establishing prejudice. A complaining party’s failure to show prejudice precludes a finding of a due process violation.<sup>386</sup> Moreover, the type of prejudice contemplated under procedural due process is of a particular type. The party alleging prejudice must “demonstrate that there is a

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<sup>381</sup> *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm’n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32, 229 P.3d 494 (internal quotation marks and citations omitted).

<sup>382</sup> 11.3.500.9(D) NMAC.

<sup>383</sup> 11.3.500.9(D) NMAC.

<sup>384</sup> 11.3.500.9(A) NMAC.

<sup>385</sup> 11.3.500.9(C) NMAC; 11.3.500.10(F) NMAC.

<sup>386</sup> *Archuleta v. Santa Fe Police Dep’t*, 2005-NMSC-006, ¶ 35, 137 N.M. 161, 173, 108 P.3d 1019, 1031 (rejecting demoted police officer’s claim that a hearing officer’s denial of his discovery request for other police officers’ disciplinary records deprived him of due process, holding that “the probable value of the requested materials was minimal and [the police officer] cannot claim any specific prejudice.”); *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm’n*, 2010-NMSC-013, ¶¶ 24–25, 148 N.M. 21, 33–34 229 P.3d 494, 506–507 (rejecting claim of procedural due process violation where public notice was found not to be misleading as to the general nature of the proceeding and issues to be decided).

reasonable likelihood that the outcome might have been different had the denied procedure been afforded.”<sup>387</sup> The mere fact that an individual is subjected to a constitutional deprivation as a result of the deprivation proceedings does not establish prejudice.

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<sup>387</sup> See also *State v. Christopher B.*, 2014-NMCA-016, ¶ 7, 316 P.3d 918 *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (“An assertion of prejudice is not a showing of prejudice.”).

#### **XIV. RECORDS REQUESTS**

The New Mexico Inspection of Public Records Act is intended to provide the public with access to information on governmental affairs.<sup>388</sup> The Public Records Act permits the inspection of public records of this state “except as otherwise provided by law.”<sup>389</sup> Each state agency and local governmental entities have designated a records custodian to whom requests to inspect records should be addressed.<sup>390</sup>

Unemployment insurance records, however, are exempted from the Inspection of Public Records Act. Disclosure of unemployment insurance information is governed by NMSA 1978, § 51-1-32 and 11.3.100.106 NMAC, Availability and Confidentiality of Department Records. Those provisions are a part of New Mexico state law to satisfy federal regulations, which require state law to:

include provision for maintaining the confidentiality of any unemployment compensation information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.<sup>391</sup>

New Mexico law requires that “information obtained from employers, employing units or claimants pursuant to the administration of the Unemployment Compensation Law and determinations as to the benefit rights of any claimant are confidential and shall not be open to inspection in any manner revealing the claimant’s employer’s or employing unit’s identity except that such information may be made available to those designated persons and agencies, and for the purposes specified in regulations issued by the secretary.”<sup>392</sup>

Accordingly, pursuant to federal and state law, the contents of the Department’s files and records shall not be released to any person except the employers, employing units or claimants to whom the file or record pertains or an authorized representative, and then, only upon a written release signed by both parties, court order, grand jury subpoena or search warrant.<sup>393</sup> Based on

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<sup>388</sup> NMSA 1978, § 14-2-1 et. seq.

<sup>389</sup> NMSA 1978, § 14-2-1(8)

<sup>390</sup> For more information on filing an IPRA request with DWS, see <http://www.dws.state.nm.us/Inspection-of-Public-Records-Act>. See also NEW MEXICO INSPECTION OF PUBLIC RECORDS ACT COMPLIANCE GUIDE (2015), <http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>.

<sup>391</sup> 20 CFR § 603.4; 42 U.S.C. §303(a)(1),(8); see also U.S. Department of Labor Unemployment Insurance Program Letter No. 34-97, Disclosure of Confidential Unemployment Compensation Information.

<sup>392</sup> NMSA 1978, § 51-1-32

<sup>393</sup> 11.3.100.106 (C) NMAC; the Department’s joint release form can be found on its website at: <http://www.dws.state.nm.us/Unemployment-Insurance/Resources/Unemployment-Records-Release-Information>.

confidentiality requirements imposed by statute and regulation, the Department will move to quash subpoenas in any litigation matters unrelated to unemployment compensation.<sup>394</sup>

While any proceeding before the Department is ongoing, a party to such proceeding may request and receive from the Department, without charge, one set of copies of the Department files and records, including but not limited to investigation reports, statements, memoranda, correspondence, tape recordings or transcripts of hearings or other data, pertaining to matters under consideration or scheduled for hearing or other proceeding before the Department.

During a pending judicial appeal of an unemployment insurance claim, the Department returns to the district court the record which contains all of the evidence heard by it and all the papers and documents in its files affecting the matters on appeal. Individuals claiming benefits may not be charged a fee to obtain one copy of the record. Thereafter, copies shall be charged at the Department's usual rate for copying.<sup>395</sup>

With the consent and approval of the Secretary and upon advice of the Department's general counsel, the Department may enter into a Memorandum of Understanding ("MOU") to exchange information with law enforcement agencies, other government agencies and with non-government providers that may provide for the exchange of information otherwise confidential under NMSA 1978, § 51-1-32.

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<sup>394</sup> [\*Daniell v. Knox Oil Field Supply, Inc. et. al.\*](#), D-503-CV-2013-00558 (N.M. 5<sup>th</sup> Jud. Dist. Ct. March 10, 2015) (granting Department's Motion to quash subpoena or for protective order for claimant's unemployment insurance records pursuant to NMSA 1978, § 51-1-32, 11.3.100.106 NMAC, and 20 CFR § 603.7).

<sup>395</sup> 11.3.500.9(C) NMAC.

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